

19 August 2013

European Banking Authority  
Tower 42  
25 Old Broad Street  
London EC2N 1HQ  
By email: [EBA-CP-2013-14@eba.europa.eu](mailto:EBA-CP-2013-14@eba.europa.eu)

Tel +44 (20) 7116 1000

[barclays.com](http://barclays.com)

Dear Sirs

**Consultation paper on draft technical standards on securitisation retention rules – EBA/CP/2013/14**

Barclays welcomes the opportunity to comment on the European Banking Authority's (EBA) consultation (EBA/CP/2013/14) ("Consultation Paper") on its draft technical standards with respect to the securitisation retention rules under the Capital Requirements Regulation (CRR).

In this letter we outline our key messages on the proposals, while the specific questions posed in the consultation paper are answered in the appendices.

**Summary of key messages**

We welcome the fact that the technical standards are entrenched within European regulation as this engenders a level playing field. In order to avoid differences in interpretation that could arise between national supervisors and compromise a consistent application of the rules, we request the EBA provide as much detail as possible in its final advice on the technical standards.

We also commend the EBA on its helpful approach on a number of areas in the draft regulatory technical standards (RTS), such as continued recognition of automatic alignment of interests in certain scenarios and application of principles in the context of disclosure requirements.

There are, however, a number of areas that present a significant gap from existing guidance that has, itself, been constructed recently through active participation by regulators and members of the industry. Given the extensive work undertaken to reach a position where the principles of the securitisation retention, due diligence and disclosure requirements are applied in an appropriate but pragmatic way, it is not clear why the EBA should now propose implementing rules that would result in a gap. We discuss the key areas of concern below.

**Market-making exemption**

We request the EBA to explicitly clarify that the current provision in the CEBS guidelines<sup>1</sup>, which allows non-EU entities to invest in securitisation positions without the originator having to meet retention requirements, is retained for immaterial portfolios. This provision applies where those entities are acting as a market-maker and the positions invested in are held in a Trading Book and not overly material. This offers a pragmatic solution to scenarios where European banks have broker-dealers within their group that are incorporated in non-European jurisdictions where an equivalent retention, due diligence and disclosure regime is not yet implemented. Without such provision, the broker-dealer would not be permitted to invest in the securitisation position as the non-EU originator would not be required to fulfill any retention requirements itself. This would result in a significant loss of business franchise that would be extremely difficult to rebuild once that jurisdiction had imposed retention requirements and the firm would be able to trade in these assets again.

---

<sup>1</sup> CEBS Guidelines to Article 122a of the Capital Requirements Directive (31 December 2010)  
(<http://www.eba.europa.eu/documents/10180/106202/Guidelines.pdf>)

In the EBA's public meeting on the draft RTS it was suggested that Article 19 of the draft RTS make reference to exposures in the Trading Book and non-Trading Book, however as this refers to due diligence only, this would appear to be insufficient. Furthermore, although Article 1.4 states that institutions shall apply the additional risk weights if the breach is material, whilst this is helpful, we would suggest that the RTS text is drafted more akin to Paragraph 9 of the CEBS guidelines to provide additional clarity.

### Grandfathering

We ask the EBA to consider the application of grandfathering provisions within the RTS. We believe that such grandfathering is required in two respects:

#### 1. Transactions executed prior to 1 January 2011 ("pre-2011")

We ask the EBA to clarify whether certain pre-2011 transactions are grandfathered given the removal of the guidance on what constitutes an existing securitisation or asset substitution under the scope of application. We believe that the status of such trades is not intended to change as a result of the RTS.

Article 122a of CRD was implemented on 1 January 2011. Transactions executed prior to this date were grandfathered up to 31 December 2014. The current guidance provides clarification on transactions which could fall into scope of the Article 122a requirements if additions or substitutions were to be made to the underlying assets between 1 January 2011 and 31 December 2014. The draft RTS do not refer to this, which is likely to cause confusion in the market around timing of the requirements, and it would be useful to have this clarified.

#### 2. Transactions executed post 1 January 2011 ("post-2011")

We note that the draft RTS do not confirm the treatment of existing post-2011 transactions under the CRD IV regime. This would result in significant uncertainty for such transactions where any aspect of the current guidance (from the existing Article 122a rules, CEBS guidelines and EBA Q&A<sup>2</sup>) is relied upon and either not explicitly included within the RTS or, in the case where the CLO manager holds the retention, explicitly excluded from the RTS. This will have implications for holders of some existing European transactions.

Significant work has been undertaken by CEBS (later EBA) and the industry to reach a position where the principles of the securitisation retention, due diligence and disclosure requirements can be applied in a pragmatic way. Following the publication of the CBES guidelines and EBA Q&A, firms will have structured transactions to comply with these requirements. Given it is not possible to make the types of change that would be required to comply with the RTS post-execution, it will be highly problematic if grandfathering provisions are not provided for the life of the relevant securitisation position.

The absence of grandfathering could potentially result in:

- (i) Forced fire sale disposals of positions, as investors avoid risk of penalty.
- (ii) Market disruption, resulting from spread differentiation between trades which comply and those that do not comply.
- (iii) An overall hindrance to recovery of the securitisation market.

As a short-term solution we propose that the EBA should confirm post-2011 transactions will not be subject to additional risk weights as a result of changes between the current guidance and the RTS. However to avoid market disruption or reduced liquidity over the longer term, we believe that grandfathering over the life of the position will be necessary.

Barclays attended the EBA public hearing on risk retention on 22 July 2013 and noted the EBA response to the industry question posed on grandfathering, namely that the EBA has no mandate to apply grandfathering. We would consider this to be a point of interpretation, since there is no provision in Capital Requirements Regulation (CRR) that explicitly states this. We respectfully ask the EBA to set out the basis for this conclusion.

---

<sup>2</sup> EBA Q&A on Guidelines to Article 122a of the Capital Requirements Directive (29 September 2011) (<http://www.eba.europa.eu/documents/10180/16325/EBA-BS-2011-126-rev1QA-on-guidelines-Art122a.pdf>)

### Correlation Trading Portfolio

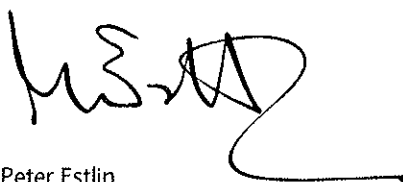
We ask the EBA to clarify the exemption permitted in the context of the Correlation Trading Portfolio. The draft RTS makes reference to commonly-traded indices based on those reference entities falling within the exemption, but it does not reference trades on bespoke baskets, such as “single-name instruments, including single-name credit derivatives, for which a liquid two-way market exists”<sup>3</sup>.

The current guidance carries a full exemption, and we would encourage the EBA to maintain the current application in order to avoid ambiguity and potential market dislocation in the absence of that exemption.

We would be happy to continue to work with the EBA, the European Commission and any other authorities as necessary to identify appropriate solutions.

I hope you find our comments helpful. Please do not hesitate to contact Nikhil Joshi on +65 9338 9789 or email: [nikhil.joshi@barclays.com](mailto:nikhil.joshi@barclays.com) if you have any questions or comments on any of the issues raised in this response.

Yours sincerely,



Peter Estlin  
Acting Chief Financial Officer &  
Group Financial Controller  
Barclays plc

---

<sup>3</sup> Article 327(1)(b)(i) (subsequently finalised as article 338(1)(b)(i)) of Regulation (EU) No xxxx/201y.

## Appendix 1: Responses to questions relating to Draft RTS on the retention of net economic interest and other requirements related to exposures to transferred credit risk

Q1: The EBA would like to know to what extent securitisations rely on paragraphs 25-26 of the CEBS Guidelines in order to achieve the retention commitment and would also like to understand if these transactions could also meet the requirements set out in Article 394(1) of the CRR without applying the criteria provided in Paragraphs 25 and 26 of the CEBS Guidelines on Articles 122a of Directive 2006/48/EC taking into account the definition of securitisation according to Article 4(37) of the CRR and the respective definitions of originator, sponsor or original lender.

Securitisations currently rely on paragraphs 25-26 of the CEBS guidelines, as well as corresponding guidance included in the EBA Q&A, in order to achieve the retention commitment. The current guidance permits another “most appropriate” entity to retain in certain circumstances. In general, we believe that a substance over form approach best achieves the general policy objectives of the risk retention regime.

We propose that the EBA clarifies the RTS text in relation to proportional retention to allow for one originator to retain on behalf of others. The draft RTS proposes that, “where the securitised exposures in a transaction were created or sponsored by multiple originators, sponsors or original lenders, the retention shall be fulfilled...” by each originator, sponsor or original lender in proportion to the total securitised exposures for which it is the originator, sponsor or original lender, respectively. The current guidance, however, allows an alternative approach whereby one originator can retain on behalf of others in certain limited circumstances, such as where an entity has originated the majority of the securitised exposures and undertakes certain structuring and asset selection activities. This is a reasonable approach which is likely to align interests between originator and investors, as well as provide clearer disclosures to investors.

The CRR Level 1 text does not prohibit the alternative approach provided in the current guidance as it refers only to retention by an entity which is an originator and does not require that entity to be the originator with respect to all of the assets. We therefore ask the EBA to clarify this point.

Furthermore we note that the draft RTS do not reflect the current guidance which provides limited flexibility for an entity other than the originator, sponsor or original lender to retain the required interest in certain circumstances. We are broadly supportive of this change though we note the potential implications for managed CLOs. We understand that some European CLO managers may be categorised as investment firms subject to MiFID and, as a result, meet the CRD IV definition of sponsors allowing them to fulfil retention requirements themselves. However we note that many managed CLOs will not satisfy the MiFID criteria, and therefore will not be permitted to retain. We would highlight to the EBA the negative implications of this change on the European CLO market.

Q2: The EBA would also like to understand if, for new securitisations - there are transactions that are likely not to be able to meet the retention requirements following the CRR and associated draft RTS.

There are new transactions that are likely not to be able to meet the retention requirements following the CRR and associated draft RTS. Significant issues are likely to arise for any type of transaction falling within the securitisation definition that lacks an involved originator, sponsor or original lender. We do not believe that these issues will be addressed by changes to the sponsor definition under CRD IV or by the proposed addition of a definition of original lender in the technical standards. This is because:

1. Certain entities acting in a sponsor capacity will not have authorisation to hold client monies or perform custodial services, and will not therefore meet the new sponsor definition of an institution, which is an investment firm subject to MiFID. We would also highlight that such entities are not required to hold client monies or perform custodial services for the role they perform, so it is unlikely that they would seek such authorisation.
2. It is unclear how the definition of original lender included within the recitals to the draft RTS differ to the existing originator definition. We ask the EBA to clarify the new original lender definition, and we would also request examples of entities which would fall within the new definition of original lender but not originator.

Third country originators and sponsors are also likely to be impacted by this change, where they are subject to a local retention regime which is not aligned with the European regime, as they may also not meet the criteria to allow them to fulfil retention requirements. This will be of particular relevance for U.S. entities. At the same time, non-European investors that wish to invest in European securitisations may be prohibited from doing so due to a reduced number of European entities that are permitted to retain.

The proposed change will also affect existing transactions, since they are unlikely to be made complaint retrospectively. As highlighted in our covering letter, this highlights the need for the RTS to contain grandfathering provisions for both pre-2011 transactions, but also post-2011 transactions that have been undertaken in good faith, based on the CEBS guidelines and EBA Q&A. The absence of grandfathering could potentially result in disposal of positions as investors avoid risk of penalty, as well as market disruption, resulting from spread differentiation between trades which comply and those that do not comply, and could overall hinder recovery of the securitisation market.

Q3: To the extent securitisations have relied on Paragraph 48 in the CEBS Guidelines on Article 122a of Directive 2006/48/EC to meet the retention requirements, would there be any material impact (be it economic, operational, etc.) to now complying with retention option (a) of Article 394(1) of the Regulation (EU) No xxxx/2013 rather than relying on the provisions of Paragraph 48 in the CEBS Guidelines on Article 122a of Directive 2006/48/EC in order to meet the retention requirements?

There would be an impact of relying on the provisions of retention option (a) of Article 394(1) (subsequently finalised as article 405(1)) instead of paragraph 48 in the CEBS guidelines. Reliance has been placed on the guidance currently provided in paragraph 48 of the CEBS guidelines for use of the originator interest holding option in the context of revolving securitisations of non-revolving exposures, especially in the context of UK mortgage master trusts. The absence of this guidance in the draft RTS gives rise to new compliance uncertainty. We encourage the EBA to include the current guidance to remove the ambiguity.

Q4: Do you consider that this way to comply with the retention requirement under option (a) should be explicitly mentioned in the RTS?

We welcome the inclusion of specific examples of ways in which retention holding options may be used in the context of liquidity facilities in ABCP programmes in the draft RTS. Specifically we agree with the confirmation provided in the draft RTS that the vertical slice holding option may be held in the form of a liquidity facility in the context of ABCP programmes. The absence of such confirmation would give rise to uncertainty with compliance.

Q5: Do you consider that the conditions enumerated in Article 6.1(b) are correct and sufficient? If not, which conditions would you add/change/remove? Why?

We consider the conditions set out in proposed article 6.1(b) to be correct and sufficient.

Q6: Do you consider that the retention option (d) under Article 8.1(b) via the provision of a liquidity facility should be explicitly mentioned in the RTS? Please also specify reasons why this provision should explicitly remain in the RTS?

We consider that the retention option (d) under Article 8.1(b) via the provision of a liquidity facility should be explicitly mentioned in the RTS. The inclusion of this guidance is helpful and will be relied upon when transactions come into scope after 31 December 2014.

Q7: Do you consider that the conditions referenced in Article 8.1(b) are correct and sufficient? If not, which conditions would you add/change/remove? Why?

We consider that the conditions referenced in Article 8.1(b) are correct and sufficient.

Q8: Are there other ways to comply with the retention options set out in Article 394 of the CRR which should be included in this RTS? Please be specific in your description of any additional ways to comply.

We are broadly supportive of the retention options set out in Article 394 (subsequently finalised as Article 405). The specific examples of options that may be used to satisfy retention requirements are considered helpful.

Q9: Is the qualification “securitisation positions in the correlation trading portfolio containing only reference instruments satisfying the criterion in Article 327(1)(b)(ii) of Regulation (EU) No xxxx/201y” introduced in Article 13(1) correct/necessary? Should this qualification be removed? If not, why?

We believe that the qualification “securitisation positions in the correlation trading portfolio containing only reference instruments satisfying the criterion in Article 327(1)(b)(ii) (subsequently finalised as article 338(1)(b)(ii)) of Regulation (EU) No xxxx/201y” introduced in Article 13(1) should be amended slightly to avoid ambiguity in its scope.

The current guidance clarifies that the exemption refers to “transactions based on a clear, transparent and accessible index... or are other tradable securities, other than securitisation positions”. This is considered to comprise the correlation trading portfolio as defined in CRD III, and equally applies to all positions that are encompassed by the portfolio definition and corresponding activities. The proposed text in Article 13, however, refers only to a sub-set of the correlation trading portfolio definition. It refers to “commonly-traded indices based on those reference entities” (Article 338(1)(b)(ii)) falling within the exemption, but it does not reference trades on bespoke baskets, such as “single-name instruments, including single-name credit derivatives, for which a liquid two-way market exists” (Article 338(1)(b)(i)). We therefore ask the EBA to confirm that trades on bespoke baskets are included within the exemption for consistency.

Q10: Is the inclusion in the exemption of the cases that are eligible to be included in that part of the correlation trading portfolio but that do not pertain to it adequate? If not, why?

The inclusion in the exemption of the cases that are eligible to be included in that part of the correlation trading portfolio, but that do not pertain to it, are adequate. The current guidance permits positions within the correlation trading portfolio to be exempt, as well as positions that satisfy the definition of the correlation trading portfolio. We consider it pertinent to ensure the application of the current guidance is maintained under the RTS.

Q11: Should the broad stress testing requirement that institutions have to undertake be part of the Internal Capital Adequacy Process, in accordance with Article 72 of CRD IV, or should it, where applicable, be in accordance with Article 173 of the CRR and follow the credit stress testing requirements for IRB banks?

We believe that the stress testing requirements be part of the Internal Capital Adequacy Process, in accordance with Article 72 of CRD IV. We do not see reason for treating securitisation positions differently to other exposures subject to stress testing pursuant to CRD IV.

Q12: Is the qualification “...securitisation positions ... held in the correlation trading portfolio... as referred to in Article 327(1)(b)(ii) of Regulation (EU) No xxxx/201y” introduced in Article 20 correct/necessary? Should this qualification be removed? If not, why?

As per our response to Q9, we believe that the qualification “securitisation positions in the correlation trading portfolio containing only reference instruments satisfying the criterion in Article 327(1)(b)(ii) (subsequently finalised as article 338(1)(b)(ii)) of Regulation (EU) No xxxx/201y” introduced in Article 20 needs to be amended slightly to avoid ambiguity on its scope.

The current guidance clarifies that the exemption refers to “transactions based on a clear, transparent and accessible index... or are other tradable securities, other than securitisation positions”. This is considered to comprise the correlation trading portfolio as defined in CRD III, and equally applies to all positions that are encompassed by the portfolio definition and corresponding activities. The proposed text in Article 13, however, refers only to a sub set of the correlation trading portfolio definition. It refers to “commonly-traded indices based on those reference entities” (Article 338(1)(b)(ii)) falling within the exemption, but it does not reference trades on bespoke baskets, such as “single-name instruments, including single-name credit derivatives, for which a liquid two-way market exists” (Article 338(1)(b)(i)). We therefore ask the EBA to confirm that trades on bespoke baskets are included within the exemption.

Q13: Is the consideration of the cases that are eligible to be included in that part of the correlation trading portfolio but that do not pertain to it adequate? If not, why?

As per our response to Q10, the inclusion in the exemption of the cases that are eligible to be included in that part of the correlation trading portfolio, but that do not pertain to it, are adequate. The current guidance permits positions within the correlation trading portfolio to be exempt, as well as positions that satisfy the definition of the correlation trading portfolio. We consider it pertinent to ensure the application of the current guidance is maintained under the RTS.

Q14: For which type of underlying assets do you think that the information on a loan level basis is not necessary for complying with the due diligence requirements under Article 395 of the Regulation (EU) No xxxx/201y? What kind of information is required in those cases? Please specify by type of underlying asset.

We do not believe that loan-level information is required in all cases to comply with due diligence requirements, and therefore it would not be appropriate to specify the types of underlying asset where information on a loan level basis is not necessary. It is our view that the current guidance requires investors to consider "all materially relevant data" which are appropriate to the nature of the securitisation. We agree with the draft RTS that investors ought to consider all features of a given securitisation, and then based on a materiality assessment, consider whether loan-level disclosures are appropriate.

Q15: Do you consider that the information in existing templates (e.g. ECB ABS loan-level data template or Bank of England ABS transparency requirements) meet the relevant due diligence and disclosure requirements under Article 395 and Article 398 of the Regulation (EU) No xxxx/201y, respectively? Please differentiate in your response in terms of the types of underlying assets, if applicable.

We consider the information in existing templates to meet relevant due diligence and disclosure requirements, however we would highlight that other potential appropriate formats could exist that would equally satisfy disclosure requirements.

Q16: Do you find the accessibility conditions (e.g. search, availability, costs) regarding the information provided in existing templates (e.g. ECB ABS loan-level data template or Bank of England ABS transparency requirements) adequate?

We consider the information provided in existing templates to be adequately accessible.

## Appendix 2: Responses to questions relating to Draft ITS relating to the convergence of supervisory practices with regard to the implementation of additional risk weights

Q1. Does the formula in Article 2 result in reasonable additional risk weights?

The formula in Article 2 can result in some disproportionate outcomes, as it is based on how long a position is held rather than the number of occasions a firm has invested in a position without satisfying due diligence requirements. It is our view that the intention of the reference to “each subsequent infringement” in Article 407 is in relation to separate repeated breaches.

Q2. Would you suggest any changes to the formula that would lead to an improved framework for the application of additional risk weights? Do you believe the variable Article394ExemptionPct equal to 0.5 if the exemption in Article 394(3) applies is reasonable?

We propose a simpler framework for the application of additional risk-weights. It is our view that the risk-weights serve to give firms disincentive to invest in positions without satisfying due diligence requirements. For this reason we propose that the risk-weights increase in line with each breach by an investing firm, starting at 250% and increasing in increments. In line with Article 407, the increments would be capped at 1250%.

Q3. Would you suggest an alternative approach for calculating additional risk weights?

As per our response to Q2, we propose a simpler framework for the application of additional risk-weights. It is our view that the risk-weights serve to give firms disincentive to invest in positions without satisfying due diligence requirements. For this reason we propose that the risk-weights increase in line with each breach by an investing firm, starting at 250% and increasing in increments. In line with Article 407, the increments would be capped at 1250%.