31 December 2010

Feedback to the public consultation on

Guidelines to Article 122a of the Capital Requirements Directive

Background and introduction

1. In June 2010, CEBS published a consultation paper (CP40) "Guidelines to Article 122a of the Capital Requirements Directive". The consultation period ended on 1 October 2010. 18 responses were received from 20 respondents; all are published on the CEBS website. CEBS also discussed the proposed guidelines with market participants in a public hearing held on 22 July 2010.

2. This paper presents a summary of the major points arising from the consultation and CEBS's point of view on them. It includes a section presenting CEBS's views on the public comments and the changes made in the consultation paper to address them.

3. The responses to the majority of the questions raised in the consultation paper were generally positive and supportive of CEBS's work and required only some clarifications; however, on some guidelines or questions raised in the consultation paper, the majority of the respondents disagreed or requested significant clarification.

General remarks

4. Respondents recognize that the guidelines proposed in this consultation paper clarify Article 122a of the Capital Requirements Directive substantially and are very useful for the implementation of the retention clause by the originator, sponsor or original lender and on the due diligence and risk management practices to be carried out by credit institutions investing in securitisation products. Views were expressed that the proposed guidelines would provide a more transparent and more uniform securitisation market and would enable the convergence of supervisory practices across Europe with regard to this Article.

5. Following the substantive number of comments and responses received from all the industry feedback on the consultation paper and in order to facilitate CEBS's response, CEBS has categorized the comments and responses in the Annex as follows: sector-specific issues, comments on specific paragraphs of Article 122a, comments on specific clauses of the consultation paper, and answers to specific questions raised in the consultation paper.

6. Sector-specific issues that are better treated thematically are a) ABCP conduits, b) correlation trading, and c) managed CLOs. However, where sector-specific issues fit better into one of the clause-specific (CP40) or paragraph-specific (Directive Art 122a) categories, they are dealt with there instead.

7. In some cases, several industry bodies made similar comments, or the same body repeated its comments in the response to different questions. In such cases, the comments, and CEBS's analysis of them are included in the section of the detailed part of this paper where CEBS considers them most appropriate.

8. In the Annex, a feedback table is provided which gives a detailed description of the comments and responses received and CEBS's views thereon.

Specific remarks

9. A large number of respondents required more clarification on a number of topics, CEBS outlines below some clarification on the retention requirements, due diligence and risk management requirements, additional risk weightings, consolidated supervision and some other sector specific issues.

10. The retention requirements should be at least 5% per option; combinations of different options to reach this 5% level are not allowed, as is apparent from the wording of Paragraph 1.

11. CEBS recognises that in certain special securitisation transactions the "nominal value" or "the nominal amount of the securitised exposure" is not clearly defined. In those cases, the originator, sponsor or original lender should look at substance over form and use the equivalent of "nominal value" or "the nominal amount of the securitised exposure" in the securitisation transaction and retain at least 5% thereof for credit risk.

12. The "nominal value" or "the nominal amount of the securitised exposure" is at point of securitisation. Thus "at origination" means when the exposures were first securitised.

13. Seller retention by way of sale of the assets at a discount is allowed. In such circumstances the discount on the assets for credit risk, on a sole basis (i.e. excluding yield considerations), should be at least 5%.

14. Liquidity facilities (drawn and/or undrawn) provided by the sponsor, original lender or originator can be used to meet seller retention requirements for ABCP conduits as long as certain conditions are met, such as coverage of credit risk, maturity, transparency, etc.

15. Letters of credit, guarantees and other types of credit enhancement provided by the sponsor, original lender or originator are an acceptable method by which to meet the retention requirement as long as certain conditions are met, such as cover of credit risk, maturity, position in waterfall, etc.

16. Synthetics and derivatives are allowable means for an originator, original lender or sponsor to meet the retention requirement.

17. Excess spread and interest-only tranches will not be allowed as a retention option.

18. Changes in the form of retention are not allowed except in exceptional circumstances only, and should be undertaken with full disclosure.

19. Specific hedges to mitigate the credit risk on the retained positions or exposures are not allowed. Other type of hedges and derivatives are allowed.

20. For investors, the due diligence requirement is only on the securitisations which they invest in, and can be performed on eligible assets in the absence of actual assets (i.e. prior to securitisation).

21. In principle, loan-level information is required to be provided by originators and sponsors to fulfil their obligations; however, CEBS recognises that for granular portfolios subject to a high level of turnover, stratification tables of loan-level information could satisfy the requirement.

22. CEBS indicates that certain events do not constitute a substitution of exposures that would cause an existing transaction (i.e. issued before 1 January 2011) to be subject to Article 122a; for example, breach of representations and warranties, substitution with cash, extension of an existing loan, drawdown of additional monies from an existing facility, etc.

23. CEBS has provided a common framework for competent authorities to apply additional risk weights for infringements of the provisions of Article 122a. The updated framework is provided in the final guidance.

24. Although Article 71 does not itself extend the application of consolidated supervision to Article 122a, in addition to its own activities, a credit institution will also become exposed to credit risk of a securitisation position by virtue of the relevant activities of any related entity (authorised or unauthorised) which falls within the

same scope of a group where consolidated supervision is applied. Paragraph 1, therefore, generally requires that such exposure to the credit risk of a securitisation position (whether in the trading book or non-trading book) shall only be assumed if the requirements of Article 122a are met. However, in determining the measures necessary for compliance with such requirements when the exposure occurs within the trading book of another group entity, the credit institution may also take into account Paragraphs 4 and 5 and the guidance provided thereon elsewhere in this document. Competent authorities may do likewise in judging the materiality of any infringements. The extent to which the requirements of Article 122a are, indeed, being respected at group level will be monitored as part of this annual post-implementation review. This point will also be taken into account in the post implementation review.

25. CEBS remains of the opinion that ABCP conduits fall under the definition of "securitisation" in the CRD, and thus remain within Article 122a of the Capital Requirements Directive. However, CEBS outlines circumstances in which alignment of interest and retention is automatically met for certain types of ABCP conduit.

26. CEBS will follow the definition of correlation trading under CRD 3, and the existing exemption from the retention requirement in Article 122a will be interpreted within this framework, as will the interpretation of what constitutes appropriate due diligence for the correlation trading book under Article 122a (from which correlation trading is not exempt).

27. CEBS agrees with some respondents that, in certain securitisation transactions (such as managed CLOs), there may be no entity that can adequately and efficiently fulfil the role of originator, sponsor or original lender. It is suggested in the comments received that an "originator SPV" could instead be used, if and only if no entity in the securitisation transaction can meet the requirements of the definition "originator", "sponsor" or "original lender". Parameters are provided in the guidance outlining cases in which such usage is interpreted to meet the broad intent of Article 122a, and cases in which it is not.

28. There are a number of issues raised by respondents that are best dealt with in the post implementation review of how effective the provisions of Article 122a are, and these are identified in the full analysis of responses provided below.

Analysis of responses to CP 40

Guidelines to Article 122a of the Capital Requirements Directive

	Received Comments (clause numbers refer to CP40)	**CEBS's analysis (clause numbers refer to CP40)**	**Relevant clause(s) in final Guidelines**
Sector-specific issues			
ABCP conduits	Some respondents argue that ABCP conduits should be excluded from the scope of 122a, as Recital 25 on purchased exposures can be interpreted to not just refer to factoring, but also to broader securitisations where receivables are purchased and sold at a discount. Otherwise, creating an exemption for a business which originally is not even included within the scope of Article 122a would be illogical. So ABCP conduits falling under Recital 25 should be exempted from the retention requirement. At the public hearing, a broader argument was made that if an ABCP conduit is fully wrapped (i.e. has liquidity facilities that assume total risk of the assets), then Article 122a should not apply to it, even though it technically is a "securitisation" under CRD, as the risk of the investor is versus the liquidity facility provider (typically the sponsor) and is not to the assets. In terms of retention requirements (if ABCP conduits are not exempt), it is argued by some respondents that the following methods mentioned below (some of which are not included among the standard (a)-(d) of	CEBS remains of the opinion that ABCP conduits fall under the definition of "securitisation" in the CRD, and thus remain within scope of Article 122a of the Capital Requirements Directive. CEBS has clarified that a number of additional forms of retention are options with regard to ABCP conduits in particular, but also to securitisations more generally, to meet the Paragraph 1 retention requirement. Some of these are as follows: Seller retention by way of sale of the assets at a discount, whereby the discount on the assets for credit risk, on a sole basis, is at least 5%. Liquidity facilities (drawn and/or undrawn) provided by the sponsor, original lender or originator can be used to meet seller retention requirements for ABCP conduits as long as certain conditions are met such as size, coverage of credit risk, maturity,	Amendments made throughout the guidance; see in particular 3, 14, 15, 47, 57, 60, 118, 135

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	Paragraph 1) should be valid methods of retention in the context of an ABCP conduit, as it is very difficult to apply options (a)-(d) to such vehicles in their current textual form in Article 122a. *Seller retention*: Retention by the sellers of the assets of at least 5%, or more specifically: "in the case of each of the conduit's underlying transactions, the originator (or if an underlying transaction involves multiple affiliated originators, any one or more of them or their affiliates) has retained a 5% net economic interest in the underlying securitised exposures or in the securitisation positions arising from that transaction"), including by way of sale of the assets at a discount greater than 5%". *Liquidity facility*: Provision of at least 5% of the liquidity facility provided to the ABCP conduit with respect to each underlying transaction is suggested to be included as retention. The argument is made that as the liquidity facilities would be used to replace ABCP funding and would be entitled to repayment from collections on the underlying assets, typically pari passu with any remaining outstanding ABCP, these facilities should, therefore, be treated as falling within retention option (a) or (b). It is also indicated that it would be helpful if a methodology to calculate the retention requirement was provided for cases in which the LF provider assumes credit risk, or alternatively a conversion table that shows the equivalence between retained notes and liquidity facility exposure. Elsewhere,	transparency, etc. Letters of credit, guarantees and similar types of credit enhancement provided by the sponsor, original lender or originator are an acceptable form of retention as long as certain conditions are met such as coverage of credit risk, maturity, position in waterfall, etc. When liquidity providers and/or programme enhancement providers are treated as investors or otherwise assume exposure to securitisation positions, the retention requirement will only apply to those transactions to which that facility provider has exposure, and not to all transactions within such securitisation.	

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	however, one respondent argued that undrawn lines such as liquidity facilities should not be taken into account in meeting retention. *PWCE:* It is argued that the sponsor providing program wide credit enhancement ("PWCE) of greater than 5% of the notional value of conduit assets (e.g. in the form of a stand-by letter of credit for the program) should be considered an eligible retention option. Elsewhere, however, one respondent argued that contingent liabilities should not be included in the retention calculation. *Letters of credit:* Letters of credit ("LoCs") of greater than 5% are argued to be a valid form of retention. With respect to conduits' sponsors (as opposed to the investors in conduit CP) having to ensure retention, it is argued that for the credit institution providing liquidity or credit enhancement facilities to an ABCP programme, to the extent it is treated as either investing or assuming exposure to securitisation positions in the programme, the requirement could presumably be met by retention of 5% economic interest by the originator (or the originator group) in each of the underlying transactions to which the facility provider is exposed. Alternatively, if the facility provider is not also the programme sponsor, it is suggested that the retention requirement could be met by the sponsor providing a part of the facility alongside the third-party facility provider or otherwise retaining an exposure described in Article 122a, Paragraph 1.		

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	Similarly, in an ABCP conduit to the extent that a liquidity provider or programme enhancement provider is treated as subject to Article 122a requirements as an investor in, or by assuming exposure to, securitisation positions held in the conduit, the retention requirement should be applied only to those transactions to which that facility provider has exposure, and then only to the securitisation positions added after 2014 or revolving transactions to which assets are added after 2014.		
Correlation Trading	Two respondents sought clarification on the exempted status of certain types of correlation trading activity from the retention requirements, as from the consultation paper it could be interpreted that trades on bespoke baskets of reference obligations are not exempted from the retention requirement. In this respect, it was argued that while Paragraph 3 correctly exempts most of correlation trading specifically from the retention requirement, given how different correlation trading as a whole (both standard and bespoke tranches) is to what is being targeted by Article 122a as a whole, it is argued that there should be an exemption from retention also for bespoke correlation trading that would be consistent with the CRM carve-out for specific risk under CRD3. Consequently, it is requested that it be made clear that bespoke credit correlation trading activity is exempt in the same way that standardized basket	CEBS will follow the definition of correlation trading as defined under CRD 3 to interpret the exempted status (under Paragraph 3) of certain transactions from the retention requirements (of Paragraph 1). For due diligence requirements on the correlation trading book, CEBS's guidelines will also follow the CRD 3 framework. CEBS agrees that selling protection is similar to investing, and that buying protection is not. It has provided clarification within the guidance on when buying and selling protection is or is not captured by the provisions of Article 122a.	73-74, 81, 98

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	activity is. While Paragraph 3 exempts correlation trading from retention, it is not exempt from due diligence. It is consequently suggested that there should be a clause clarifying what is expected for due diligence in the correlation trading book. In this respect, there are a number of suggestions provided. One suggested solution is for Article 122a to point to the Comprehensive Risk Measure treatment (CRM) in CRD3 (coming into force on Dec 31, 2011), which sets out various risk assessment requirements that will apply to the correlation book. It could be indicated in CP40 that traders who undertake these activities are fulfilling requirements that are "appropriate" for the correlation trading book. An alternative suggestion is to indicate specifically after clause 63 that for the correlation trading book due diligence should focus on three key areas: (a) the eligibility of the proposed transaction for the correlation trading book; (b) ensuring that the reference portfolio comprises only 2 way liquid corporate credit default swaps; (c) review of risk parameters and the impact of including the proposed transaction in the existing credit correlation book; and (d) review of the related structure and its legal documentation. One respondent argues that in a correlation trading book due diligence requirements only refer to instances where one is selling protection, and not where one is buying protection, as there will be		

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	constant buying and selling of protection on securitisations. Selling protection in economic terms is similar to investing (one is assuming exposure); buying protection in economic terms is not (one is transferring exposure to another party).		
Managed CLOs	Some respondents argue that for some transactions which potentially come under the definition of securitisation, there may be no entity that can fulfil the role of "originator" or "sponsor" as defined in the original CRD. This is the case for managed CLOs, in which the sponsor (i.e. the investment manager or arranger) may not be a credit institution as required by the definition, and the originators or original lenders will not be involved in the securitisation. A specific proposal on which feedback is requested by one respondent is as follows: An Originator SPV would be created to acquire the portfolio of assets from the market and then sell the assets to the CLO issuer. The Originator SPV would, therefore, meet the requirements of the definition of "originator". The Originator SPV will hold the relevant retention through one of the methods set out in 122a. The Originator SPV will be funded by, and all of the risk in the Originator SPV (and, therefore, the retention) will be held by an entity (the "Retention Party") that will either be: a) the investment manager; b) a fund which is controlled or managed by the investment manager; or c) another entity which has a role in the	CEBS agrees that in certain securitisation transactions there may be no entity that can adequately and efficiently fulfil the role of originator, sponsor or original lender in meeting the retention requirement. As suggested in the comments received, the originator SPV could be used, if and only if there are definitional issues surrounding certain parties to the transaction (for instance, the sponsor is not a credit institution). The originator SPV could meet the retention requirement via two of the three options suggested: these are (a), i.e. the investment manager, and (c), i.e. another entity, which has a role in the structuring of the CLO or the asset selection for the CLO (such as a sub-advisor or portfolio selection advisor). However, the suggested option (b), i.e. "a fund which is controlled or managed by the investment manager" will not be allowed as it is the least likely to create alignment of interest with the investor, as the supposedly	25-26

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	structuring of the CLO or the asset selection for the CLO (such as a sub-advisor or portfolio selection advisor). A separate question was raised by two respondents: can those MiFID investment firms with authorised permissions categories that bring them within the scope of the CRD by virtue of re-cast CAD, (i) fulfil the role of sponsor, and hence hold retention themselves, even though they are not credit institutions? and/or (ii) hold retention in an SPV that is deemed an "originator" and is consolidated for regulatory purposes with the investment firm manager and/or its wider group? As regards (i), an investment firm cannot currently meet the definition of a sponsor under the directive, but is it possible that an investment firm that is part of a group containing a credit institution and is subject to consolidated supervision within the EU of that institution/group could ensure that the retention requirement is satisfied through making use of Paragraph 2 of Article 122a? As regards (ii), where there is not a credit institution in the group, then Paragraph 2 of Article 122a may be unavailable; however, is it possible for the investment firm to set up an SPV to act as an "originator" provided that the investment firm is subject to consolidated supervision within the EU under Directive 2006/49/EC and the scope of that consolidation includes the SPV? However, the interaction of MiFID and the CRD is not necessarily straightforward and an investment firm contemplating such an approach would need to consider its regulatory permissions and the financial	"retained" exposure could essentially be re-sold to another of the investment manager's funds or CLOs, without any retention by the investment manager or any entity involved in structuring the CLO. CEBS believes that if Article 122a had been applied to investment firms then it is likely that a similar provision to Paragraph 2 would have been granted for investment-firm-only groups; in which case, it seems not unreasonable to allow similar treatment for the purposes of allowing investment-firm-only groups to comply in cases of CLOs, especially as they cannot meet the definition of sponsor.	

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	consequences that result (including those that result from the consolidated supervision not only of the SPV, but also from any other relevant group entities).		
Specific Paragraphs of Article 122a			
Paragraph 1	In the various retention options, there are references to "nominal value" (in (a), (b) and (d)), and "nominal amount" in (c). If this distinction is not intentional, it should be clarified that this is the case.	References to "nominal value" and "nominal amount" are not intentional, and this has been clarified in the guidance.	34
Paragraph 3	With respect to the phrase "CDS which do not hedge a securitisation", there is uncertainty as to the meaning of this exemption. A credit default swap should not of itself be caught in the scope of Article 122a unless it constitutes a securitisation position. This would involve the pool of exposures being tranched, and the tranching determining the distribution of losses on the pool. There is no reason that a single-tranche credit default swap should fall within the scope of Article 122a at all. The wording "where these instruments are not being used to package and/or hedge a securitisation that is covered by Paragraph 1" is confusing. Hypothetically, "packaging" of securitisation positions might include a CDO, and therefore would be caught. But if an investor in ABS chooses to hedge its positions to manage its risk, through entering a credit default swap on the underlying entities (for instance, a negative basis trade), this is not necessarily an activity which should be penalised with a retention requirement. It could be interpreted that the wording	CEBS agrees with the comment. It is hedging the retained position or exposure that is specifically not allowed. This has been clarified in the guidance. It should be kept in mind, that according to Article 96, clause 2 of Directive 2006/48/EC, the provider of credit protection to securitisation positions is to be considered as holding positions in the securitisation and is, therefore, subject to Article 122a, the same as an investor.	75-76

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	is intended to prevent the hedging of the retained amount under Paragraph 1 (for instance, establishing a traditional securitisation and then overlaying this with a synthetic securitisation), but the wording is unclear and clarification to that effect is needed.		
Paragraph 4	Some respondents asked CEBS to confirm that where assets are not yet in a pool at funding (e.g. during a ramp-up period or where assets may be substituted into a revolving pool), investor due diligence may be performed on the eligible assets in the absence of actual assets. Paragraph 4 would be unworkable if that were not the case. Potential investors will need to understand what "independence of the valuer" means. In an RMBS there is no valuation of the collateral, but rather a credit and cash flow assessment. It is unclear whether an assessment equates to a valuation in this context	CEBS agrees with the comment; investor due diligence may be performed on the eligible assets in the absence of actual assets. This has been clarified in the guidance. There is no need to explain "independence of the valuer", as this requirement only applies "where applicable". Nonetheless, some additional guidance on the applicability and materiality of this clause has been provided.	80
Paragraph 7	The term "securitisation exposure" should be interpreted as "securitisation position" and "collateral" should be interpreted as "securitised exposure" to make it consistent with CRD.	CEBS agrees with the comment, and has added clarification to the guidance.	89
Specific Clauses on guidelines consultation paper (CP40)			

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
Executive summary/ Consolidation	The executive summary says that "a credit institution will become exposed to credit risk by virtue of the activities of any related entity which falls within the same scope where consolidated supervision is applied". The guidelines thus suggest that Article 122a falls under the application of Article 71 of CRD (Directive 2006/48/EC), i.e. it would apply to the non-EU subsidiary of an EU credit institution (e.g. an overseas broker-dealer). However, counter-arguments to this are: Article 122a is not among the provisions referred to in Article 71, and Article 122a itself does not refer to application on a consolidated basis, nor does the Directive mandate such an extension of scope. It is not within CEBS's scope to broaden the mandate thus. While it is true that Paragraph 2 of Article 122a allows the retention requirement to be met on a consolidated basis, this is a permissive provision and applies to the meeting of the retention requirement only. It does not in any way mandate credit institutions to account for exposures to securitisations within any entities falling within the scope of its consolidated supervision (e.g. investment firm subsidiaries) on a consolidated basis when applying Article 122a. Aside from the lack of a legal basis for applying this at a consolidated level, it would be practically impossible to apply it to subsidiaries in non-EU jurisdictions where the separate and different retention requirements of the host regime conflict with the provisions of Article 122a. Therefore, it is argued that the consolidated supervision approach should be dropped. One suggestion in this respect is a mutual recognition and acceptance process with respect to retention, particularly in light of the calls made by the G20 for	Although Article 71 does not itself extend the application of consolidated supervision to Article 122a, a credit institution will (in addition to its own activities) also become exposed to the credit risk of a securitisation position by virtue of the relevant activities of any related entity (authorised or unauthorised) which falls within the same scope of a group where consolidated supervision is applied. Paragraph 1, therefore, generally requires that such exposure to the credit risk of a securitisation position (whether in the trading book or non-trading book) shall only be assumed if the requirements of Article 122a are met. However, in determining the measures necessary for compliance with such requirements when the exposure occurs within the trading book of another group entity, the credit institution may also take into account Paragraphs 4 and 5 and the guidance provided thereon elsewhere in this document. Competent authorities may do likewise in judging the materiality of any infringements. The extent to which the requirements of Article 122a are, indeed, being respected at group level will be monitored as part of this annual post-implementation review.	8-10

	Received Comments (clause numbers refer to CP40)	**CEBS's analysis (clause numbers refer to CP40)**	**Relevant clause(s) in final Guidelines**
Clause 1	Clause 1(i): This requirement is vague; as since "academic" studies have shown that there is no optimal retention requirement, it should now be obvious that the problem of quantifying alignment originator and investor interests is not sufficiently specified to be answered. How then can investors be made responsible for this specification? Clause 1(ii): This is another standard that investors will find difficult, and it raises the risk that investors will not be protected by safe harbours in the case of violations due to structural provisions, such as hedging arrangements or fee structures, that are not even disclosed in the public transaction documents.	There is only a requirement to "consider"; investors should be responsible and not invest in positions that raise warning flags after due consideration. No amendment has been made in this respect. Investors will only be expected to consider what is disclosed. No amendment has been made in this respect.	1
Clause 9	The definition of warehouse relates to "more than one lender", which means that it is accidentally conveyed that it is only a warehouse if there are at least two lenders/investors funding the warehouse. However, a single-lender warehouse is also a securitisation, by definition, so references to "more than one lender" and suchlike should be deleted.	CEBS has amended the example.	17

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
Clause 10	According to clause 10, the sanctions listed in Article 122a, Paragraph 5, in the case of a breach of Paragraphs 4, 5 and 7, also apply in the case of a breach of the ban on investment in Paragraph 1. This is justified by the reference to Paragraph 1 in Paragraph 4(a). However, this transfer of the sanction mechanisms to credit institutions which breach Paragraph 1 is not necessarily possible. Paragraph 1 prohibits the acceptance of a securitisation position if the originator, sponsor or original lender has not disclosed that it will keep sufficient retention available at all times. Paragraph 4(a), on the other hand, refers only to the investor, which needs to know the information disclosed according to Paragraph 1. The sole purpose in mentioning Paragraph 1 in Paragraph 4(a) is, therefore, to define the obligation to provide evidence; it is not intended to link it to the sanctions of Paragraph 5	The indirect link between non-fulfilment of Paragraph 4 and non-fulfilment of Paragraph 1 exists, nonetheless, and tracks through the document. However, amended wording has been added to clarify how this follow-through is interpreted to work.	18-19
Clause 14	For some respondents, this clause is understood to mean that only certain of these transactions fall at all within the context of Article 122a (i.e. as "securitisations"), and, therefore, it is requested that the words in the first set of parentheses are qualified so as to read "(including covered bonds, treasury bonds, or similar transactions in cases in which the definition of securitisation is met)". For other respondents, they note that CEBS draws attention to the fact that the definition of a securitisation is based mainly on the fact that the	The wording of the example that is deemed to be confusing (covered bonds) has been amended to be more clear. Furthermore, amended and additional text has been provided indicating that the provisions of Article 122a as they apply to investors are independent of whether or not significant risk transfer is met by the originator, original lender or sponsor. Otherwise, the guidance already notes that a securitisation is clearly defined under CRD, and that transactions that meet such a definition are captured by	22

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	credit risk is transferred. While this is not disputed, the distinction that follows is not justified, as securitisations are sufficiently defined in the directive, and an extension to include transactions with no transfer of risk to third parties should be rejected. If this were not the case, then the requirements of Article 122a would also need to be adhered to if, for instance, a bank were granted a reduction in capital requirements for a purely internal company transaction, either at an individual or group level, and where neither a third party investor nor a refinancing or placement with investors are planned. The resulting costs of implementing Article 122a would be completely disproportionate. Consequently, the reference to transfer of credit risk in this clause should be amended or removed, or clarification to cover the above points should be added.	the provisions of Article 122a.	
Clause 15	With respect to original lenders, CEBS has indicated in its proposed guidance an understanding of the "original lender" (undefined), but it is not clear how this description of an original lender would differ from the first limb of the originator definition.	The guidance on what an "original lender" is has been amended. However, a precise definition of "original lender" is not provided, in order to avoid unintended consequences through excluding certain lenders that do not fit under the definitions of "originator" and "sponsor", making them ineligible to hold the required retention.	23
Clause 17	It has been pointed out that not all deals will involve a party which clearly falls within the definition of an originator or a sponsor, and the requirement will not be satisfied if another party holds the interest (for instance, a loan to a real estate company, secured on	The party meeting the retention requirement should be the party that will benefit from the securitisation transaction and whose risks and rewards should be best aligned with the interests of the investors. Additional guidance	25-26

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	commercial real estate), whole business securitisations, corporate securitisations, future flow securitisations, and certain types of structured corporate debt. The only guidance CEBS provides in clause 17 is that "should a transaction involve an entity which fails to meet the definition of originator or sponsor, the retention requirements must be fulfilled through the original lender".	has been provided on circumstances where there is no party at all that meets any of the definitions of originator, sponsor or original lender.	
Clause 18	It is suggested that the statement in the Executive Summary that "measurement of the level of commitment will not be affected by either the amortisation of such interest … or through the allocation of losses which in effect reduce the level of retention over time" be expanded so that it applies to all of options (a) to (d) and not just option (d) (as sub-clause (ii) on page 19 references only option d), and that it makes clear that in respect of options (b) and (c) that "losses" for this purpose include defaults in the retained exposures as well as losses on the securitisation tranches	Amendments have been made to the final guidance to reflect this.	43
Clause 24	The calculation of the net economic interest as the "nominal" exposure requires clarification. In particular, is this the book value of the securitisation assets prior to securitisation, or the discounted value of these assets? The connection of the retention level to "nominal values" in clause 25 is reasonable in the case of securitisation tranches or receivables or lines of credit. However, the nominal value may not be a	It is the nominal value at the time of securitisation, and it is not a discounted value, book value, or market value. The term "nominal value" is deemed to be sufficiently understood by market practitioners to require no further clarification. For retention in such forms as derivatives, liquidity facilities (for ABCP conduits) and letters of credit, additional guidance has been	33-34, and (for derivatives, liquidity facilities, letters of credit, etc) throughout the guidance

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	suitable measurement basis for retention in the case of derivatives, such as currency and interest derivatives. A similar problem exists when determining the retention for securities where the underlying portfolio consists of derivatives. Please establish an appropriate basis for valuation. It is also unclear which assessment basis is to be used to measure retention in the form of possible liabilities, such as letters of credit or liquidity facilities.	provided on how this could be applied; equivalence should be sought with the more explicit and simplified forms in which options (a)-(d) are typically met. No guidance is provided on currency and interest derivatives, however, as it is not interpreted that these are typically eligible forms of retention in cases where they do not assume any credit risk.	
Clause 26	It is argued that the directive does not prevent originators from retaining through a combination of options, and indicated that at the very least any complementary retention to the option chosen should be considered at the time of assessing breaches of the retention requirement.	It is clear from Paragraph 1 that combinations of options are not allowed. However, in the guidance, text has been added that as part of post-implementation review further advice to the Commission on combinations of options may be considered.	36
Clause 28-31	With regard to the suggestion that an originator would be in breach of Paragraph 1 if it were to sell its retained interest in a securitisation, CEBS has not clarified how the sale of an entire business would be treated. It is suggested that the purchaser of the business should inherit the obligation to retain a net economic interest in any assets which form part of a securitisation forming part of the sale; however, this has not been addressed in the consultation paper guidelines	The guidance is clear that there will be no additional risk weights unless through "negligence or omission" of the investing credit institution, and extra text has been added on circumstances in which "unforeseen corporate actions" could not have been predicted in advance by such credit institution when investing.	30, 70
Clause 33	Respondents indicated that this clause should be deleted. Article 122a aims to involve originators,	The guidance has been amended throughout with respect to synthetics as a means of	Amendments made

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	sponsors or original credit providers in the risk of the securitisation. The guidance should not prevent originators/sponsors from selling the retained interest and entering into a fully matching CDS or TRS, as economically it is the same as retaining, and is, in fact, similar to synthetic securitisation. Funding aspects are irrelevant. Furthermore, the maintenance of the prohibition would also give rise to the question of how the form of retention could be applied to synthetic securitisations	fulfilling the retention requirement. It is possible to meet the retention requirement synthetically, for instance via a total return swap.	throughout the guidance, but see in particular clauses 45 and 68
Clause 34	In spite of the explanations given in this clause there seems to be lack of clarity as to when the 5% is measured. It is argued that while it is clear that the net economic interest is to be measured at origination, it is unclear whether this means origination of the securitisation or origination of the relevant assets. Additional clarification is required on this, as it is particularly problematic in the context of CLOs, due to their revolving nature. The price paid by the CLO for assets, given they are acquired in the secondary market, is likely to be different (lower) than the face amount of the assets. It is argued that the retention amount should be set at closing for CLOs based on the acquisition price of the assets (or, in the case where the assets have not been acquired at closing, the proceeds of the CLO issuance, which will subsequently be applied to acquire assets). This is argued to be consistent with the intention of Article 122a, as the acquisition price and issuance proceeds represent the value of the investment as at closing, and that the face amount of the assets is irrelevant	Measurement is "at origination", i.e. when the exposures were first securitised. This is deemed to be sufficiently clear in the guidance already. However, further text has been added to clarify that retention is measured with respect to the nominal value of the exposures at the time of securitisation, and is independent of the acquisition price of such exposures. The decision-tree is included in the final guidance. Amendments to the relevant clause have encompassed the suggested changes.	43

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	for this purpose It was suggested that the decision-tree used in the public hearing presentation be included in the guidance also. CEBS should confirm whether in clause 34 (iii) on page 20, the two references to "balance" in the final two lines should read "notional".		
Clause 35	There are requests for further explanation, as there is general uncertainty regarding its meaning	Clause 35 is just a statement of fact; there is no need for further clarification.	44
Clauses 38-42	Can the retention of notes in a self-issued (retained) securitisation meet the retention requirement for a publicly issued securitisation, if the assets are of the same type, and using option (c)? According to clause 40, the random selection of the positions to be retained when using the form of retention in (c) should not lead to higher concentrations in the portion to be retained or in the securitised portion. However, the random selection of the positions is aimed at having the same characteristics for securitised and retained positions. This requirement that it not be "overly concentrated" should not, therefore, be breached if a concentration exists purely due to a deliberate orientation of the securitisation transaction, e.g. it is aimed at providing investors with exposure to one country or one sector (e.g. "shopping centres"). This should be clarified	It is now clarified elsewhere in the guidance that there is nothing to prevent exposures retained to fulfil the requirements using option (c) being used for funding, regardless of whether this is in structured or unstructured form, as long as credit risk is retained by the originator, sponsor or original lender. If the entire securitisation is concentrated, there is no ambiguity, and it is not deemed necessary to explicitly address this point. Regarding the potential need to "ring-fence assets", see comments above on use of assets for funding in structured and unstructured form, which also address these comments.	49-53, 66-68

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	It is not clear whether or not it is necessary to ring-fence the assets that meet the retention requirement when option (c) is being used, and thus make them ineligible for other securitisations		
Clause 44	While CEBS does not want to provide a conclusive list of securitisation positions which could act as a "first loss tranche", there are some that are potentially missing. Guarantees (in the wider sense) and credit insurance should also be recognised as retention if these are part of the credit structure, are assumed by creditworthy counterparties, hedge credit risk, and require quick payout of guarantees or insurance in the event of a shortfall. It is only an additional guarantee by which an originator, sponsor or original lender covers its retained exposure (not just adding credit enhancement for investors) that should not be allowed as retention. The term equity must not be used in securitisations as it suggests the recourse to assets other than those which form part of the securitised pool. This would contradict one fundamental element of a securitisation, which is that recourse is possible only to the assets and nothing else. If recourse were possible to other assets the structure would rather qualify as covered bond or Pfandbrief.	CEBS disagreed with these comments. The "out-sourcing" of risk to "credit worthy counterparties" does not cause the originator, sponsor or original lender to retain credit risk vis-à-vis the assets, and therefore it does not qualify as retention under the allowable options. Consequently, third-party guarantees do not qualify as retention. Use of the word "equity" in drafting has been clarified in a footnote in the final guidance.	55
Clause 46	It is not clear when a refundable purchase price discount would qualify as retention. It is suggested that the full amount of the refundable purchase price should be treated as retention, as the full risk may	As long as the discount consists of at least 5% for credit risk it would qualify as meeting the retention requirement (under option (d)), and this has been clarified in the updated	59-60

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	materialise on the part of the originator, and, in a worst case scenario, the originator will not receive any residual and will have borne the full risk, accordingly. The reference to "economic substance of a securitisation justifying this" is too vague. It is also suggested that the refund can be made when the underlying exposure discounted has fully performed, to be consistent with the guidance's view that once a first loss tranche has been used it does not need to be replenished.	version of the guidance. Elsewhere, within the guidance, clarity has given on meeting the retention requirement via the sale of assets at a discount, for instance, in the case of ABCP conduits. Finally, the phrase "assuming (as per Recital 24) that the 'economic substance of the securitisation' justifies this" has been deleted from this part of the guidance, as this applies to Article 122a and CEBS's guidance more generally (i.e. retention must always meet the economic substance), and the explicit citation of it here is redundant and creates confusion. Beyond this, no further guidance on these points, or amendments to the existing text, was deemed necessary.	
Clause 53	Whilst there is no explicit provision in Article 122a for non-deposit taking groups, which report on a consolidated basis for accounting purposes, to retain the 5% risk on a consolidated basis, this must be implied and there should be guidance allowing retention on this basis to satisfy the requirements. Whilst accounting treatment does not necessarily equate with capital treatment, as these entities are not subject to their own capital requirements, the entities ought to be able to account for the retained exposure in the most tax/accounting efficient manner without the investor being penalised.	This option would be allowed and would meet retention requirements. Text has been added to the guidance in this respect.	71
Clause 57	According to clause 57, the requirements of	It is deemed that sufficient guidance has	78

	Received Comments (clause numbers refer to CP40)	**CEBS's analysis (clause numbers refer to CP40)**	**Relevant clause(s) in final Guidelines**
	Paragraph 4 should be met prior to investing, and if there is a material change/event affecting the investment. More explanation is needed on such event-based reassessment, and it may not be necessary in certain circumstances, for instance purchasing new issuance from the same program (e.g. constantly buying 180-day paper from an ABCP conduit), if the risk profile has not changed. It is suggested that information flow should potentially be more frequent, and that a greater frequency or even event-based reporting, be mandatory.	been provided already, and as the extent of due diligence needed will in reality be case-dependent, as well as being dependent upon the different types of assets being securitised, and structures used to fulfil such securitisation, further guidance is unnecessary.	
Clause 66	It must be made clear that where a certain type of data is not applicable or relevant or possible (e.g. "credit scores" are not possible for ABCP conduit receivables), that this is not a breach.	The underlying text of Paragraph 5 already say "where relevant", so no change is necessary.	88
Clause 68	It should also be clarified that the originators, sponsors and original borrowers do not need to disclose any information relevant to competition, which relates to collection policies, etc.	Potential investors should decide what information they need to inform their investment decision; if that is not available or provided they should not invest. There is existing text that covers the fact that there is no need to provide information that breaches regulatory or legal requirements; this is deemed to be sufficient.	91
Clause 84	The wording in clause 84, with regard to being in breach of "ensuring disclosure by originator, sponsor or original lender of retention of net economic interest," directly contradicts Article 122a, which states that the investor would only be in breach "if the requirements are not met in any material respect	See response to comments on clause 10 above. Also note that additional risk weights only ever apply should there be negligence or omission on the part of the investing credit institution.	18, 111

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	by reason of the negligence or omission of the credit institution".		
Clause 103	Although the guidance interprets "individual underlying exposures" as meaning loan-level data, it is argued by respondents that Paragraph 7 does not require originators to publish loan-level data, and should not bring in a requirement for loan-level data "through the back door" via Article 122a. Two arguments in this respect are: Paragraph 7 appears to mostly be an admonition to originators that they should make it possible for investors not to be in breach of their obligations under Article 122a, by satisfying the retention and reporting requirements. However, Paragraphs 1-5 of the Article do not impose on investors the obligation to have access to loan-level data, calling the interpretation that a loan-level disclosure obligation is imposed by Paragraph 7 on originators into question. The term "individual underlying exposures" could refer to pool stratification tables (not loan-level data), as these are indeed required by investors to satisfy their Article 122a obligations; loan-tapes, by contrast, are not. Similarly, other respondents request that Paragraphs 4, 5, 6 and 7 in Article 122a should be amended (or alternatively guidance should be given) to allow due diligence at portfolio level (not individual loan level) for very large granular portfolios. In particular, it is	The guidance has been amended to outline that loan-level information is in principle required; however, CEBS recognises that in certain circumstances (e.g. for granular portfolios) stratification tables of loan-level information may be more appropriate to satisfy the requirement. This distinction should be equally valid for the information that credit institutions, as originators and sponsors, need to provide (under Paragraph 7), and for the due diligence that credit institutions as investors (or otherwise assuming exposure) would expect to receive and analyze (under Paragraphs 4-5). However, certain other arguments made in these responses (such as that Paragraph 7 is not really meant to apply to originators and sponsors at all) are rejected.	128

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	requested that the requirement for "individual" loan-level data not be compulsory to analyse risk characteristics of the underlying receivables in ABCP securitisations, as they are usually based on a very granular portfolio with a very high turnover. The need to potentially have no loan-level disclosure of ABCP conduits should potentially apply not just to the investor's due diligence requirements under Paragraphs 4-5, but also to the originator's disclosure requirements under Paragraph 7.		
Clause 104	In this clause there is a limitation on scope for disclosure requirements should such disclosure breach laws or regulations (e.g. on market abuse or confidentiality), but this should also be extended to not requiring disclosure of the bank's own internal rating of a borrower, which is typically prohibited due to internal compliance policies. Therefore, it is proposed to add the words "directly or indirectly"; as in, "breach [directly or indirectly] other legal or regulatory requirements". It is also requested that there should be clarification of clause 104 to ensure that banks will not be required to provide information under Paragraph 7 that would breach confidentiality between bank and customer, whether such confidentiality arises from legislation, common law or equivalent custom, or the provisions of market documentation.	There is no current or proposed requirement to disclose internal ratings. "Confidentiality provisions" need no further explanation. However, the existing wording has been amended somewhat (including the addition of "directly or indirectly"), and via reference to confidentiality, which may, nonetheless, address some of the points raised.	129
Clause 106	There was some confusion with respect to this clause. It is suggested that it be amended: "The term "existing" in this context is interpreted to mean those	There is only one time dimension, but it is recognized that this area of the guidance was poorly worded. CEBS has added an	131-132

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	securitisations that were existing on or before [delete "on or after"] 1 January 2011, not those that were existing on or before [delete "on or after"] 31 December 2014	explanatory table, as well as specific examples, for the avoidance of doubt in the final guidance.	
Clause 109	It is also uncertain if an institution assumes exposure to a securitisation position before 1st January 2011 for which the originator, sponsor or original credit provider has not disclosed that they intend to fulfil the retention requirement, even though exposures are to be substituted or added after 31st December 2014, whether or not an increased risk weight could be imposed after 31st December 2014. The arguments against imposing such additional risk weights (hereafter "ARWs") are as follows. First, applying such penalties to transactions which existed before the standard was released is not acceptable, as the investor would be penalised for circumstances which were not foreseeable when the transaction was agreed. Second, clause 109, as worded, does not clearly take account of the provision in Paragraph 5 of Article 122a that an investor will not be subject to the additional risk weights unless breach is by reason of its negligence or omission. It seems that additional risk weights will be applied automatically from the end of 2014 in respect of existing securitisations involving asset substitutions after 2014 in all cases where the originator or sponsor does not hold the required interest. If read this way, the clause could	See response to clause 106; guidance on "existing" and "new" securitisations has been amended substantially to address these points. Regarding the specific case mentioned here, a credit institution will by 2014 have been fully aware for some time of the retention requirement to be met if exposures are substituted after 31st December 2014, as well as the potential penalties applicable for non compliance with these requirements. However, text has been added linking this requirement, and any potential additional risk weights as a result of breach thereof, to negligence and omission (as elsewhere in the guidance). It is also recognized in the updated guidance that for positions acquired or exposures assumed before 1 January 2011, this (i.e. negligence and omission) may not necessarily be the case, and it is recognized that there may be circumstances in which it is not possible for the retention requirement be fulfilled retrospectively with respect to such positions. For such reasons, competent authorities may under certain circumstances assess the nature of non-	131-132

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	be seen to disregard the lack of any negligence or omission on the part of the investor. Third, this is also contrary to the statements made in clause 87, that actions beyond the control of the investor should not result in the investor being penalised and that an institution would not be obliged to dispose of a securitisation position in such circumstances. It has been pointed out that where the originator or sponsor does not add 5% to the transaction that is captured, this may not be due to the unwillingness of the sponsor or originator to assume a new 5% position in the securitisation (although there is a high likelihood that it may be unwilling), but may be because this is not envisaged in the transaction documents of the securitisation, or may be due to the fact that certain classes of noteholders (that are not subject to Article 122a) vote to not allow the originator assume a 5% stake (for instance, due to conflicts of interest if it were to do so). Alternatively, there could be classes of noteholders (not subject to Article 122a) that vote to continue to have the transaction revolve, even though other classes of noteholders (subject to Article 122a) vote to stop the securitisation revolving to avoid its being subject to Article 122a. It is also argued to be contrary to the allowances that were made to originators during the lobbying process behind Article 122a	fulfilment of Paragraph 1 for those positions and exposures acquired or assumed prior to 1 January 2011 differently to those acquired and assumed after 1 January 2011. The final point, on when a securitisation becomes subject to Article 122a should it continue to revolve, has been clarified in the guidance.	

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	Clause 109 should be potentially be deleted, but if kept, the wording "the additional risk weights" at the end of the clause should be replaced with "the additional risk weights specified by Paragraph 5 will only apply to the credit institution after 31st December 2014 in the event of its negligence or omission." Also, should it be necessary to ensure retention for pre 1 Jan 2011 securitisations that continue to revolve after 31 December 2014, it should also potentially be clarified that for a securitisation issued before 1 January 2011 (where substitution does not happen until after 31 December 2014, but where it is certain that such substitution actually will happen i.e. it is known in advance), the retention requirement does not have to be fulfilled until after 31 December 2014.		
Answers to specific questions			
Question 1	Most respondents agree with the distinction of investing versus assuming exposure. However, one respondent says that there should be no distinction; the only driver should be whether or not the institution is capable of suffering a loss. It is pointed out that the distinction between "investing" and assuming "exposure" is valid, but there is no definition of what is "investing"? For instance, would the provision of credit enhancement	While there is, indeed, no definition of "investing" in CRD, it is not appropriate within this particular guidance document to undertake to provide such a definition. However, more clarity is given in the updated guidance on activities that typically would or would not be subject to Article 122a, which indirectly indicates what would or would not typically constitute "investing" or "assuming exposure". It is also clarified which activities	11, 16, 19

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	by a subordinated note be seen as "investing" or "assuming exposure"? Is a credit institution investing in synthetic securitisations considered to be "investing" or "assuming exposure". It could be clarified that "investing" implies the provision of third-party, arm's length up-front funding, such as via issued/tranched securities, for a return based on price or yield, so that the provision of swaps, unfunded CDS protection, liquidity facilities, etc. are not "investing". There are other types of activities for which clarification is needed. While clarifications have been provided with respect to liquidity facilities and derivatives, it is unclear whether (a) repos, (b) securities lending, and (c) TRS funding trades are captured by Article 122a, in terms of the need to do due diligence and ensure retention. They should probably not be captured, as the credit risk is primarily versus the counterparty to which the loan has been made, with the collateral only as contingent security, and regulatory treatment of such lending also treats it this way. If this is the case, it should be clarified as such. It is not clear whether or not self-issued/retained securitisations (e.g. for central bank repo funding) are captured under Article 122a. There is an issue if a credit institution is fulfilling multiple roles. For instance, it is not clear from the table (i.e. that maps out the requirements by role) or	are not deemed as investing (for instance, repo). Regarding self-issued securitisations, no guidance on this was deemed to be required. For instance, if a securitisation is structured from an originator's own assets and is fully retained by the originator, then it is likely that capital continues to be held against the assets (not the securitisation), and there has effectively been no tranching of credit risk (as no tranches have been sold at all, as all are retained). It would not typically be the case that Article 122a would apply to such securitisations. However, should a tranche subsequently be sold to a third-party investor, this situation may change, and the provisions of Article 122a may apply. However, it is not within the scope of the guidance to address all such circumstances; rather, in such circumstances the credit institution should prudently determine whether a position is subject to the requirements of Article 122a. If a credit institution is fulfilling multiple roles, it should meet the requirements for each such role discretely, and there is no "hierarchy" as such. Guidance on this situation has been added to the final text. Further guidance has been provided on how additional risk weights are applied to the	

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	subsections 3-10 that a credit institution could potentially assume multiple roles in respect of a securitisation, but should only need to fulfil the requirements with respect to one of these roles. For example, if an institution acts as hedge counterparty in a corporate finance ABCP programme, it may be classified as an investor. However, if it simultaneously acts as a sponsor of this ABCP programme, it is a sponsor, and should no longer be considered an investor, and should only have to apply the requirements of Article 122a for sponsors, rather than investors. It may need to be clarified that the requirements of 122a only have to be met once (for instance, in one capacity only) for a credit institution that is fulfilling multiple roles (in the same securitisation). It may be necessary to provide a hierarchy, e.g. the role of sponsor overrides the role of investor, etc. With respect to Paragraph 5 (Article 122a) and the table on page 10 (Guidance) outlining roles and additional risk weights ("ARWs"), clarification is needed on how the ARWs will apply in the case of a breach of Paragraph 7 requirements, where such ARWs are applied to the interest retained by the sponsor or originator. (FBF, 7) More specifically, the last (bottom right) cell in the table on page 10 of CP40 states that the penalties for breach of Paragraph 7 are applied to the exposures retained by the originator. However, the discussions in CP40 around the additional risk weights (clauses 77 to 90) do not give any further guidance on how these risk weights will be measured, as the scales set out in	retained interest for breach of Paragraph 7. However, the argument that such additional risk weights are never meant to apply to credit institutions as sponsors or originators under Paragraph 7 is rejected. On the inter-linkage between Paragraphs 1 and 4, see earlier response to comments on clause 10 above. The decision tree from the public hearing has been added to the final guidance.	

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	those clauses seem to apply only to breaches by the investor. Alternatively, and more broadly, it is argued that there are no penalties intended for originators and sponsors under Paragraph 7, and the only penalty that can be clearly seen as applying to originators/sponsors is that specified under Paragraph 6, where failure to apply the same criteria for credit granting to securitised and non-securitised exposures, and to positions to be held in the trading book or the non-trading book, will mean the originator cannot avail itself of the risk transfer treatment in Annex IX. However, this penalty provision does not apply to Paragraph 7 breaches, and it is suggested that the final cell at the bottom of this table (page 10) is incorrect, and ARWs are not meant to be applied to the retained position of the originator or sponsor for breach of Para 7. Arguments in this respect include the following. First, Paragraph 5 opens with "Credit institutions, other than when acting as originators or sponsors or original lenders, shall establish…", and, therefore, it can potentially be assumed that the penalties of Paragraph 5 can only apply to credit institutions as investors (not as originators, sponsors or original lenders). Otherwise, CEBS would have to argue that the originator exemption at the very beginning of Paragraph 5 only applies to the first sub-paragraph, and not to the third sub-paragraph, where the penalties are specified.		

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	Second, Paragraph 5 states that "where the requirements in Paragraphs 4, 7 and in this Paragraph are not met in any material respect by reason of the negligence or omission of the credit institution", without specifying whether it is a credit institution acting as investor or acting as sponsor, originator or original lender. Third, the third sub-paragraph of Paragraph 5 also applies the risk weight to the "relevant securitisation positions", which means the securitisation positions referred to in the first sub-paragraph of Paragraph 5 – i.e. those held by the investor or entity assuming exposure. Finally, imposing penalties to the retained amount incentivises the originator to minimise the retained amount; this can hardly be the intention behind Article 122a. Therefore, it is possible to read Paragraph 5 differently to the interpretation of CEBS, and more specifically as follows: if the requirements are not met by a credit institution as investor due to the fault of the credit institution as investor, the ARWs apply, but if the requirements are not met by the credit institution as investor due to the fault of the credit institution as originator, no penalty applies to the investor (nor to the originator either, because it is not in scope of this Paragraph). There is a possible disconnect in the table that lays out the different parties to whom the requirements		

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	apply. Basically, Paragraph 1 and Paragraph 4 apply to different groups of parties (e.g. Paragraph 1 includes LF providers, and Paragraph 4 does not), but CEBS then indicates that Paragraph 4 sub-references Paragraph 1, so the requirements of Paragraph 4 mean the requirements of Paragraph 1 have to be met, but this makes no sense if then in its table CEBS also indicates that the parties to whom Paragraph 1 and Paragraph 4 apply are different, as in the case above, i.e. LF provider. It was suggested that the following decision tree from the public hearing presentation should be enclosed in the guidelines.		
Question 2	Most respondents agree with the distinction for liquidity facilities (with exceptions noted below). It is also consistent with the wording of Article 122a (1), which is expressed to apply to credit institutions that are "exposed to the credit risk of a securitisation position". In clause 7 on page 11, it is suggested that CEBS cut the final words "credit institutions assuming exposure to credit risk". This is to reflect changes in the table above, and the decision-tree in the presentation. Basically, the eligible/non-eligible liquidity facility is a binary test (by which a credit institution is captured under Article 122a or not), and if it is a non-eligible liquidity facility, a credit institution does not then test to see if it has "exposure to credit risk" (which also does not match with "principal losses" test for	The text describing the treatment of liquidity facilities when assuming exposure to securitisations was mostly kept in its previous form, with some small changes. In particular, whether a liquidity facility is captured or not by Article 122a is initially a test of whether it is "eligible" or not, and then (if it is "ineligible") a test of whether it assumes exposure to principal losses or not.	12

	Received Comments (clause numbers refer to CP40)	**CEBS's analysis (clause numbers refer to CP40)**	**Relevant clause(s) in final Guidelines**
	counterparties) to have a second decision-level on whether Article 122a applies or not. Rather, the very fact that it is a non-eligible liquidity facility means that Article 122a applies. It is argued that the carve-out for eligible liquidity facilities should be widened to include all those that do not assume the risk of principal losses (as is already the case with derivatives). In the table on page 10, the liquidity facility provider will always be subject to Article 122a if it does not fulfil the criteria for qualified liquidity facilities in Directive 2006/48/EC, Annex IX, part 4, Paragraph 2.4.1, subsection 13. Feedback suggests that this reference to the definition of qualified liquidity facilities is too narrow. For instance, many liquidity facilities provided to term ABS transactions do not qualify as eligible facilities, but do not assume credit risk (i.e. they limit drawdown in the event of asset deterioration or potential default, and are senior in the waterfall), and so should not be within scope. Consequently, it is argued that the carve-out for liquidity facilities should be similar to that for derivatives (i.e. is the credit institution assuming risk of principal losses or not), and the credit institution providing the facility should make the determination.		
Question 3	Most respondents agree with the distinction for derivatives (with exceptions noted below). It is also consistent with the wording of Article 122a (1), which is expressed to apply to credit institutions that are "exposed to the credit risk of a securitisation	The text describing the treatment of derivatives when assuming exposure to securitisations was mostly kept in its previous form, albeit with some changes.	13, 45

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	position". It should, furthermore, be clarified for the avoidance of doubt that interest and currency swaps are not an exposure to credit risk. These are usually linked to the nominal profile of the portfolio. If this changes due to shortfalls in the securities portfolio, this can have positive or negative effects on the market value of the swap, depending on the structure of the swap and the market situation. So there can be indirect exposure to credit risk (affecting the average life or outstanding notional balance of the swap, for instance), as opposed to direct exposure to credit risk. While clause 8 on page 11 of the consultation puts the emphasis on whether or not there is exposure to principal losses, this could result in misinterpretation. For instance, the differentiation could relate to whether any hedge directly mitigates or reduces the exposure to the retention. If retention can be met through a derivative (e.g. a swap), it is not clear how the measurement basis for retention is to be defined. A simple reduction to the nominal value would not necessarily be appropriate. The methodology could potentially consider both future exposure elements and a credit element that looks at the positioning of the derivative within the securitisation capital structure.	The request to clarify that interest rate and currency swaps are not captured is unnecessary, as it is already deemed to be explicitly stated and clearly worded in the guidance (including with examples) that it is the case that they are not captured. The second query on defining measurement of retention through derivatives ("e.g. a swap") is already deemed to be clear enough in the existing guidance. First, if this question is referring to retention via an interest rate swap or currency swap, this is not a valid form of retention in itself, if it is not exposed to the credit risk of the assets (see clause 24 above). Second, if this question refers to retention via a credit default swap or total return swap or suchlike, then the guidance has extra text added that where retention is in synthetic rather than cash form, equivalence of measurement should be sought with the more explicit and simplified ways of measuring the 5% outlined in the underlying text of Article 122a.	
Question 4	The mechanics of applying the 5% retention rule, including "no multiple application" provisions, to resecuritisations will be more complex than outlined in the guidance, because there is still no definition of	The definition of a "re-securitisation" is a subject for CRD3, and its provision will not be undertaken in this guidance.	29

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	what exactly constitutes a resecuritisation. For instance, the difference between a CDO of ABS and a single-tranche re-remic transaction is large, but both could potentially be resecuritisations. For instance, it is suggested that it be explicitly pointed out that ABCP are not to be treated as resecuritisations, and so multiple application is not necessary. In respect of the first sentence of clause 20, it should be clarified that where different original lenders sell their exposures to a single intermediate originator, which then sells them on to the issuer, then that single intermediate originator ought not to have to retain in respect of any proportion of the pool for which an original lender has made the required retention. However, the retention requirement is permitted to be met by the intermediate originator in respect only of exposures from original lenders who have not retained in respect of their portions of the pool. (Joint, 10) Similarly, where there are multiple originators, and the originators retain separately, it should be specified that the retention amount is fulfilled by adding together the retained amounts of all the separate originators, and ensuring that the ratio between the sum of the net economic interest of the participants and the total notional amount of the securitisation is greater than 5%.	The consultation paper is deemed to be clear enough on retention requirements in cases where there is sale of exposures by multiple original lenders to an intermediate originator. Aside from some small textual changes, this has consequently not been amended.	
Question 5	Almost all respondents disagree with CEBS and want flexibility in changing the form of retention, and indicate that the underlying text has nothing that	In the final guidelines it is indicated that changes to the form of retention is only allowable under exceptional circumstances	32

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	prevents changing the form of retention. Should the form of retention change, investors should be informed of the opportunity to cancel the security before a change to the retention.	(for example, when re-structuring of a transaction is necessary), where such change is explicable and a good reason for it exists (for instance, not just due to a changing performance outlook on the underlying exposures that the originator, sponsor or original lender wishes to protect itself against), and provided that such change is disclosed in a transparent manner to investors.	
Question 6	Most respondents think excess spread and interest-only tranches should count as retention as long as it is actually subordinated in the waterfall (and not senior). However, no respondents were able to give a satisfactory quantification of how the 5% would be calculated. Computation of retained excess spread or synthetic excess spread could only ever be modelled (with assumed prepayments, defaults, etc), and would have to be agreed in advance with the investor, with the methodology of calculation disclosed to the investor. However, there would never be any clear consistent parameters for such quantification. Others indicated that if an unfunded reserve fund does not count as retention (as guidance states to be the case), it is not logical that excess spread should count as securitisation.	Excess spread and interest-only tranches will continue to not be allowed as retention options.	33-36
Question 7	Almost all respondents think the market should police	The final guidance will allow the market to	37

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	itself on ensuring an undertaking to retain is legally enforceable; it is not feasible for it to be otherwise, given jurisdictional differences, plus investors will ensure that this will be captured in legal transaction documents anyway.	develop its own form of legally enforceable retention, and the issue will be kept for review in the post-implementation period.	
Question 8	Most agree with the list of hedges and the distinction. It is suggested that the provision of (only) a list of hedges that are not valid would suffice. Any hedge that does not directly reference the assets should be permissible. Insofar as CEBS intends to maintain the concept of a combined "negative" and "positive" list, it should, at the very least, also be clarified that hedges against other market risks (such as foreign currency or interest risks) which result from the retention are permitted. However, it is also argued that even the prohibition of direct hedges (not just indirect hedges) for securitisation positions as required in subsection 30 may be difficult to implement in practice. For example, many institutions have established a clear distinction (Chinese walls) between their investment and trade books for the purposes of risk management in order to prevent possible conflicts of interest. This separation of investment and trade books could, however, make it more difficult to identify existing connections between securitisations in the future. Furthermore, subsidiaries of internationally active institutions are constantly entering new positions around the world, where is not possible to directly	The language has been simplified to indicate that only hedges to mitigate the credit risk of the positions or exposures that specifically meet the retention requirement are not allowed. This answers other questions raised with respect to corporate group-level hedging, etc. The language on the provision of interest rate and currency swaps not counting as a "hedge" of a securitisation, in the textual form in which it already exists in the guidance, is deemed to be sufficient and not to lack any clarity, and so has not been amended. Regarding the difficulties that group-level activities raise in relation to tracking whether there is a "hedge" in place or not, this is addressed in the updated guidance by indicating that the provisions only expect that which is "within the limits of what is plausible, material and could reasonably be expected to be within the control or knowledge of a credit institution". Consequently, an investing credit institution	38-42

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	check whether they are to be regarded as a securitisation or securitised position hedge. Furthermore, there could be a situation in which an originator is buying protection through a CLO for a portfolio of corporate credits, and the prop desk or another desk engages in a CDS on one of the names in the portfolio. Permanently reconciling the CLO and the trading book might lead to operational issues. Consequently, a more appropriate interpretation of subsection 30 is requested. Regarding 30(b) ("credit institutions should also consider hedges to obligors (for instant corporate borrower) across its balance sheet and ensure that hedging doesn't undermine the effectiveness of the retention requirement"), there are questions as to whether hedges at the corporate/group level constitute permissible hedging, and as to how broad the consideration in 30(b) needs to be? Can the party that retained 5% have hedges in place at the corporate/group level? For instance, if the originator does not hedge the actual loan to firm ABC that is sold to the SPV, and does not hedge the tranche issued by the SPV that it retains, but does have other hedges in place with respect to its broader relationship with firm ABC beyond the individual loan sold to the SPV (for instance, it may have other unsecured loans, undrawn borrowing facilities, etc with firm ABC), is this non-permissible hedging? Likewise, if a firm sells a secured CRE loan into the SPE, but keeps an unsecured senior loan to the same lender; is it allowed for the firm to hedge the latter as	is not expected to understand the full capital structure, and potential direct or indirect hedges, that may be in place. It is only expected to receive confirmation that the positions or exposures retained specifically to fulfil the retention requirement have not been hedged. It is also clarified in the guidance that external credit insurance, mortgage guarantee insurance, etc. are not considered to be a "hedge" if undertaken as a legitimate and prudent element of credit-granting, and if their usage does not create a specific differentiation between the credit risk of the retained positions or exposures and those positions or exposures that are sold to investors. On the question of whether it is possible to hedge the excess retained position above the required amount (i.e. "at least 5%"), it was deemed self-evident that there is nothing to prevent hedges or sales above that level. As the guidance around hedging has now been much simplified, it was not deemed necessary to add the decision tree from the public hearing into the consultation paper.	

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	long as it does not hedge the former? Finally, if there is no direct hedge on the exact loan sold to the SPV, but there is a CDS on the corporate entity, is this permissible? It is suggested that in clause 28 there is a precondition that an ABS investor is unlikely to be able to satisfy, i.e. "A credit institution should consider the economic substance of the entire transaction and consider whether any credit risk mitigation, short position or hedge essentially renders the 5% retention ineffective. Such protection arrangements will not be permissible." The text suggests that an ABS investor might have to know the entire capital structure, not only of the securitisation itself, but also of the originator, and know whether the originator has any mechanisms in place that might intentionally or inadvertently hedge the risk in the retained portion of the securitisation. Given that most originators in Europe are large banking groups with capital structures whose complexity exceeds that of any securitisation by several magnitudes, no ABS investor could ever be confident of having cleared this hurdle. In securitisations of trade receivables, originators commonly absorb losses by purchasing external credit insurance. This is part of the normal operating business insurance that a non-bank originator would take out, and confirmation is sought that such insurance is not treated as a "hedge" of the underlying exposures, but is instead a legitimate and prudent part of insuring an operating business.		

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	Another example is mortgage guarantee insurance, which may be taken out in respect of a mortgage pool; this is insurance taken out by lenders in the normal course of business, and should likewise not fall foul of the restriction in Article 122a. If the originator has retained more than 5% (e.g. 20%), can it hedge the excess difference (i.e. 15%)? It was suggested that the decision-tree in the public hearing presentation be included in the guidance also.		
Question 9	Almost all respondents agree on 5% of an underlying loan as being a permissible form of retention and noted it is common practice in synthetic securitisations.	Given the agreement on this point, the guidance will continue to stand as it is.	46
Question 10	Almost all respondents agree on allowing option (b) to apply to both revolving structures and revolving loans. One respondent did not seem to be sure of the need for the clarification. Clarification was requested with respect to the term "revolving exposure".	Given the agreement on this point, the guidance will continue to stand as it is. Even if this is deemed to be an unnecessary clarification, there were sufficient queries and misunderstandings on the topic to require explicit clarification. The term "revolving exposure" is broadly understood, and no definition was deemed to be necessary.	48
Question 11	It was argued that the CEBS approach is incorrect. Recital 25 to Directive 2009/111/EC states specifically "where securitisation transactions contain other securitisations as underlying, the retention	For investors, the requirement to ensure retention is, indeed, only at the layer of the resecuritisation in which they invest, and there is no requirement by either the investor	61-63

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	requirement should be applied only to the securitisation which is subject to the investment." It should be made clear that multi-level securitisations that are chosen because of the securitisation law of individual countries (Law 130 in Italy, FTC in France) or the financing structures (e.g. co-funding structures, where two separate conduits of two banks jointly fund a preceding SPV; separation of borrower/purchaser SPV and issuer SPV) should not be treated as resecuritisations, and multiple application should not be applied to these.	in the resecuritisation (or the sponsor/originator of such resecuritisation) to ensure retention is met for the underlying securitisations as well, as this would be duplicative. However, it could be the case that credit institutions investing or assuming exposure to such resecuritisations deem such information to be material for credit analysis (i.e. in fulfilling their obligations under Paragraphs 4 and 5), or credit institutions acting as sponsors or originators deem such information to be material for purposes of transparency and disclosure (i.e. in fulfilling their obligations under Paragraph 7). Wording in the final guidance has been amended to this effect. The existing text regarding the fact that certain types of funding structures created for legal reasons should not lead to multiple retention has been updated and expanded.	
Question 12	There was still some confusion with regard to the interpretation of this explanation of the securitisation of off-balance sheet commitments. The calculation of the "net economic interests" for off-balance sheet items should be explained through the use of an example. The term "notional" is, inter alia, used in synthetic transactions, where instead of a reference to a	Most of the comments received are not contrary to the initial intention of CP40, but the wording of the draft guidance seems to have created confusion. As a result, it has been amended, in particular, to deal with cases where the notional refers to undrawn or contingent amounts that may or may not crystallize in the future (and against which consequently no retention is required until such time as they crystallize). A specific	65

	Received Comments (clause numbers refer to CP40)	CEBS's analysis (clause numbers refer to CP40)	Relevant clause(s) in final Guidelines
	nominal amount, reference is made to the notional amount (which, in substance, means such nominal amount). Against this background, it is suggested that the term "notional amount" be clarified through the use of examples, as it is not clear how this term should be interpreted and used in practice. For credit card transactions, all references to notional value of the transaction should be based on the amount of receivables generated, and not on the available balance. This is the way the credit card securitisation market has evolved; notional value of the agreement is never considered as the agreement can be cancelled at any time. Consequently, for credit card transactions using option (b), the seller interest should be calculated as a portion of the actual receivables generated under the relevant credit card agreements. However, a contrary point was raised by another party, arguing that if the securitisation includes revolving exposures (e.g. revolving loans to large corporate companies), what should be considered is the full credit line (drawn + undrawn amounts), and then the retention requirement has to be fulfilled by retaining the 5% of the credit line Furthermore, the way the notional value of future cash flows/sales can be calculated should be explained.	example has also been given, as requested. This change concurs with the suggestion that retention is only against the drawn/existing balance of notional commitments that are contingent, and does not concur with the suggestion that retention be against the entire balance (drawn and undrawn) of such contingent commitments.	
Question 13	Almost all agree that the retained position should be useable for funding.	CEBS agrees that the retained position or exposures should be useable for funding, as long as the credit risk of such retained	66-68

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		positions or exposures remains with the party to which the retention requirements apply. The guidance has been amended accordingly to reflect this.	
Question 14	Most agree with the trading vs non-trading distinction (except where noted below), but believe that further clarification on trading vs non-trading book distinctions is needed, and how this can affect the intensity of due diligence in the fast-paced environment of a trading book. Respondents pointed to the fact that the wording of Article 122a includes the need for firms to implement policies and procedures appropriate to their trading book and non-trading book for recording and analysing points (a)-(g) of Paragraph 4; however, the guidance seems to go beyond this by requiring (at clause 59) that a credit institution must meet the "minimum threshold due diligence requirements" of clauses (a)-(g) of Paragraph 4, irrespective of whether it is in the trading or non-trading book. Respondents argued that Paragraph 4 only requires the institution to have appropriate due diligence policies for recording and analysing these matters and does not require that it meet a minimum threshold for the trading book to apply the same points of due diligence in every case regardless of the circumstances of the trade. It was foreseen, for example, that trading desks might implement policies and procedures whereby they might "pre-vet" a universe of existing transactions in the market and	Additional guidance has been given on the extent to which the trading book may have a different intensity of due diligence, with specific hypothetical examples and scenarios provided for illustrative purposes. Clarification has also been provided on the extent to which the requirements of Paragraph 4 are met via appropriate policies and procedures that are commensurate with the risk profile of a book (for instance, a trading book), rather than being viewed as a static "checklist" to be met in a manner than is invariant to specific circumstances. This also involves an assessment of situations in which a trading book may have to deal with circumstances in which its market-making operations expose it to a non-material proportion of positions that are not in all respects compliant with the requirements of Article 122a. It is not the intention of the guidance to provide a higher standard for the trading book than the non-trading book (contrary to one response), and the clarifications provided on scenarios with respect to the trading book should indirectly make this clear. However,	82-85

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	continue to monitor those transactions on an ongoing basis. If a particular transaction is so "pre-vetted" and has been monitored, then the desks would bid on or make markets in the bonds from that transaction on any particular day, based on pre-vetting monitoring. This practical application of the CEBS approach to the differing "intensity" of diligence in a trading environment would preserve the viability of a secondary market. Clarification was sought as to whether, when investing within the limit structure of a trading book, all analysis needs to be undertaken before the acquisition of each individual position, or whether analysis need not be undertaken for all positions individually (e.g. a large "bid list"), and so risk can be managed at the portfolio level. In particular, it would be important to recognise that during the trading of securitisations, it is virtually impossible to conduct a comprehensive analysis at the level of the individual underlying loans before the actual acquisition of the position. For instance, if it is a large "all-or-nothing" bid list for the trading book, and there is one position out of 500 for which a piece of information for the due diligence requirements cannot be fulfilled, does this prevent the firm from bidding for the entire bid list? Would the resulting ARWs be applied just to that position, or to the entire bid list, or to the entire trading book? It could be accidentally interpreted that the trading book has a higher requirement than the non-trading book due to (i) clause 63, on adjusting the intensity	as a broad principle, it is not the case that trading book due diligence standards are "higher" or "lower" than those of the non-trading book; in each case, it should be commensurate with the risk profile of the relevant book. It is nowhere indicated that additional risk weights in the trading book would be higher than those of the non-trading book. Consequently there has been no specific amendment to the guidance in this respect. It is envisaged that the additional risk weight framework, when applied to the trading book, takes into account the forthcoming changes to how capital is calculated for the trading book under CRD 3. However, CRD 3 is not the subject of this consultation paper, and so the updated guidance does not provide further elaboration on the interaction of CRD 3 and the additional risk weights framework provided in this guidance. Nonetheless, the guidance now makes clear that application of additional risk weights should be in a manner than reflects proportionate treatment across the trading and non-trading books. The application of additional risk weights will always be case-dependent, and any guidance beyond this is consequently unnecessary. The response that on-going monitoring and stress-testing requirements should not apply	

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	of due diligence to changing market conditions for the trading book only, and (ii) clause 60, on the trading book requirements not being a sub-set of non-trading book requirements. It should be clarified if this is not the case, i.e. if there is not a higher standard for the trading book. It seems to indicate in clause 90 that additional risk weights could actually be higher in the trading book than in the non-trading book, stating "This guidance interprets the outcomes of such circumstances with reference to the forthcoming trading book proposed amendments to the Directive ("CRD 3"), where a 'floor' is introduced to the effect that the capital requirement for a securitisation position can be no less than that which would apply if the position were held in the non-trading book." It is requested that there be clarification as to what is intended by this statement and how additional risk weights will be accounted for in the trading book under CRD3. The due diligence requirements have been split into pre-investment (Paragraph 4) and on-going monitoring requirements (Paragraph 5). It is questioned whether the latter are appropriate for trading book assets which are held for a short time only and where appropriate due diligence would be a pre-investment decision (all on-going monitoring requirements impact price/liquidity and hence the decision to trade in the security in the first place). In particular, in Paragraph 5, stress testing is not an appropriate requirement for trading book assets, given the short term hold horizon. As intra-day	to the trading book is not accepted, and no change has been made in this respect.	

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	trading would not constitute investing as there is no holding period, some respondents also assume that the investor due diligence provisions would not apply.		
Question 15	Almost all respondents agree with cross-referencing CEBS stress-testing guidance. As Annex II of CP 32 defines only general guidelines for securitisation stress testing, further guidance covering is requested on: a) stress testing on exposures deriving from securitisations in own origination vs stress testing on exposures deriving from positions as investor; b) how to manage stress testing on exposures that are externally rated with stress testing on exposures that are internally evaluated (for example, with the Supervisory Formula Approach); c) how to manage the stress test results on the underlying portfolios with the tranches in cases where the securitisation has an external rating, as stress test results performed according to the bank's general stress test exercise on own portfolio might not be directly reflected in the notes external rating. ABCP programs should be exempt from the stress-testing requirements, as there is not sufficient information, they are short-term exposures, and the credit risk is assumed by the sponsor anyway via LF, so attention should be placed on the sponsor instead for practical reasons.	As a result of this feedback, the reference to the broader stress-testing guidance of CEBS has been maintained. The adequacy of these can also be monitored in the post-implementation phase. The suggestion that there be a carve-out for ABCP conduits from the stress-testing requirements is not accepted, especially as meeting the stress-testing requirement is generally assumed to be fulfilled under the framework of the broader CEBS guidance on stress-testing, and so no distinct or explicit carve-outs from its framework are proposed. The same applies to all other requests for clarification on specific types of stresses, or carve-outs for specific asset classes, by respondents. Regarding the use of ECAI (rating agency) models, this is an option provided in the underlying text of Article 122a, and is not mandatory in the text. Consequently, if the assumptions of a proprietary model are not public or open to validation, a credit institution could question whether it should be using such a model, and may elect to take an alternative approach to stress-testing.	92-95

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	The guidance allows investors to rely on rating agency models for performing stress tests. These are typically developed by the rating agency, and are not always published. It could be difficult, and in certain cases impossible, to specifically validate the assumptions used in the structuring of those models by the relevant rating agency without the full underlying data supporting the design and metrics of those models. There should be a published list of models that have regulatory approval.	CEBS will not be providing a published list of models that have regulatory approval, contrary to one response, as it is the responsibility of credit institutions themselves to undertake stress-testing (and if necessary, utilize models) that they understand to be adequate and appropriate to the risk profile of their positions.	
Question 16 & Question 17	Almost all respondents argued that the additional risk weights ("ARWs") appear to be arbitrary, too high, escalate too quickly, compound themselves when they should not (e.g. multiple breaches on the same security), go to full deduction from capital too quickly, that the differentiation between different ARWs for different breaches is not justified, that the ARWs go beyond the original text, that minor and major breaches are treated the same, and that the fixed scale does not leave sufficient discretion to national regulators. The absolute values of the ARWs, as outlined in the table on p. 36 of the guidance, are also challenged. It is argued that the discretion afforded to national regulators in Paragraph 5 of Article 122a in applying additional risk weights are not being used, and that it would be better to allow grace periods for compliance and remove the fixed scale. Thus regulators could	There has been a new structure of additional risk weights introduced into the guidance. Rather than outline its key features here, readers are referred to the guidance document itself. Other specific points raised by respondents and noted here are also addressed in this new guidance on the application of additional risk weights. These additional points addressed by this amended framework for additional risk weights include the following: o discretion of competent authorities; providing a worked example of the ARW calculation; o providing graphs and illustrative examples of how ARWs are introduced and accelerate; o defining what a "subsequent" breach is (different time or separate	101-112

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	impose higher additional risk weights for substantial breaches or negligence by investors and less onerous risk weights for inadvertent or lesser breaches. There seems to be particular uncertainty about which calculation method is used for ARWs. It is recommended that, whatever method is decided upon, the calculation of the risk-penalty (in mathematical terms) be added to the guidance, but that graphs and tables are not added (as these could change over time, should the underlying risk weights change). The additive nature of the penalties for separate breaches on the same security is challenged as not being justified, as breaches are likely to be correlated. It is argued that the penalty applied for "subsequent" breaches should not refer to other types of breaches with respect to the same transaction (i.e. different types of breach, same deal), nor to different breaches of the same type over time on the same transaction (i.e. same type of breach, same deal), but should instead refer to the same breach occurring in multiple subsequent transactions (i.e. same type of breach, different deals). Put another way, Paragraph 5 talks about "subsequent infringements", but CEBS has expanded this to read "additional" where the Article states "subsequent". As a result, there is a catalogue of infringements, all of which can conceivably apply simultaneously at any given point in time. And since multiple infringements result in cumulative penalties, this means that escalation directly to the penalty cap can occur in a single time	security?); o clarifying what a "progressive increase" consists of; o expressing the result of an ARW calculation as risk weights and not as capital requirements absorption; o editorial clarification that capital required will never exceed the exposure value of a position; o deletion of clause 88; o deletion of clause 89; and o guidance on how the final sentence of Paragraph 5 is to be interpreted. The guidance does not address the point raised that capital required for securitisation positions should not exceed the capital required for the underlying assets if not securitised. The CRD is already deemed to be sufficiently clear with this respect to such considerations, and should there be any circumstances in which this is subjective, it is a matter for discretion of the relevant competent authority. The point raised that pending changes to the definition of capital could disrupt the intended outcome of the application of additional risk weights, and so the guidance should allow for a deduction from capital instead, is not accepted. The scope of the guidance is additional risk weights, and not the decision to risk-weight or to deduct, and the guidance	

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	step. In other words, CEBS has read "subsequent" to mean "individual" whereas "subsequent" should mean "following", so that only one additional risk weight should apply to a failure to meet the due diligence requirements, with later penalties increasing only if the investor later makes the same breach in relation to investing in securitisation positions. In other words, the "subsequent" additional risk weights are intended to capture breaches which are or threaten to be systemic within the bank rather than one-off breaches. In addition, it is argued that the ARW structure outlined in the guidance does not cohere with the underlying text, which implies that increases in risk weight from 250% should apply to further infringements, not the nature of the infringement itself. It is suggested that Table 1 on p. 34 and clauses 80-81 would be better expressed as risk weights, instead of capital requirements absorption. (UCG, 20) Alternatively, Table 1 should also be revised to show the maximum capital charge that can be effectively applied to a securitisation position after consideration of the amount being capped at the nominal value of the position, i.e. those numbers over 100% should be adjusted down to 100%. Clarification was also requested with respect to clauses 80-81 and Table 1 to ensure that it is clear that the maximum risk weight inclusive of ARWs does not require capital held against a position to exceed its exposure value. This means confirming that the 1250% applies on an	makes it clear that the capital required against a position after the imposition of additional risk weights should not exceed the exposure value of such a position. Should changes to the definition of capital cause distortions in the outcome of the application of additional risk weights, this can be tracked on a post implementation basis, and the framework adjusted if necessary. The response that additional risk weights should only apply to positions in the trading book with a holding period higher than 30 days is not accepted. The response that it be made clear that additional risk weights should not apply to positions in the trading book when such positions have been sold before the breach is identified is not accepted as requiring amendment. There is already a sentence in the guidance that specifies that if a securitisation position matures or is sold, it is assumed that the additional risk weight will cease to apply. However, there is also a clause giving flexibility to competent authorities to apply additional risk weights to an individual position, multiple positions, or a book of positions in a business unit. This is intended to capture cases in which the relevant securitisation position has been sold, but in which the competent authority believes that the credit institution is still not meeting	

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	aggregate basis, not just as a cap on the additional risk weight. Accordingly, clause 81 should introduce the 1250% cap for the 'new risk weight' and not for the 'additional risk weight'. Here, the 'new risk weight' is the sum of the 'original risk weight' and the 'additional risk weight'. The cap on the increased risk capital charge appears to be incorrect from an editorial perspective. It is argued that the original intention was that the overall risk charge must not exceed 1250% (full capital deduction). It should be clarified that the sum of the original risk weight and the additional risk weight must not exceed 1250%. Furthermore, the interpretation in the last 4 lines of clause 81 (that is, capital should not exceed exposure value) should apply to any application of additional risk weights and not just to the effect of cumulative increases. The Basel securitisation rules indicate that the capital required for securitised assets should not exceed the capital required if the assets were not securitised. The CRD proposals do not appear to conform to this principle, and the RWA could be above the RWA of the pool, absent the securitisation. This would happen, for instance, if an originator/sponsor securitised assets and retained exposure to this securitisation, but then an additional risk weight for infringement of Article 122a was subsequently applied to such retained exposure. Consequently, it is proposed that the following be included: "the resulting overall risk weight applied to the retained tranche(s) should also be capped at the risk weight attracted by the securitised pool of exposures prior to	the provisions of Article 122a with respect to other positions that have not been sold (and to guard against any repeated disregard for the Article 122a provisions).	

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	the securitisation" or "when an originating institution retains one or several tranches in the securitisation, the provisions of Paragraph 5 will not result in a capital charge amount (after application of penalties [additional risk weights]) that will be greater than what would have been assessed against the underlying exposures had they not been securitised (Kirb)". The new capital requirements agreed in September by the Basel Committee on Banking Supervision have changed the definition of capital so that it is possible, after the provisions have been implemented, that the capital requirement applicable to risk weighted assets may amount to more than 8% of the exposure. As the 1250% mentioned in Article 122a is expressed as a maximum, it is argued that CEBS can allow an institution to which this risk weight would apply to deduct the position from capital instead. Clause 84(f) is argued to be effectively gold-plating Paragraph 5 of Article 122a. ("For repeat breaches on the same securitisation holding, an immediate risk weight of 1250% would be applied for a minimum period of one year".) Paragraph 5 deals with repeat breaches already through the "subsequent breaches" wording, and states that the competent authority must progressively increase the risk weight for such breaches. If an instant 1250% risk weight is imposed, there is no room for progressive increases. (Joint, 30) It is argued that CEBS has effectively introduced a new concept into the regulation – a repeat breach. A repeat breach has a meaning very similar to the term		

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	"subsequent infringement" used in Article 122a, the key difference being that an ongoing infringement is not counted as a repeat breach; only a breach following a cure of the infringement qualifies as a repeat breach. It is argued that clause 88 should be deleted. This clause says that for repeat breaches on the same holding, if an institution has not introduced appropriate procedures causing recurrent infringements, the supervisory authority should double the additional risk weights according to subsection 88 and apply these weights to all of the institution's securitisation positions for at least 12 months. The arguments are that such an extreme breach of the standards should instead be covered by the SRP, that excessive automatic increases in risk weights could cause the firm to breach its minimum capital requirements, that it does not allow for removal of the extra capital in cases of quick remediation, and that Paragraph 5 simply states that the risk weight applied should be progressively increased and does not envision such a drastic increase. In clause 86 it is requested that "could" be changed to "will", so that it is clear the additional risk weights will cease to apply once the requirements of Article 122a are met. In clause 89, there is uncertainty as to what is intended to be achieved by disclosure to the market of a breach of Article 122a, where the "prior capital		

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	treatment amounted to a full deduction". The "prior" capital treatment would only be 1250% for the originator (not the investor), as the investor does not hold the position before it invests, and so the investor does not ascribe it a "prior" risk weight. If the originator held exposures for which the prior capital treatment amounts to a full deduction from capital, it is not sure how the breach would be ascribed to those securitised exposures in particular, as opposed to others. Furthermore, this ability to require disclosure is not covered by the specifications of Directive 2006/48/EC. This clause should, therefore, be deleted. Furthermore, it is argued that this risk weighting already represents a complete reduction of the equity for this position, and so, many of the requirements in Paragraphs 4 and 5 no longer need to be applied to these positions, for example, undertaking stress tests, as no deterioration can occur from a regulatory point of view. It is suggested that the additional risk charge for positions in the trading book should be applied only to securitizations positions with a holding period longer than 30 days. It should be clarified how CEBS plans to implement the final sentence of Paragraph 5 of Article 122a, which reduces the risk weights for breaches for securitisations that are exempt from Paragraph 1 under Paragraph 3. This is an area of flexibility in the text of CRD which has not been used by the Committee in the current draft guidance, and allows lower additional risk weights for breaches of due		

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	diligence requirements by investors in transactions exempt from Paragraph 1. It was asked how additional risk weights would be applied to trading book positions in situations where the position had already been sold before the breach had been identified. It was suggested that a sample calculation be included in the guidance.		
Question 18	Many respondents agree on the clarification of due diligence requirements for sponsors of securitisation of assets of a third party. Some respondents requested clarification. While Article 122a states that Paragraphs 6 and 7 apply to sponsors, sponsors do not typically undertake the credit approval process in respect of the exposures which they sponsor into ABCP conduits, and so should not subject them to their own credit approval process. The companies define their own credit issuance standards, which may deviate from those of the sponsors. It is important that the sponsor assesses the appropriateness of the credit issuance standards applied by the respective company. However, requiring the same credit standards for both securitised and non-securitised exposures for the sponsor of an ABCP conduit is not workable; the seller of assets into a conduit will not necessarily follow the same origination practices and standards as the conduit sponsor itself.	Given the responses, this section of the guidance only required small amendments or clarifications. It is now indicated in the guidance that credit institutions, when acting as sponsors or originators of securitisations for a third party, are not expected to subject the exposures of such third party to their own internal credit approval process or credit scoring model (which may not be calibrated to the exposures of such third party), but are just expected to ensure that they are "sound" and "well-defined" as per the text of Article 122a. The suggestion that clause 95 needs to be deleted is rejected, as this is deemed to cohere with the intent, purpose and text of Article 122a. However, the text has been amended slightly to provide a specific example of a case in which a credit institution	114-118

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	It needs to be made clearer that when a sponsor is involved in the same type of credit, it does not mean that in their due diligence on the originator they have to run each loan of the originator through the sponsor's own credit scoring model. Clause 95 requires that sponsors should be aligned with the credit granting rules of the originator, whether they are credit granting in the same asset class or not; hence, asking more than is required in the underlying text. It is suggested that this clause be deleted; it should instead be stated that if a sponsor is not active in credit-granting in the same type of exposure, Paragraph 6 does not apply. This is because this obligation is both difficult if not impossible to fulfil and does not add any value. Why should a bank apply the same origination standards as a supplier of auto parts? Consequently, in the event that an application is not meaningfully possible, a sponsor should only demonstrate that it has knowledge of, and has assessed the underlying origination standards.	may be acting as sponsor or originator of a securitisation for a third party in an exposure type in which it itself is not active in credit-granting.	
Question 19	Most respondents agree on the interpretation of participations and underwritings Some believe that the trading versus non-trading distinction mentioned in this sentence (where the credit institution is underwriting) should also be linked to the allowance for intensity difference of trading versus non-trading book elsewhere.	Given the responses, this section of the guidance only required small amendments or clarifications. A linkage between Paragraph 6 and the trading book vs non-trading book potential for distinction should be understood, but an appropriate linkage between the two has	119

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	Other respondents noted that underwriting is considered a trading book activity only under the CRD; therefore, it is hard to understand how you can have the same standards with respect to transactions underwritten in the non-trading book. So it is unclear how this area will be approached in practice and further guidance is needed. It is unclear what "participations" are. More clarification is requested on what requirements (such as those in the opening table of the guidance) apply to institutions involved in "participations and underwritings". Are they to be classified as (a) investors, or (b) "assuming exposure", or (c) originators/sponsors? This needs to be mapped to requirements under the opening table. It is argued by some respondents that in the event that a bank/credit institution participates in or underwrites a securitisation position (even if purchased from third parties) such bank/credit institution qualifies as an investor and not as an originator or sponsor	been introduced in the updated guidance. Regarding the point raised on the distinction between "underwriting" in the trading book and "underwriting" in the non-trading book, the point is recognized as valid (i.e. underwriting is typically a trading book activity), but relates to the choice of wording used in the underlying text of Article 122a itself, and does not in any case affect the intended outcome of this clause, i.e. to ensure that credit institutions "apply the same standards of analysis" to such participations and underwritings. Consequently, no change to the guidance was deemed to be necessary. The term "participations" was deemed to be sufficiently broadly understood by most market participants that a definition was not necessary. Regarding what "role" a credit institution assumes when it is involved in participations and underwritings, additional guidance is provided linking this section to that which deals with the potential for a credit institution to undertake more than one role with respect to a single securitisation.	
Question 20	Almost all respondents agree on disclosure template usage with one exception.	Given the responses, this section of the guidance only required small amendments or	122

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	These templates are not yet agreed and are not expected to be in place by the time the CRD comes into force in January 2011. It is suggested that a transitional period between the implementation of the CRD and the introduction of the new templates should be recognised and permitted, and that securitisations should not be penalised where originators make loan-by-loan information available on an on-demand rather than published basis during that period.	clarifications. Templates 'can' be used, not 'must' be used. Therefore, if they are not as yet agreed on, there is no obligation to use them. However, it should be noted that publication of information, rather than on-demand provision of information, is preferable as it gives access to all investors on a more equal basis. However, there is no specifically defined 'transitional' period envisaged by the final guidance.	
Question 21	Almost all respondents agree on disclosure template usage.	See Question 20 above; a similar outcome applies to responses to this question.	122
Question 22	Most respondents would prefer a reasonable materiality threshold, but provide no suggested quantification. Some suggested alternatives to having no materiality threshold are as follows: Attention is drawn to the equivalent guidelines of CEIOPS, which indicate that the provisions will only apply to existing transactions where there are "material substitutions". Instead of introducing a materiality threshold, it is suggested that a trial period be implemented during which, on a quasi shadow basis, the new rules would be applied and their impact would be measured. Following such a trial period, the impact should be	While no materiality threshold has been introduced into guidance (there was no suggested or valid quantification of such a threshold), CEBS recognizes that certain cases and events do not constitute "substitution" (for example, breach of representations and warranties, substitution with cash, extension of the underlying loan, new drawings on an existing loan facility, etc). Clarifications have been provided in this respect. For ABCP conduits, a new seller after 2014 will cause the conduit as a whole to be captured by Article 122a.	131-137

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	analysed and the rules should be reassessed. Even if there is no materiality threshold, it is suggested that it be clarified whether the following are considered to be substitutions: o Cases should be excluded where exposures are substituted due to breach of representations and warranties (e.g. if an exposure transferred into the portfolio does not comply with the selection criteria when subsequently evaluated and, therefore, needs to be replaced). It is unlikely that the underlying transaction documents of existing securitisations can be amended to prevent such substitutions, and cash is not always an allowable alternative; o It should be made clear that substitution with cash (i.e. instead of with replacement loans) does not cause securitisations to come under the Article 122a provisions; o In a CMBS deal it is assumed that a new rental agreement, a new lease, or a new tenant would not be a new exposure; o It is assumed that the extension of the underlying assets (e.g. the extension of the maturity of an existing loan, due to restructuring, in a CLO or CMBS) is not a substitution; and o It should be clarified with respect to credit card ABS that substitution of assets refers to the designation of new accounts (which would be substitution), and not to new receivables under existing accounts (which would not be		

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	substitution). Otherwise, all existing credit card deals will be caught in 2014 even if they do not add new accounts.		