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DG FISMA
European Commission
Rue de Spa, 2
1000 Bruxelles

Submitted via the European Commission's website portal

17 September 2021

Dear Sir and Madam,

The ACC and AIMA's response to the European Commission's consultation on the functioning of the EU Securitisation Framework

The Alternative Credit Council (ACC)[1] and the Alternative Investment Management Association (AIMA)[2] welcome the opportunity to provide feedback to the European Commission (Commission) on the functioning of the EU securitisation framework (the 'Consultation').

AIMA and the ACC's members are private credit managers managing or marketing alternative investment funds ('AIFs') in the EU which invest in a wide range of wholesale securitisation transactions globally. This makes us direct or indirect providers of financing for EU private businesses. Although the extensive reforms introduced via Regulation (EU) 2017/2402 (the

[1] The Alternative Credit Council (ACC) is a global body that represents asset management firms in the private credit and direct lending space. It currently represents 200 members that manage over $450bn of private credit assets. The ACC is an affiliate of AIMA and is governed by its own board which ultimately reports to the AIMA Council. ACC members provide an important source of funding to the economy. They provide finance to mid-market corporates, SMEs, commercial and residential real estate developments, infrastructure as well the trade and receivables business. The ACC's core objectives are to provide guidance on policy and regulatory matters, support wider advocacy and educational efforts and generate industry research with the view to strengthening the sector's sustainability and wider economic and financial benefits. Alternative credit, private debt or direct lending funds have grown substantially in recent years and are becoming a key segment of the asset management industry. The ACC seeks to explain the value of private credit by highlighting the sector's wider economic and financial stability benefits.

[2] AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with around 2,000 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org

‘Securitisation Regulation’ or the ‘Regulation’) have to some extent supported investor confidence in the securitisation framework, we agree with the conclusions of the High Level Forum for the Capital Markets Union’s report (the ‘HLF CMU report’) that “securitisation has been playing a very limited role in Europe, as the market did not recover from the 2008 crisis”. We agree with their view that the EU needs to review the current securitisation regulatory framework and welcome the Commission’s initiative to invite industry comments through this consultation.

We also agree with the HLF CMU report that improving access to finance in the EU needs to be prioritised in the post-COVID recovery context. We note that securitisation is underutilised in the EU as shown by the HLF CMU report: it only represents 3% of the EU GDP, compared to 12.5% of the GDP in the US and 12% in the UK.

A reformed securitisation framework is crucial to further reduce the EU economy’s dependence on bank funding while also expanding the range of banks’ asset and capital management options to absorb market and regulatory pressures, notably with the introduction of Basel 3 related requirements. Securitisation can enhance banks’ resilience by providing them with another tool for the management of their non-performing exposures and support effective risk management across the financial system, as a complement to the recently adopted NPL package. In addition, investors will experience a broadening of investment opportunities and cross-border investments will be encouraged.

An efficient securitisation market is an essential feature of a well-functioning business finance market, and we welcome the Commission’s consideration of how the EU securitisation framework can be enhanced. We have provided more detailed comments in response to the specific questions posed in this call for evidence but would highlight the following key areas:

- **Investors due diligence:** We agree with and support the HLF CMU report recommendation to introduce more flexibility regarding the due diligence and verifications conducted by EU investors for third-country securitisations. As the documentation required by the Regulation is not always available for third-country securitisations, we find the solution of allowing an EU-regulated investor in such securitisations to determine whether it has received sufficient information to meet the Regulation’s requirements to carry out its due diligence obligation an adequate route. This will allow EU investors to broaden their investment choices without compromising on the end investor protection. We do not think that the solution of applying an equivalence framework is adequate in the context of EU institutional investors choosing to invest in third-country securitisations.

- **Extend the definition of “sponsors” to AIFMs and to third-country investment firms**: AIFMs should be capable of qualifying within the “sponsor” definition given that a number of such managers already operate in the market and have active and tested experience of establishing and managing Collateralised Loan Obligations (‘CLOs’). AIFMs are subject to initial capital and own fund requirements in order to be able to conduct their activities. Provided an AIFM is maintaining the required amounts of initial capital and own funds, there should be no restriction on the AIFM holding additional retained capital in the form of the retention amount for a securitisation. Furthermore, the AIFMD review will further clarify what MiFID services AIFMs can carry out. We support the broadening of those in order to also ensure that sponsorship activity can be carried out. We also support a confirmation that third-country investment firms can also act as sponsor for the purpose of the Regulation.

- **Interaction between the institutional investor definition and AIFMD:** We support a clarification of the "institutional investor" definition in the Securitisation Regulation to confirm that the definition only covers authorised AIFMs, i.e., AIFMs authorised under AIFMD Article 6 for EU AIFMs or AIFMD Article 37 for non-EU AIFMs. Indeed, the definition of "institutional investors" in the Securitisation Regulation covers EU AIFMs and some non-EU AIFMs that are marketing their AIFs "in the Union". Conceptually, marketing "in the Union" under the AIFMD framework is an activity for which non-EU AIFMs must be authorised under Article 37 of the AIFMD which then grants them the use of the third-country passport. The definition of "institutional investor" in the Regulation should not be read to cover non-EU AIFMs marketing an AIF "in a Member State" (i.e., without the benefit of the third-country passport) as this is a specific and different concept in the AIFMD framework that is not referred to in the definition.

- **ESG and securitisation**: In general, our members recognise that ESG and climate related disclosures are necessary for investors to make informed decisions when allocating capital. The asset management sector is currently subject to multiple regulatory requirements in relation to the identification, assessment and disclosure of ESG risk factors. These requirements meet the EU's stated objectives regarding climate-related disclosures in the securitisation market. We therefore question the necessity and value of specific ESG disclosure requirements for securitisation vehicles which run the risk of introducing inconsistencies in the approach to ESG reporting and metrics among investors and issuers. We would rather recommend an integrated and centralised approach to ESG disclosures using the Sustainable Finance Disclosure Regulation ('SFDR') review which is planned in less than two years (2023). There are also substantial challenges around ESG data collection for many participants in the securitisation markets that are material when it comes to disclosure. This is most pronounced in instances where such data was not collected on the underlying assets at origination. In such instances it is extremely challenging to go back and collect such data.

- **Simple, Transparent and Standardised (STS) certification for CLOs:** The CLO market is a key means by which capital markets are connected to the non-financial economy and could become a key source of financing for EU businesses. CLOs fall within the remit of the Securitisation Regulation but are ineligible for STS certification. The exclusion of CLOs from the STS framework acts as a brake on the provision of finance to borrowers. This would be particularly beneficial for insurers seeking income generating assets with higher returns than are currently available in a low-yield environment, while also allowing them to become a more prominent source of finance for the real economy than they are currently. Developing an approach to STS certification for CLOs that is consistent with global regulatory standards would also contribute to the EU's general effort of further developing efficient and attractive capital markets.

- **Risk retention modalities:** We would encourage the Commission to reconsider the current approach to risk retention calculation for non-performing exposures so that this is assessed on the transaction price rather than the nominal amount. This would better align with the actual economics of the transaction and support a more efficient secondary market for non-performing exposures. We would also invite the Commission to introduce the option for 'L-shaped' risk retention modalities alongside the horizontal and vertical approaches. This option would provide more flexibility for transactions to be structured to meet the needs of investors without compromising the alignment of interests promoted by risk retention more generally.

We would be happy to elaborate further on any of the points raised in this letter. For further information please contact Marie-Adélaïde de Nicolay, head of AIMA Brussels office (madenicolay@aima.org).

Yours faithfully,

Jiří Król
Deputy CEO, Global Head of Government Affairs, AIMA
Global Head of the ACC

ANNEX

Only the questions to which the ACC and AIMA chose to answer appear in this Annex.

1. Effects of the Regulation

Question 1.1. Has the Securitisation Regulation (SECR) been successful in achieving the following objectives:

	Fully agree	**Somewhat agree**	**Neutral**	**Somewhat disagree**	**Fully disagree**	**No opinion**
Improving access to credit for the real economy, in particular for SMEs					x	
Widening the investor base for securitisation products in the EU					X	
Widening the issuer base for securitisation products					X	
Providing a clear legal framework for the EU securitisation market				X		
Facilitating the monitoring of possible risks						X
Providing a high level of investor protection						X
Emergence of an integrated EU securitisation market						X

Question 1.2. If you answered 'somewhat disagree' or 'fully disagree' to any of the objectives listed in the previous question, please specify the main obstacles you see to the achievement of that objective.

We fully support the comments of the HLF CMU report according to which "securitisation has been playing a very limited role in Europe, as the market did not recover from the 2008 crisis" and that this has "limited banks' ability to grant loans to the detriment of the EU economy, and has reduced the availability and variety of financial instruments to investors to build well diversified investment portfolios."

As referred to in our cover letter, the volume of EU securitisation deals remains very low and we believe that several elements in the Regulation can be amended to better support the development of the market and, ultimately, an increased access to finance by EU businesses. We provide detailed comments to that purpose in response to the various questions in the questionnaire but would also like to add two key elements that we think could substantially develop securitisation as a financing tool for EU businesses:

- The possibility for AIFMs to act as "sponsors" and the confirmation that third-country investment firms can also act as sponsors; and
- The possibility for CLOs to be classified as STS under certain conditions.

We detail our views on these two points below.

Clarify and/or extend the definition of "sponsors"

- Third country investment firms should be allowed to act as sponsor

We would welcome a clarification that third country investment firms can act as sponsors for the purpose of the Regulation. The "investment firms" definition in MiFID II to which the Regulation refers does not include a territorial requirement as Article 4(1)(1) reads as follows:

> "'investment firm' means any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis.
>
> Member States may include in the definition of investment firms undertakings which are not legal persons, provided that:
>
> (a) their legal status ensures a level of protection for third parties' interests equivalent to that afforded by legal persons; and
>
> (b) they are subject to equivalent prudential supervision appropriate to their legal form.
>
> However, where a natural person provides services involving the holding of third-party funds or transferable securities, that person may be considered to be an investment firm for the purposes of this Directive and of Regulation (EU) No 600/2014 only if, without prejudice to the other requirements imposed in this

Directive, in Regulation (EU) No 600/2014, and in Directive 2013/36/EU, that person complies with the following conditions:

(a) the ownership rights of third parties in instruments and funds must be safeguarded, especially in the event of the insolvency of the firm or of its proprietors, seizure, set-off or any other action by creditors of the firm or of its proprietors;

(b) the firm must be subject to rules designed to monitor the firm's solvency and that of its proprietors;

(c) the firm's annual accounts must be audited by one or more persons empowered, under national law, to audit accounts;

(d) where the firm has only one proprietor, that person must make provision for the protection of investors in the event of the firm's cessation of business following the proprietor's death or incapacity or any other such event;...."

Such clarification would clearly contribute to reviving and developing EU securitisation market thereby bringing more financing for EU businesses.

- AIFMs to be allowed to act as sponsors

Article 2(5) currently reads as follows:

"'sponsor' means a credit institution, whether located in the Union or not, as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013, or an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU other than an originator, that:

(a) establishes and manages an asset-backed commercial paper programme or other securitisation that purchases exposures from third-party entities, or

(b) establishes an asset-backed commercial paper programme or other securitisation that purchases exposures from third-party entities and delegates the day-to-day active portfolio management involved in that securitisation to an entity authorised to perform such activity in accordance with Directive 2009/65/EC, Directive 2011/61/EU or Directive 2014/65/EU;...."

The current definition of "sponsor" permits any bank ("credit institution") or MiFID investment firm to be a sponsor but prohibits AIFMs, and also non-EU asset managers, from being sponsors. We believe CLO managers and loan fund managers should be included in the definition of "sponsor", which remains currently limited to credit institutions and investment firms. The definition of sponsor in Article 2(5) of the Regulation should be amended as follows:

"'sponsor' means a credit institution, whether located in the Union or not, as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013, or an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU other than an originator, **or an Alternative Investment Fund Manager as defined in point (b) or Article 4(1) of Directive 2011/61/EU** that…:"

We believe that this amendment would fit with the spirit and intention of the Regulation as demonstrated by the following reasons:

- **AIFMs are CLO managers but cannot be dual-licensed, which leads to artificially complex structures:** AIFMs should be capable of qualifying within the "sponsor" definition given that a number of such managers already operate in the market and have active and tested experience of establishing and managing CLOs. As AIFMs are not able to be dual-licensed (and therefore hold a MiFID license next to their AIFM license), they are not currently able to be sponsors, which the European Banking Authority (EBA) noted in a report on authorisation, risk retention, due diligence and disclosure: "very often CLO managers are AIFMs and therefore cannot obtain dual authorisation under the AIFMD and MiFID."[3]

- **Similar to MiFID investment firms, AIFMs are subject to initial capital requirements:** AIFMs are subject to initial capital and own fund requirements. Provided an AIFM is maintaining the required amounts of initial capital and own funds, there should be no restriction on the AIFM holding additional retained capital in the form of the retention amount for a securitisation. An additional specific requirement regarding own funds could be added in the "sponsor" definition in relation to AIFMs if needed. Since the activities of AIFMs are more limited than those allowed to a MiFID investment firm generally, holding the retention amount for a securitisation should not cause a special prudential concern. It is true that AIFMs have not generally been designed to retain investments/capital other than for prudential purposes, but they can.

- **AIFMs acting as CLO managers meet the same organisational standards as other investment firms:** CLO managers would meet the same experienced management team standard set out for other loan servicers in the Securitisation Regulation. It is difficult to see the regulatory purpose for preventing such managers from qualifying explicitly as the retention party in securitisation transactions. We understand that the "actively managed" aspect of a CLO is seen to differentiate CLOs from other loan servicers in this respect but would highlight that CLO managers are subject to investor oversight and recourse via the standardised tests and criteria that the CLO manager is required to meet (see Figure 2 below). This means that any purchases or sales are still required to take place in compliance with the transaction eligibility criteria and that allowing CLO managers to qualify as the retention party would not pose risks than do not also exist for other investment firms.

- **The sponsor definition should be extended to all firms, including AIFMs, able to perform MiFID-types activities:** We believe that the activity of portfolio management which is one of the two core functions of an AIFM according to the AIFMD can be interpreted in a broad sense and could include holding risk retention. However, should the reading of the AIFMD and the portfolio management be stricter and not allow holding the risk retention, we feel the AIFMD

[3] https://www.eba.europa.eu/sites/default/documents/files/documents/10180/534414/b152ba27-9a02-4d82-82a0-e05c8123a7df/Securitisation%20Risk%20Retention%20Report.pdf?.

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review offers an opportunity to extend the list of activities that an AIFM can perform and include a larger list of MiFID-types activities under Article 6(4). In that context, AIMA is advocating for a broadening of the list of activities an AIFM can undertake under Article 6(4) of the AIFMD, such as execution of orders on behalf of clients and placing of financial instruments without a firm commitment basis.

- **Non-EU fund managers cannot, for the time being, be considered as investment firms:** The fact that non-EU asset managers also cannot be MiFID investment firms means that they are shut out of the market, which creates an unlevel playing field, or alternatively face higher costs and operational burden in order to comply with the "originator" route for risk retention. This acts as a disincentive to non-EU managers which are potential investors in EU securitisations As explained above, MiFID investment firms and authorised AIFMs are already subject to a requirement to retain funds. Holding, directly or via an affiliated entity, any additional retained amounts in the form of the securitisation retention amount is not prohibited.

We therefore propose that the definition of “sponsor” be amended to allow AIFMs to qualify for the purposes of the risk retention rules. The most obvious and helpful way of doing this would be to provide that, in addition to banks and investment firms, AIFMs can also act as sponsors, as proposed in the amendment above.

STS for Collateralised Loan Obligations (CLOs)

In addition, we believe the objective of the Regulation, and of this review, to ensure a more active role for securitisation in the financing of the EU recovery could be better achieved by allowing CLOs to be classified as “STS”.

Indeed, the CLO market is a key means by which capital markets are connected to the non-financial economy. Due to the tranching involved, CLOs fall within the remit of the Securitisation Regulation, but they are ineligible for Simple, Transparent and Standardised (‘STS’) certification as they are deemed to be “actively managed” for the purposes of the Securitisation Regulation.

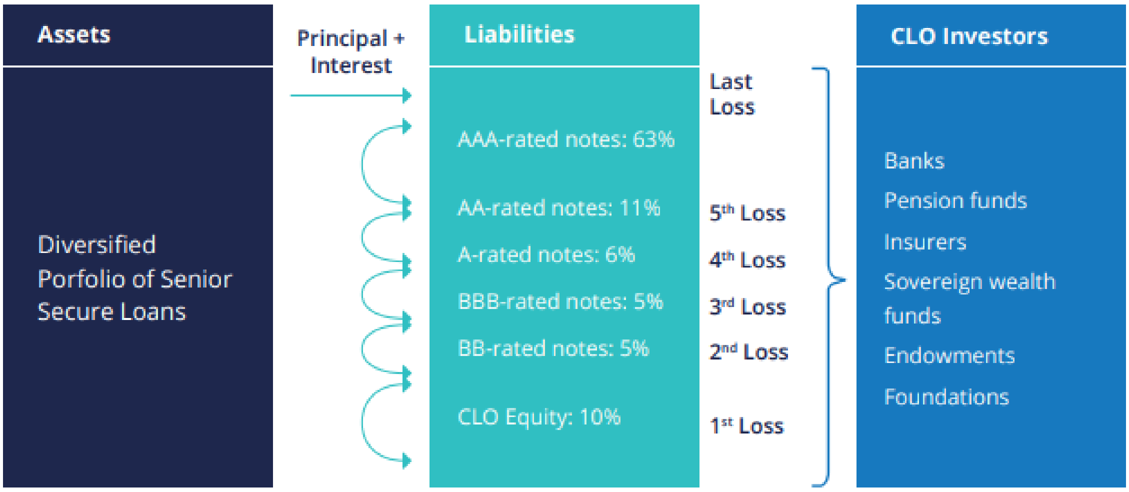
The exclusion of CLOs from the STS framework acts as a brake on the provision of finance to borrowers, while also limiting the ability of banks to de-leverage their balance sheets. Developing a new approach that would allow CLOs to achieve STS certification would help attract investor capital and support the availability of finance for EU businesses. This would be particularly beneficial for insurers seeking income generating assets with higher returns than are currently available in a low-yield environment. Such a reform would also allow them to become a more prominent source of finance for the real economy than they are currently. Diversifying the sources of finance available to corporates will also encourage a more resilient economy by reducing the dependency on bank finance as a driver of investment and growth.

Developing an approach to STS certification for CLOs that is consistent with global regulatory standards would also contribute to the EU’s general effort of further developing efficient and attractive capital markets.

<u>What are CLOs?</u>

CLOs raise capital from institutional investors and lend this to businesses across a range of industry sectors. This allows investors to invest in assets they would not be able to invest in on an individual loan basis, while also diversifying their exposure to different segments of the economy. A CLO generates returns for investors by returning the interest and principal payments they receive from borrowers. Around two-thirds of global CLOs are held by non-bank investors such as pension funds, insurers and investment funds.[4]

Figure 1: Typical CLO Structure



CLOs and STS certification

CLOs are unique in that a CLO manager can "manage", within a set of well-defined constraints, the pool of underlying loans to optimise returns for their investors. In practice this means that the CLO manager seeks to identify better performing borrowers and loans rather than simply "buying the market". CLOs operate within an inherently stable framework. CLO managers are subject to strict guidelines from the outset. Those guidelines are disclosed to investors and must be adhered to during the life of the CLO. In most deals, the manager can only turn over a limited portion of the collateral, generally around 20%, each year. CLO managers can only replace the loans in the portfolio with loans that meet the eligibility criteria of the CLO structure used to structure the initial pool of the securitisation. Such eligibility criteria are typically determined by external ratings which ensures consistency across the market and is independent from the CLO manager. This practice helps ensure investors' interests are being protected, while also supporting the efficient allocation of capital across the economy.

Due to the tranching involved, CLOs fall within the remit of the Securitisation Regulation, but they are not eligible for STS certification as they are deemed to be "actively managed" for the purposes of the Securitisation Regulation. We support the policy objective of the STS framework to ensure

[4] https://www.esma.europa.eu/sites/default/files/library/esma_50-165-883_report_on_trends_risks_and_vulnerabilities_no.2_2019.pdf, p.50.

transparency and support good investor outcomes and believe that typical CLO structures are consistent with this objective for several reasons:

- CLO managers are required to comply with standardised tests and criteria (see Figure 2) prescribing how the CLO should be managed rather than on a solely discretionary basis;
- CLO managers typically report details of trading of underlying exposures in the context of the CLO manager's management responsibilities, providing investors with transparency;
- The subordination of a proportion of the CLO manager's fees incentivises strong performance of the CLO transaction and aligns the CLO manager's interest with their investors; and
- The strong performance of highly rated European-managed CLOs during the past decade demonstrates the resilience of the structure.

Figure 2: CLO structural protections

Test	Description
Over Collateralisation ('OC')	The OC tests protect noteholders against a deterioration in the value of the portfolio collateral. This is tested by comparing the value of outstanding notes versus collateral and ensuring it is sufficiently over collateralised.
Interest Coverage ('IC')	The IC tests protect noteholders against a deterioration in interest income from the portfolio. This is tested by comparing the interest income received versus the liabilities due to ensure there is sufficient coverage.
Weighted Average Life ('WAL')	The weighted average life of all the loans in the portfolio. Designed to prevent the total risk horizon of the portfolio from exceeding a covenanted level.
Weighted Average Spread ('WAS')	The average effective interest rate spread for the loan portfolio over an index rate. This test ensures a minimum level of income from the underlying portfolio that should be sufficient to pay interest on the liabilities.
Weighted Average Rating	A measure of the average credit rating of the portfolio, which is an indicator of the portfolio's average credit risk.

As noted above, any discretion afforded to the CLO manager is subject to investor oversight and recourse via the standardised tests and criteria that the CLO manager is required to meet. Furthermore, we would highlight how comparing pre and post trade positions demonstrates how almost all the reinvestment criteria of CLOs support better portfolio management and incentivise good investor outcomes.

We would therefore ask EU policy-makers to consider amending the STS criteria to encompass transactions where active management can only occur within the portfolio criteria established by the CLO manager and their investors. This would align with the Securitisation Regulation's existing requirements for new exposures into revolving pools to meet the initial eligibility criteria and for proven servicer experience level.

2. Private securitisations

The legal framework acknowledges the bilateral and bespoke nature of so-called private securitisations and does not require them to disclose detailed information about the transaction to potential investors in the same way that it does for public securitisations. However, this needs to be balanced against the need to ensure adequate supervision of private transactions, which requires access to sufficient information on the part of supervisors. As a result, the current legal framework requires private securitisations to fill in the same data templates as public securitisations.

Question 2.4. Do investors in private securitisations get sufficient information to fulfil their due diligence requirements?

Yes
No
No opinion

Please explain your answer.

Whether a securitisation is private or public, investors will apply a robust approach to risk analysis as part of their investment and in any negotiations with counterparties. While private securitisations by definition do not include the same level of public disclosures as public transactions, the disclosures involved in these transactions are typically negotiated to the level required by the investor(s) in that private financing transaction. Under the Securitisation Regulation, private securitisations are already subject to highly prescriptive transparency requirements including onerous template-based loan-level and investor reporting.

Question 2.5. Do you find useful to have information provided in standard templates, as it is currently necessary according to the transparency requirements of Article 7 and the associated regulatory and implementing technical standards?

Yes
No
No opinion

Please explain your answer.

For private warehouse transactions, the structure and transaction documentation is very tailored to the lenders and other parties involved, meaning that compliance with standardised disclosure, transparency and template-based reporting requirements adds cost and administrative burden to all parties without any commensurate benefits for investor protection or encouraging the creation of a wider issuer or investor base.

Members receiving data under the ESMA template as investors report that although they understand the need for originators to comply with such requirements, they also do not make much use of the data set reported under ESMA template. They therefore usually require other types of data on top of ESMA's data fields.

Question 2.6. Does the definition of private securitisation need adjustments?

Yes
No
No opinion

If you answered 'yes' to question 2.6, please explain why and how should the definition of private securitisations be adjusted.

Considerable difficulty, cost and administrative burden was created for "private" securitisations as a result of the changed course by ESMA to its initial consultation on template-based disclosure, whereby the industry provided detailed input on the understanding that template-based reporting would only apply to "public" securitisations, only for ESMA to change course without any further meaningful public consultation with the industry on the appropriateness of prescribed templates for the "private" securitisation market.

We would consider it appropriate to introduce an alternative, proportionate and more commercially meaningful approach to distinguishing between "public" and "private" securitisations for the purpose of the transparency requirements under the Securitisation Regulation. In particular, on bilateral and privately negotiated securitisations (such as private warehouse transactions that are common in the CLO space), parties should be free to decide on the content of disclosure by applying the general principles of Article 7 only (i.e., that there needs to be disclosure of the core transaction documents, disclosure about the underlying assets, some investor reporting) but without prescribing any standardised template-based reporting. We think such better differentiation is already supported by Recital (13) of the Securitisation regulation that acknowledges that "private securitisations are often bespoke.... [I]nvestors are in direct contact with the originator and/or sponsor and receive the information necessary to perform their due diligence direction from them."

We would be happy to engage in a dialogue between policymakers and industry in this area alongside other trade associations who share similar views.

3. Due diligence

The transparency regime in the SECR requires that the originator, sponsor and SSPE of a securitisation make a range of information available to the holders of the position, to competent authorities and, upon request, to potential investors. The information is provided via templates and is intended to enhance the transparency of the securitisation market as well as to facilitate investors' due diligence and the supervision of the market. The following questions aim to find out whether the information that is currently provided to investors is appropriate, sufficient and proportionate for their due diligence purposes and whether any improvements can be made.

Question 3.1. Do you consider the current due diligence and transparency regime proportionate?

Yes
No
No opinion

Please explain your answer.

See our response to Question 4.4.

Question 3.7. Are disclosures under Article 7 sufficient for investors?

Yes
No
No opinion

Please explain your answer.

We note that sufficiency of information that investors may need on a securitisation (including in the CLO space) does not depend on the highly prescriptive requirements of the Regulation alone. In fact, pre-2019 practice continues on European CLOs whereby additional reporting continues to be provided (such as monthly investor reporting based on pre-2019 CLO 2.0 market practice and quarterly payment date reporting) even though it is not required by the Regulation. This is because, as noted in our response to Question 2.6 above, the reporting templates developed under the Regulation were not developed with the full and early involvement of industry experts, and both exclude important material and include unnecessary details. In particular, we would note in this regard that the content of currently applicable templates is not modelled on best practices for CLO 2.0 that the market had implemented. For example, ECB-style loan-level reporting that formed the base for the Securitisation Regulation reporting templates is imposed on CLOs even though CLOs would not have been historically eligible for ECB/Eurosystem liquidity operations and would not have used such template-based reporting in practice. Similarly, while the Securitisation Regulation prescribes xml format reporting, that is not the format that securitisation investors expected or required historically, so many investors continue to require all deal reporting to be made available as Excel documents as well.

4. Jurisdictional scope

The Joint Committee of the ESAs issued an opinion to the Commission on the jurisdictional scope of the Securitisation Regulation, identifying some elements of the legal text that require clarification. This section of the questionnaire seek feedback on the issues identified by the Joint Committee.

Question 4.1. Have you experienced problems related to a lack of clarity of the Securitisation Regulation pertaining to its jurisdictional scope?

Yes
No
No opinion

Please explain your answer:

See our response to Question 1.2 and our ask to clarify that third country investment firms can act as sponsors.

Question 4.2. Where non-EU entities are involved, should additional requirements (such as EU establishment/presence) for those entities be introduced to facilitate the supervision of the transaction?

Yes
No
No opinion

Please explain your answer:

We believe that requiring an EU presence or establishment for a securitisation transaction involving EU investors would be seen as a burdensome requirement for parties involved in the securitisation transactions, especially for transactions where limited numbers of EU investors are involved or their collective investment in the transaction is relatively low when compared to the levels of investment from non-EU investors. This could end up limiting investment opportunities for EU investors.

Although a presence requirement might be viewed by some as a further means to protect EU investors, we believe this objective should be balanced with the crucial need to support banks in freeing up their balance sheets to be able to develop and maintain the financing of EU businesses. Furthermore, EU investors are subject to a prescriptive supervisory reporting requirement in relation to their securitisation investments which ensures adequate supervision and protection of EU end investors.

Question 4.3. In transactions where at least one, but not all sell-side entities (original lender, originator, sponsor or SSPE), is established in the EU:

A. Should only entities established in the EU be eligible (or solely responsible) to fulfil the risk retention requirement under Article 6?

Yes
No
No opinion

Please explain your answer.

Such a requirement would result in less financing been made available for EU companies.

B. Should the main obligation of making disclosures under Article 7 be carried out by one of the sell-side parties in the EU? In this case, should the sell-side party(ies) located in a third

country be subject to explicit obligations under the securitisation contractual arrangements to provide the necessary information and documents to the party responsible for making disclosures?

Yes
No
No opinion

Please explain your answer.

Such constraint would not be useful since the reporting obligation clearly applies to the originator, the sponsor and the securitisation special purpose entity, whether or not they are located in the EU.

C. Should the party or parties located in the EU be solely responsible for ensuring that the "exposures to be securitised" apply the same credit-granting criteria and are subject to the same processes for approving and renewing credits as non-securitised exposures in accordance with Article 9?

Yes
No
No opinion

Please explain your answer.

We would generally recommend that the Commission reconsider the appropriateness of the application of credit granting standards to sponsors under Article 9 of the Regulation before making any other changes. Indeed sponsors should not be required to meet credit granting standards since they only establish and manage securitisations that purchase third party assets.

D. Should a reference to sponsors located in a third country be included in the due diligence requirements Article 5(1)(b) of the SECR? How could their adequate supervision be ensured?

Yes
No
No opinion

Please explain your answer.

Question 4.4. Should the current verification duty for institutional investors laid out in Article 5(1)(e) of the SECR be revised to add more flexibility the framework?

Yes
No
No opinion

Please explain your answer:

Article 5 of the Securitisation Regulation puts the responsibility for checking the compliance with the Regulation by parties involved in a securitisation on the institutional investor investing in the relevant securitisation. Article 5(1)(e) specifically requires that an institutional investor ensures that parties involved in the securitisation (originator, sponsor and/or lender) make available a prescriptive set of information related to the securitisation, including:

- information on underlying exposure on a quarterly basis;
- final offering documents, details of the structure of the deal and closing transactions documents, any relevant documents on collateralisation, any relevant document on inter-creditor arrangements; etc.;
- quarterly investors reports; and
- any information regarding significant events, etc.

Specific provisions regarding when those documents must be provided also apply -- for example each quarter, one month after the due date of the payment of interest for investors reports or before pricing for information on private deals.

Institutional investors in scope of the Regulation investing in any securitisation transactions (whether involving EU or non-EU assets or parties) must comply with Article 5 and the request for information element of limb (e) as summarised above. These requirements have proven extremely complex to implement in practice because of third countries' differences in the regulatory and business practices and approaches. We understand this complexity affected the EU securitisation market competitiveness and attractiveness, and we would very much welcome the introduction of a level of flexibility on the transparency requirements.

We fully support the HLF CMU report's recommendation to introduce more flexibility to the framework as regards institutional investors' verifications. Specifically, we support the HLF CMU's recommendation to allow an EU-regulated investor in a third-country securitisation to determine whether it has received sufficient information to meet the requirements of Article 5 to carry out its due diligence obligation proportionate to the risk profile of such securitisation.

We feel such a proposition would facilitate EU investors' diversification of investments and access to non-EU financial products, thus increasing the benefit to EU end investors.

Furthermore, we believe that a third-country equivalence regime is not an adequate answer to address the confusion related the application of Article 5(1)(e). Indeed, even the most advanced securitisation markets outside the EU (other than the UK, possibly) would fail to qualify as "equivalent" under the framework suggested by the ESAs – functionally eliminating the ability of EU investors to make appropriate, measured judgments designed to maximise their returns and those of their stakeholders.

This approach could be potentially disruptive for the market and the impact on existing third-country securitisation positions should be carefully assessed.

Finally, we believe that institutional investors are able enough to judge whether they have received sufficient information (including information contractually promised to be provided on an ongoing basis) to make an informed judgment about the risks of taking an investment decision, as they do with virtually every other asset class other than securitisation.

If you answered 'Yes' to question 4.4, how can it be ensured that the ultimate objective of protecting EU institutional investors remains intact?

Should the HLF CMU report's recommendation be applied, we feel that this option strikes the right balance between an adequate protection of EU institutional investors and ensuring they can access a diversified pool of securitisations. Indeed, with the proposed solution, the EU institutional investors can still opt to rely on the full set of Regulation's requirements for transactions or vehicles where they could feel less protected. Letting the EU professional investor making its own choice as regards the level of protection needed depending on the securitisation and its underlying assets appears to be an appropriate policy choice.

Question 4.5. Should the SECR and the Alternative Investment Fund Managers Directive (AIFMD) be amended to clarify that non-EU AIFMs should comply with the due diligence obligations set out in Article 17 of the AIFMD and Article 5 of the SECR with respect to those AIFs that they manage and/or market in the Union?

Yes
No
No opinion

Please explain your answer:

The application of the "institutional investor" definition within the Securitisation Regulation to AIFMs established and with their registered offices outside the EU ('non-EU AIFMs') and AIFMs that qualify for the exemption provided in Article 3(2) of the AIFMD ('sub-threshold AIFMs') is a source of uncertainty for some market participants.

Article 5 of the Securitisation Regulation imposes certain due diligence requirements on "institutional investors" investing in securitisation positions issued from 1 January 2019.

"Institutional investor" is defined in Article 2(12)(d) of the Securitisation Regulation to include:

> "an alternative investment fund manager (AIFM) as defined in point (b) of Article 4(1) of Directive 2011/61/EU that manages and/or markets alternative investment funds in the Union."

Article 17 of the AIFMD confirms the due diligence obligation of AIFMs subject to the AIFMD when investing in securitisation and provides for the legal and sectoral regulatory framework for the supervision of those AIFMs. It is important to note that Article 17 of the AIFMD only applies to those AIFMs that are subject to the whole AIFMD framework, i.e., authorised AIFMs.

We detail below why we believe that the Securitisation Regulation should be clarified that it only applies to authorised EU AIFMs and authorised non-EU AIFMs (under Article 37), as follows:

"an alternative investment fund manager (AIFM) as defined in point (b) of Article 4(1) of Directive 2011/61/EU ~~that manages and/or markets alternative investment funds in the Union~~ ***and authorised in accordance with the requirements of Article 6 or Article 37 of that Directive.***"

We provide a detailed explanation of our recommendation below.

a) The Securitisation Regulation's intention

When it was drafted and adopted, the Securitisation Regulation's aim was to consolidate existing requirements related to securitisation in various EU legislative texts, including requirement applying to authorised AIFMs under the AIFMD.

At no stage in the legislative process of the Securitisation Regulation was there any stated intention to widen the scope of the existing rules provided by the AIFMD on risk retention so that they should apply to any other AIFMs that were either not authorised or sub-threshold. Article 17 of the AIFMD therefore does not, and should not, be applied to those AIFMs not subject to the entire AIFMD framework.

The Explanatory Memorandum in the 2015 Commission Proposal for the Securitisation Regulation (the 'Commission Proposal') makes clear that the policy intention of the Securitisation Regulation was simply to consolidate the various risk retention and due diligence requirements from the various pieces of legislation (CRR, AIFMD, Solvency II) into a single regulation. The purpose of the Securitisation Regulation was to clarify the applicable framework but not to broaden its scope. In particular, the Explanatory Memorandum states:

"the EU securitisation framework is **drafted where relevant in line with the existing definitions and provisions in Union law** on disclosure, due diligence and risk retention. This will ensure that the market can continue to function on the basis of the existing legal framework where that framework is not amended..." (At page 8; emphasis added)

"Whereas existing EU law provides in the credit institutions, asset management and insurance sector already for certain rules, these are scattered amongst different legal acts and they are not always consistent. **The first part of the proposal therefore puts the rules in one legal act, thus ensuring consistency and convergence across sectors**, while streamlining and simplifying the existing rules. As a consequence the sector-specific provisions on the same topic would be repealed." (At page 13; emphasis added)

Any intention to widen the scope broader than the current AIFMD Article 17's scope would have been expressed in the Commission Proposal, in the Recitals of the Securitisation Regulation or elsewhere, given that this would be a significant expansion of the scope of the existing rules by applying them to any non-EU AIFMs and sub-threshold AIFMs.

In addition, the *Third country dimension* section of the Commission Proposal makes clear that the Securitisation Regulation is intended to apply only to EU institutional investors:

> "**EU** institutional investors can invest in non-EU securitisations and will have to perform the same due diligence as for EU securitisations…." (At page 17; emphasis added)

The above policy objectives are reflected in the Recitals to the Securitisation Regulation. Recital (38) of the Securitisation Regulation provides:

> "This Regulation promotes the harmonisation of a number of key elements in the securitisation market without prejudice to further complementary market-led harmonisation of processes and practices in securitisation markets…."

Recital (39) of the Securitisation Regulation goes on to provide that:

> "Directives 2009/65/EC, 2009/138/EC and 2011/61/EU of the European Parliament and of the Council and Regulations (EC) No 1060/2009 and (EU) No 648/2012 of the European Parliament and of the Council are amended accordingly to ensure consistency of the Union legal framework with this Regulation on provisions related to securitisation the main object of which is the establishment and functioning of the internal market, in particular by ensuring a level playing field in the internal market for all institutional investors."

Since the intent of the Securitisation Regulation was not to modify the scope of the securitisation regulatory framework in the EU, the definition of "institutional investors" in the Securitisation Regulation should be read as corresponding to the pre-existing scope of AIFMD Article 17. The Securitisation Regulation "institutional investor" definition could therefore be clarified to clearly state that it refers to "authorised AIFMs" (under Article 6 or 37 of the AIFMD).

b) The Securitisation Regulation's institutional investors definition refers to third-country AIFMs which will choose to opt for the third country passport

The above statement can be further complemented by the reference to marketing an AIF "in the Union" rather than marketing "in a Member State" in the definition of an institutional investor.

This wording under the legislative and conceptual framework of the AIFMD is key as it refers to two separate marketing choices:

Article 37 refers to the use of the third country passport and is entitled: "Authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them **in the Union** in accordance with Article 39 or 40" (emphasis added).

Article 42 refers to the marketing on a country-by-country basis, under the rules set by the NCAs: "Conditions for the marketing **in Member States** without a passport of AIFs managed by a non-EU AIFM" (emphasis added).

As per Article 37(2), an AIFM seeking an authorisation under Article 37 "shall comply with [the AIFMD]". Article 17 of the AIFMD therefore applies to those AIFMs authorised under Article 37 which are non-EU AIFMs marketing their funds **in the Union.** Similarly, and as mentioned above, the definition of an "institutional investor" in the Securitisation Regulation refers to an AIFM that "manages or markets an alternative investment fund **in the Union**" (emphasis added).

In addition, the words "and/or markets" were included in Article 2(12)(d) of the Securitisation Regulation in order to ensure that, if/when the Commission adopted a delegated act under Article 67(6) of the AIFMD to specify that Article 37 (and other related Articles) are to become applicable in the Union, the reference to "institutional investor" could accommodate such non-EU AIFMs that manage AIFs established in the Union and/or market AIFs in the Union.

It is noted that, at the time of the Commission Proposal (September 2015), there may have been some expectation that the Article 37 AIFMD regime would be introduced by the time that the Securitisation Regulation came into effect, or soon after.

In summary, the definition of "institutional investor" is intended to capture some non-EU AIFMs, being those that manage EU AIFs and/or market AIFs into the Union, but only when Article 37 of the AIFMD is activated.

c) Other types of investors in scope of the Securitisation Regulation are all EU-regulated firms

As a matter of EU legislative interpretation, a reference to a specific type of firm in EU legislation – as compared with the use of the generic term "person" – is intended to apply only to the firm as regulated in accordance with EU legislation.

For example, the definition of "institutional investor" in the Securitisation Regulation refers to: "a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013". Point (1) of Article 4(1) of Regulation (EU) No 575/2013 defines "credit institution" simply as: "an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account".

It is accepted, however, that a third country "undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account" is not intended to be included in the definition of "institutional investor" in the Securitisation Regulation. Rather, only credit institutions authorised under Directive 2013/36/EU are included in the definition of "institutional investor".

In the same manner, Article 4(1)(b) of the AIFMD defines "AIFMs" to mean "legal persons whose regular business is managing one or more AIFs." However, that does not refer to all such persons globally. Rather, that term should be read as referring only to AIFMs which are subject to regulation under the AIFMD; that is, authorisation and full compliance in the case of authorised AIFMs, under Article 6 and Article 37 of the AIFMD.

d) Broadening the scope of the Securitisation Regulation to other non-EU AIFMs risks affecting EU investors' allocation choices

We are aware of the fact that the definition has caused confusion in the market as some appear to have taken the view that the "institutional investor" definition applies to non-EU AIFMs that might market an AIF in a Member State, similar to the interpretation of the ESAs in their recent opinion on the Securitisation Regulation's jurisdictional scope. [5] This interpretation brings non-EU AIFMs marketing their funds in single EU Member States in scope of the Securitisation Regulation, although they are not in scope of AIFMD Article 17.

We believe this view is not justified by the spirit of the Regulation (as demonstrated in (a) above), whereby no broadening of the scope of Article 17 and its potential impact on the market was ever mentioned, assessed or justified in the policy discussions and negotiations surrounding the adoption of the proposal.

We also believe that capturing such entities in the "institutional investors" definition would certainly make them avoid marketing their AIFs in Member States for fear of being subject to the Regulation's due diligence requirements that would apply even to their non-EU securitisation deals. Lack of investment diversification for EU institutional investors would be the direct consequence of this interpretation. Indeed, our members report already seeing some non-EU AIFMs decide not to market certain AIF strategies into Member States where investment in securitisation positions is an important part of the strategy, as a direct result of the publication of the Joint ESAs' recent Opinion.

The consequence of such an interpretation is to apply the requirements not only with respect to the one AIF marketed in a Member State, but also to all of the non-EU AIFMs non-EU facing business, since the provisions apply at the entity level (the AIFM), rather than at the fund level (the AIF). In other words that non-EU manager would be restricted from purchasing any securitisation position for any client, including clients with no EU ties whatsoever.

The consequences of bringing all non-EU AIFMs marketing via an NPPR into the scope of the Securitisation Regulation for the rest of a non-EU AIFM's business will cause non-EU AIFM's to assess carefully whether the benefits of marketing an AIF in Member States sufficiently outweigh the direct and indirect costs of this regulation to the AIFM and its non-EU facing clients to warrant continuing to market to Member States' local investors. Given the relative costs and benefits in the current market climate, it is likely that many, if not most, non-EU AIFMs in this position will forgo the management/marketing opportunities rather than disadvantaging their non-EU facing client base. This will have the dual effect of limiting the non-EU funding sources for EU securitisations and limiting investment choice for investors in AIFs.

Finally, in the spirit of the AIFMD, those AIFMs marketing under national private placement rules are subject to Articles 22-24 and 26-30 of the AIFMD (as per Article 42 of the AIFMD), which relate to investor transparency, supervisory reporting and cooperation between the home country supervisor of the non-EU AIFM and EU NCAs. The organisational and conduct requirements (e.g., conflicts of interest, risk management, liquidity management, and thus also investment restrictions) are left to the home supervisor of the AIFM which will have signed a cooperation agreement with the local EU NCA. The rationale behind the adoption of those requirements was to allow Member States' local institutional investors (pension funds, insurance companies, etc.) to be able to access a diversified and global pool of investment management talents, in order to serve

[5] https://www.esma.europa.eu/document/esas'-opinion-european-commission-jurisdictional-scope-application-secr

their end-clients and meet their own fiduciary duties, while being covered by a minimum set of transparency and organisational standards as well as supervisory rules.

The framework also leaves room for each NCA to further strengthen or restrict the access to its local investors depending on the structure of its market and the needs of local professional investors. Member States with an important private pension fund industry for example are in crucial need of ensuring an easy access to a diversified and global pool of financial products to their investor community. The purpose was also for those local EU Investors to be able to invest such products often set up for a global, professional and sophisticated clientele who acknowledges the potential risks in investing in a non-locally regulated product. Those investors are also usually themselves prudentially regulated and supervised, and the risk pertaining to their own investment choices is therefore very much mitigated. This was the spirit behind the drafting of Article 42 of the AIFMD which serves a unique and singular purpose in the whole AIFMD conceptual framework.

Should the Commission still be concerned regarding the protection of local EU investors investing in non-EU AIFs involved in securitisation transactions and being distributed via AIFMD Article 42, we believe a solution to ensure appropriate protection while allowing a decent access to a global fund market could be to add a reporting requirement in Articles 22-24 of the AIFMD as regards securitisation due diligence and verification policies implemented by the AIF. This would allow the local professional investor to be fully informed of how the AIF and its AIFM are treating investments in securitised products, while not creating the huge disincentive resulting from an amendment of the AIFMD bringing all those Article 42 non-EU AIFMs in scope of Article 17.

e) Grandfathering arrangements

In any events, should the definition of “institutional investor” be amended/clarified so that non-authorised non-EU AIFMs are out of scope, meaningful grandfathering or transitional provisions will be needed to accommodate existing arrangements where non-EU AIFMs acting as “institutional investor” in-scope of Regulation are identified as “managing investor” under Article 5(5) and are delegated by other institutional investor(s) the task of carrying out the due diligence.

Question 4.6. Should the SECR be amended to clarify that sub-thresholds AIFMs fall within the definition of institutional investor thereby requiring them to comply with the due diligence requirements under Article 5 of the SECR?

Yes
No
No opinion

Please explain your answer.

For similar reasons as outlined above – it was never the intention of the Regulation – but also for proportionality reasons, we believe the Regulation does not and should not apply to subthreshold AIFMs.

6. Sustainability disclosure

SECR requires that where the underlying loans are residential mortgages or auto loans/leases the available information related to the environmental performance" of the underlying assets is published for STS securitisation. This obligation was amended with the capital markets recovery package by including a derogation, whereby originators may, instead, choose to publish "the available information related to the principal adverse impacts of the assets financed by underlying exposures on sustainability factors". The Commission is asked to investigate whether the requirements in Articles 22(4) [term STS] and 26d(4) [on-balance-sheet STS] about publishing the available information related to the environmental performance of the assets should be extended to securitisation where the underlying exposures are not residential loans or auto loans or leases, with a view to mainstreaming environmental, social and governance disclosure.

Question 6.1. Are there sufficiently clear parameters to assess the environmental performance of assets other than auto loans or mortgages?

Yes, for all asset classes
Yes, but only for some asset classes (please specify)
No
No opinion

The impact of the already existing EU ESG requirements is starting to be seen in the securitisation market. For example, investors asking CLO managers for disclosures to help them meet their own obligations under the Sustainable Finance Disclosure Regulation ('SFDR') has resulted in some recent deals including a qualified obligation to provide Potential Adverse Impact reporting.

There are substantial challenges around ESG data collection for many participants in the securitisation markets that are material when it comes to disclosure. This is most pronounced in instances where such data was not collected on the underlying assets at origination. In such instances it is extremely challenging to go back and collect such data.

Our members' experience in other areas of their investment management activity confirms that any ESG-related disclosure with respect to securitisation will remain challenging without corresponding requirements on corporates to report this data. Any approach to improving transparency and promoting investor choice with respect to ESG and securitisation should first focus on improving the quality and availability of the underlying assets at origination, rather by imposing requirements on participants in the securitisation market who were not involved in the origination of the assets and are less able to collect such data. We would also question the necessity and value of specific ESG disclosure requirements for securitisation when there are no equivalent proposals being considered for other capital raising investment structures.