EBA/CP/2017/22

15 December 2017

Consultation Paper

Draft Regulatory Technical Standards

specifying the requirements for originators, sponsors and original lenders relating to risk retention pursuant to Article [6(7)] of Regulation (EU) [XXX/201X]

Contents

1. Responding to this consultation

The EBA invites comments on all proposals put forward in this paper and in particular on the specific questions summarised in 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the EBA should consider.

Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 15 March 2018. Please note that comments submitted after this deadline or submitted via other means may not be processed.

Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the EBA's rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the EBA's Board of Appeal and the European Ombudsman.

Data protection

The protection of individuals with regard to the processing of personal data by the EBA is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the EBA in its implementing rules adopted by its Management Board. Further information on data protection can be found under the Legal notice section of the EBA website.

2. Executive Summary

Regulation (EU) [XX/20XX][1] (the 'STS Regulation') sets out requirements concerning the retention of material net economic interest and other requirements related to exposures to securitisations and mandates the EBA to prepare, in close cooperation with the European Securities and Market Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA), draft Regulatory Technical Standards in this area. The STS Regulation requires the EBA to submit the draft Regulatory Technical Standards to the Commission by the date which is six months from the entry into force of the Regulation.

Main features of the RTS

The draft Regulatory Technical Standards, in accordance with Article [6(7)] of the STS Regulation, should specify in greater detail the risk retention requirement and, in particular, the matters listed in that paragraph (including the modalities of retaining risk, the measurement of the level of retention, the prohibition of hedging or selling the retained interest and the conditions for retention on a consolidated basis).

The EBA drafted the Regulatory Technical Standards with a view to ensuring that, to the extent feasible, the rules set out in Commission Delegated Regulation (EU) No 625/2014[2], which was developed under Regulation (EU) No 575/2013[3], continue to apply. Considering, however, the scope of the new mandate, certain provisions in Commission Delegated Regulation (EU) No 625/2014 are not reflected in the new Regulatory Technical Standards. Such provisions, which were deemed to fall outside the realm of the new mandate, include Chapter IV (*Due diligence requirements for institutions becoming exposed to a securitisation position*), Article 21 (*Policies for credit granting*) and Article 23 (*Disclosure of materially relevant date*) of Commission Delegated Regulation (EU) No 625/2014. Generally, in respect of disclosure, only provisions relating to the initial disclosure of issues relating to risk retention were included in the new Regulatory Technical Standards, as the further specification of ongoing disclosure in terms of issues relating to risk retention is covered by the mandate set out in Article [7(3)] of the STS Regulation. Other provisions carried over from Commission Delegated Regulation (EU) No 625/2014 include guidance on the operation of Article 14 of Regulation (EU) No 575/2013 regarding the application of certain requirements on a consolidated basis.

[1] Regulation of the European Parliament and the Council [XX/20XX] laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012.

[2] Commission Delegated Regulation (EU) No 625/2014 of 13 March 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council by way of regulatory technical standards specifying the requirements for investor, sponsor, original lenders and originator institutions relating to exposures to transferred credit risk.

[3] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

Furthermore, the draft Regulatory Technical Standards contain provisions which are new compared to Commission Delegated Regulation (EU) No 625/2014. The main new provisions relate to the circumstances when an entity shall be deemed not to have been established or to operate for the sole purpose of securitising exposures, the prohibition on adverse selection set out in Article [6(2)] of the STS Regulation and the change of the retainer.

Finally, certain provisions in the draft Regulatory Technical Standards, which were carried over from Commission Delegated Regulation (EU) No 625/2014, were subject to amendment, whether for the purposes of reflecting the new requirements set out in the STS Regulation or for the sake of clarity.

The Regulatory Technical Standards have been drafted in such a way as to (i) ensure the alignment of interest (risks) and information between the securitisation sponsors, originators and original lenders and the investors buying the securitisation positions and (ii) facilitate the implementation of the risk retention requirements by the sponsor, originator or original lender.

Next steps

Following the conclusion of the consultation period, the draft Regulatory Technical Standards will be finalised and submitted to the European Commission for adoption.

3. Background and rationale

1. Securitisation markets were affected during the financial crisis by what are termed 'misaligned incentives' or 'conflicts of interest'. These terms refer to situations where certain participants in the securitisation chain have incentives to engage in behaviour which, while furthering their own interests, is not in the interests of, and may be detrimental to, other participants in the securitisation chain or the broader efficient functioning of the market. These misalignments and conflicts are generally thought to have contributed to the loss of investor confidence in securitisation products and are also seen as a barrier to the recovery of the market.

2. In order to address such concerns, Article 405 of Regulation (EU) No 575/2013 set out the requirement for an institution, other than when acting as an originator, a sponsor or an original lender, to be exposed to the credit risk of a securitisation position in its trading book or non-trading book only if the originator, sponsor or original lender has explicitly disclosed to the institution that it will retain, on an ongoing basis, a material net economic interest which, in any event, shall not be less than 5 %. Material net economic interest could be retained under any of the options listed in that article.

3. Article 410 of Regulation (EU) No 575/2013 mandated the EBA to develop draft regulatory technical standards to specify in greater detail, amongst other things, the retention requirement set out in Article 405 of that Regulation. Based on the draft submitted by the EBA, the Commission adopted Commission Delegated Regulation (EU) No 625/2014.

4. Following the adoption of Commission Delegated Regulation (EU) No 625/2014, the STS Regulation was enacted. The latter Regulation lays down a general framework for securitisation. It defines securitisations and establishes due diligence, risk retention and transparency requirements for parties involved in securitisations, in addition to providing a framework for simple, transparent and standardised securitisation.

5. Article [6] of the STS Regulation sets out the requirements for risk retention. Those requirements are broadly consistent with those set out initially by Article 405 of Regulation (EU) No 575/2013. In accordance with Regulation (EU) [XX/20XX][4], Part Five of Regulation (EU) No 575/2013, which included Article 405 of that Regulation, will be deleted and all references to Part Five of Regulation (EU) No 575/2013 shall, in that Regulation, be read as references to Chapter 2 of Regulation (EU).

6. In accordance with Article [6(7)] of the STS Regulation, the EBA, in close cooperation with the European Securities and Market Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA), is required to develop draft regulatory technical standards to specify in greater detail the risk retention requirement, in particular with regards to:

[4] Regulation of the European Parliament and of the Council [XX/20XX] amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms.

(a) the modalities of retaining risk pursuant to paragraph 3 of Article [6] of the Regulation, including the fulfilment through a synthetic or contingent form of retention;

(b) the measurement of the level of retention referred to in paragraph [1] of Article [6] of the Regulation;

(c) the prohibition of hedging or selling the retained interest;

(d) the conditions for retention on a consolidated basis in accordance with paragraph [4] of Article [6] of the Regulation;

(e) the conditions for exempting transactions based on a clear, transparent and accessible index referred to in paragraph [6] of Article [6] of the Regulation.

7. For the purposes of public consultation, this paper sets out the draft Regulatory Technical Standards prepared by the EBA pursuant to the mandate set out in Article [6(7)] of the STS Regulation, which replaces the previous mandate set out in article 410 of Regulation (EU) No 575/2013. To the extent relevant and appropriate, the proposal draws upon the existing provisions of Commission Delegated Regulation (EU) No 625/2014, which is going to be repealed and replaced with the enactment of the new Delegated Regulation and will only remain applicable to certain securitisations the securities of which were issued before 1 January 2019.

4. Draft regulatory technical standards

COMMISSION DELEGATED REGULATION (EU) …/201.

of …

supplementing Regulation (EU) No [XXX/201X] of the European Parliament and of the Council by way of regulatory technical standards specifying the requirements for originators, sponsors and original lenders relating to risk retention and [partially] repealing Commission Delegated Regulation (EU) No 625/2014

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) [XXX/201X] of the European Parliament and of the Council[5], and in particular Article [6(7)] thereof,

Whereas:

(1) The retention of a material net economic interest aims at aligning interests between the parties respectively transferring and assuming the credit risk of the securitised exposures. Where an entity exclusively securitises assets consisting of its own liabilities, alignment of interests is established automatically for that securitisation. Where it is clear that the credit risk remains with the originator, the retention of interest by the originator is unnecessary and would not improve on the pre-existing position.

(2) It is appropriate to clarify when exposure to securitisation positions is deemed to occur in relation to certain specific instances in which entities set out in [Article 2(12)] of Regulation (EU) [XXX/201X], other than when acting as originator, sponsor or original lender, may become exposed to the credit risk of a securitisation position, including when such entities act as a counterparty to a derivative instrument with the securitisation transaction, as a hedge counterparty with the securitisation transaction, as a liquidity facility provider to the transaction and when such entities hold securitisation positions in the trading book in the context of market making activities.

(3) In re-securitisation transactions credit risk transfer occurs at the level of the first securitisation of assets and at the second 'repackaged' level of the transaction. The two levels of the transaction, and the two corresponding instances of credit risk transfer, are independent with respect to the requirements set out in this Regulation. Institutional investors should verify compliance with the retention requirement at each level of the transaction to which they become directly exposed to transferred credit risk. Therefore, if an institutional investor becomes exposed only to the second 'repackaged' level of the transaction, compliance with the retention requirements needs to be verified by that institutional investor only in relation to the second level of the transaction. Within the same re-securitisation transaction, those institutional investors who only became exposed to the first level of securitisation of exposures should verify

[5] Regulation (EU) [XXX/201X] of the European Parliament and of the Council of [….] laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (OJ L [xxx], [date], p. [x]).

compliance with the retention requirements only in relation to the first level of securitisation in the transaction.

(4) Pursuant to Article 14(2) of Regulation (EU) No 575/2013, entities established in third countries which are included in the consolidation in accordance with Article 18 of Regulation (EU) No 575/2013, but do not directly fall within the scope of application of the additional risk weights, should, in limited circumstances, such as for exposures held in the trading book for the purpose of market-making activities, not be deemed to be in breach of Article [5] of Regulation (EU) [XXX/201X]. Institutions should not be considered to be in breach of that Article where any such exposures or positions in the trading book are not material and do not form a disproportionate share of the trading activities, provided that there is a thorough understanding of the exposures or positions, and that formal policies and procedures have been implemented which are appropriate and commensurate with that entity's and the group's overall risk profile.

(5) It is appropriate to specify in greater detail the application of the retention commitment, including when there are multiple originators, sponsors or original lenders, as well as to provide further details regarding the different retention options. Furthermore, it is equally appropriate to clarify how to determine whether an entity has been established or operates for the sole purpose of securitising exposures and thus cannot act as a retainer, how to measure the retention requirement at origination and on an on-going basis, and how to apply the exemptions.

(6) Points (a) to (e) of Article [6(3)] of Regulation (EU) [XXX/201X] lay down various options pursuant to which the required retention of interest may be fulfilled. This Regulation further clarifies ways in which to comply with each of those options.

(7) The retention of an interest could be achieved through a synthetic or contingent form of retention, provided that such methods fully comply with one of the options laid down in points (a) to (e) of Article [6(3)] of Regulation (EU) [XXX/201X], to which the synthetic or contingent form of retention can be equated, and provided that the use of such methods is disclosed in the final offering document or prospectus.

(8) Hedging of the retained interest is prohibited where those techniques undermine the purpose of the retention requirement. This implies that hedging should be allowed where it is undertaken prior to the securitisation as a legitimate and prudent element of credit granting or risk management and does not create a differentiation between the credit risk of the retained positions or exposures and the securitisation positions or exposures transferred to investors for the benefit of the retainer.

(9) In order to ensure the ongoing retention of the material net economic interest, retainers should ensure that there is no embedded mechanism in the securitisation structure by which the retained material net economic interest measured at origination would necessarily decline faster than the interest transferred. Similarly, the retained material net economic interest should not be prioritised in terms of cash flows to preferentially benefit from being repaid or amortised such that it would fall below 5 % of the ongoing nominal value of the tranches sold or exposures securitised. Moreover, the credit enhancement provided to the investor assuming exposure to a securitisation position should not decline disproportionately relatively to the rate of repayment on the underlying exposures.

(10) Initial disclosure to investors on the level of the retention commitment and of all materially relevant data, including on the credit quality and performance of the underlying exposures, is necessary for effective due diligence on the securitisation positions. Disclosed data should include details of the identity of the retainer, the retention option chosen, the retained material net economic interest upon securitisation and the commitment to retain a material net economic interest on an on-going basis. Where exemptions provided for in paragraph [5 or 6] of Article [6] of Regulation (EU) [XXX/201X] are applicable, there should be explicit disclosure of securitised exposures where the retention requirement does not apply and the reason for the disapplication.

(11) Originators and sponsors should have the right to select assets to be transferred to the SSPE that ex-ante have a higher than average credit risk profile compared to the average credit risk profile of comparable assets that remain on the balance sheet of the originator, provided the higher credit risk profile of the assets transferred to the SSPE is clearly communicated to the investors, potential investors and competent authorities. Where that is not the case, when assessing whether the prohibition on selecting assets to be transferred to the SSPE with the aim of rendering losses on the assets transferred to the SSPE higher than the losses over the same period on comparable assets held on the balance sheet of the originator is being breached, it should be considered whether it could reasonably have been expected that the performance of the assets would not be significantly different. Where, except as a result of the selection as carried out by the originators or sponsors for the respective securitisation, there are no comparable assets, the aforementioned prohibition should not apply.

(12) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority to the Commission.

(13) The European Banking Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council[6],

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation the following definitions apply:

(a) 'contingent form of retention' means the retention of material net economic interest through the use of guarantees, letters of credit and other similar forms of credit support ensuring an immediate enforcement of the retention;

(b) 'excess spread' means finance charge collections and other fee income received in respect of the securitised exposures net of costs and expenses;

(c) 'retainer' means the entity acting as originator, sponsor or original lender which retains a material net economic interest in the securitisation in accordance with [Articles 6(1) and 6(3)] of Regulation (EU) [XXX/201X];

(d) 'synthetic form of retention' means the retention of a material net economic interest through the use of derivative instruments;

(e) 'vertical tranche' means an exposure which exposes the holder to the credit risk of each issued tranche of a securitisation transaction on a pro-rata basis.

Article 2

Particular cases of exposure to the credit risk of a securitisation position

[6] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

1. Where an entity set out in [Article 2(12)] of Regulation (EU) [XXX/201X] acts as a credit derivative counterparty or as a counterparty providing a hedge or as a liquidity facility provider with regard to a securitisation transaction, it shall be deemed to become exposed to the credit risk of a securitisation position when the derivative, the hedge or the liquidity facility assumes the credit risk of the securitised exposures or the securitisation positions.

2. For the purposes of Articles [5] and [6] of Regulation (EU) [XXX/201X], where a liquidity facility complies with the conditions specified in point (b) of Article 248(1) of Regulation (EU) No 575/2013 for applying a conversion factor of 0 %, the liquidity provider shall not be deemed to become exposed to the credit risk of a securitisation position.

3. In the context of a re-securitisation or a securitisation with multiple discrete underlying transactions, an entity set out in [Article 2(12)] of Regulation (EU) [XXX/201X] shall be deemed to become exposed to the credit risk only of the individual securitisation position at the respective level at which it is assuming exposure.

4. Institutions shall not be deemed to be in breach of Article [5] of Regulation (EU) [XXX/201X] in accordance with Article 14(2) of Regulation (EU) No 575/2013 on a consolidated basis provided that the following conditions are met:

   (a) the entity which holds the securitisation positions is established in a third country and is included in the consolidated group in accordance with Article 18 of Regulation (EU) No 575/2013;

   (b) the securitisation positions are held in the trading book of the entity referred to in point (a) for the purposes of market making activities;

   (c) the securitisation positions are not material with respect to the overall risk profile of the trading book of the group referred to in point (a) and do not form a disproportionate share of the trading activities of the group.

Article 3

Retainers of material net economic interest

1. The retained material net economic interest shall not be split amongst different types of retainers. The requirement to retain a material net economic interest shall be fulfilled in full by any of the following:

   (a) the originator or multiple originators;

   (b) the sponsor or multiple sponsors;

   (c) the original lender or multiple original lenders.

2. Where the securitised exposures are created by multiple originators, the retention requirement shall be fulfilled by each originator on a pro rata basis, with reference to the securitised exposures for which it is the originator.

3. Where the securitised exposures are created by multiple original lenders, the retention requirement shall be fulfilled by each original lender on a pro rata basis, with reference to the securitised exposures for which it is the original lender.

4. By way of derogation from paragraphs 2 and 3, where the securitised exposures are created by multiple originators or multiple original lenders, the retention requirement may be fulfilled in full by a single originator or original lender provided that either of the following conditions is met:

   (a) the originator or original lender has established and is managing the ABCP programme or other securitisation;

   (b) the originator or original lender has established the ABCP programme or other securitisation and has contributed more than 50 % of the total securitised exposures measured by exposure value.

5. Where the securitised exposures have been sponsored by multiple sponsors, the retention requirement shall be fulfilled by either:

   (a) the sponsor whose economic interest is most appropriately aligned with investors as agreed by the multiple sponsors on the basis of objective criteria including the fee structures, the involvement in the establishment and management of the ABCP programme or other securitisation and exposure to credit risk of the securitisations;

   (b) by each sponsor proportionately in relation to the number of sponsors.

6. For the purposes of Article [6] of Regulation (EU) [XXX/201X], an entity shall be deemed not to have been established or to operate for the sole purpose of securitising exposures and, therefore, may constitute an originator if it satisfies each of the following conditions at the closing of the relevant securitisation:

   (a) it has a business strategy and the capacity to meet payment obligations consistent with a broader business enterprise and involving material support from capital, assets, fees or other income available to the entity, but disregarding any exposures to be securitised by that entity and any interests retained or proposed to be retained in accordance with this Regulation, as well as any corresponding income from such exposures and interests;

   (b) it has been established and operates for purposes consistent with a broader business enterprise;

   (c) it has sufficient decision makers with the required experience to enable it to pursue the established business strategy, as well as an adequate corporate governance structure.

Article 4

Fulfilment of the retention requirement through a synthetic or contingent form of retention

1. The retention requirement may be fulfilled in a manner equivalent to one of the options set out in Article [6(3)] of Regulation (EU) [XXX/201X] through a synthetic or contingent form of retention where each of the following conditions is met:

   (a) the amount retained is at least equal to the requirement under the option to which the synthetic or contingent form of retention can be equated;

   (b) the retainer has explicitly disclosed in the final offering document or prospectus that it will retain, on an ongoing basis, a material net economic interest in that manner, including details of the synthetic or contingent form of retention, the methodology used in its determination and its equivalence to one of those options.

2. Where an entity other than a credit institution as defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013 acts as a retainer through a synthetic or contingent form of retention, the interest retained on a synthetic or contingent basis shall be fully collateralised in cash and held on a segregated basis as client funds as referred to in Article 16(9) of Directive 2014/65/EU of the European Parliament and of the Council[7].

Article 5

Retention option (a): the retention of not less than 5% of the nominal value of each of the tranches sold or transferred to investors

1. A retention of not less than 5 % of the nominal value of each of the tranches sold or transferred to investors as referred to in point (a) of Article [6(3)] of the Regulation (EU) [XXX/201X] may also be achieved by any one of the following:

   (a) retention of at least 5 % of the nominal value of each of the securitised exposures, provided that the credit risk of such exposures ranks *pari passu* with or is subordinated to the credit risk securitised for the same exposures;

   (b) the provision, in the context of an ABCP programme, of a liquidity facility which may be treated as a senior securitisation position for the purposes of determining capital requirements in accordance with Part Three, Title II, Chapter 5 of Regulation (EU) No 575/2013, where the following conditions are fulfilled:

      (i) the liquidity facility covers 100 % of the share of the credit risk of the securitised exposures that is being funded by the respective ABCP programme;

      (ii) the liquidity facility covers the credit risk for as long as the retainer has to retain the material net economic interest by means of such liquidity facility for the relevant securitisation transaction;

      (iii) the liquidity facility is provided by the originator, sponsor or original lender in the securitisation transaction;

      (iv) the investors becoming exposed to such securitisation have been given access to appropriate information within the initial disclosure to enable them to verify that points (i), (ii) and (iii) are complied with;

   (c) retention of a vertical tranche which has a nominal value of no less than 5 % of the total nominal value of all the tranches sold or transferred to investors.

[7] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

Article 6

Retention option (b): the retention of the originator's interest of not less than 5% of the nominal value of each of the securitised exposures

A retention as referred to in point (b) of Article [6(3)] of Regulation (EU) [XXX/201X] may be achieved by retaining at least 5 % of the nominal value of each of the securitised exposures, provided that the retained credit risk of such exposures ranks pari passu with or is subordinated to the credit risk securitised for the same exposures.

Article 7

Retention option (c): the retention of randomly selected exposures equivalent to not less than 5% of the nominal value of the securitised exposures

1. The pool of at least 100 potentially securitised exposures from which retained and securitised exposures are randomly selected, referred to in point (c) of Article [6(3)] of Regulation (EU) [XXX/201X], shall be sufficiently diverse to avoid any excessive concentration of the retained interest. When carrying out the selection of retained exposures, the retainer shall ensure that the distinction between retained and securitised exposures is genuinely random. This shall not prevent the retainer of randomly selected exposures, when forming the initial pool of exposures from which the selection shall be carried out, to take into consideration, where appropriate, factors such as vintage, product, geography, origination date, maturity date, loan to value ratio, property type, industry sector, and outstanding loan balance.

2. The retainer shall not, except as permitted under Article 12(2), add to the securitisation exposures which had initially been designated as retained exposures, but may designate exposures which had previously been added to the securitisation as retained exposures.

Article 8

Retention option (d): the retention of the first loss tranche

1. The retention of the first loss tranche in accordance with point (d) of Article [6(3)] of Regulation (EU) [XXX/201X] shall be fulfilled by either on-balance sheet or off-balance sheet positions and may also be fulfilled by any of the following:

   (a) provision of a contingent form of retention as referred to in point (a) of Article 1 or of a liquidity facility in the context of an ABCP programme, which fulfils the following criteria:

      (i) it covers at least 5 % of the nominal value of the securitised exposures;

      (ii) it constitutes a first loss position in relation to the securitisation;

      (iii) it covers the credit risk for the entire duration of the retention commitment;

      (iv) it is provided by the originator, sponsor or original lender in the securitisation;

      (v) the investors becoming exposed to such securitisation have been given access within the initial disclosure to appropriate information to enable them to verify that points (i), (ii), (iii) and (iv) are complied with;

(b) overcollateralisation, as referred to in Article 242(9) of Regulation (EU) No 575/2013, if that overcollateralisation acts as a 'first loss' retention of not less than 5 % of the nominal value of the securitised exposures.

2. Where the first loss tranche exceeds 5 % of the nominal value of the securitised exposures, it shall be possible for the retainer to only retain a portion of such first loss tranche, where this portion is equivalent to at least 5 % of the nominal value of the securitised exposures.

3. For the fulfilment of the risk retention requirement at a securitisation scheme level, retainers shall not take into account the existence of underlying transactions in which the originators or original lenders retain a first loss exposure at the transaction-specific level.

Article 9

Retention option (e): the retention of a first loss exposure of not less than 5% of every securitised exposure

1. The retention of a first loss exposure at the level of every securitised exposure in accordance with point (e) of Article [6(3)] of Regulation (EU) [XXX/201X] shall be applied so that the credit risk retained is always subordinated to the credit risk that has been securitised in relation to those same exposures.

2. The retention referred to in paragraph 1 may be fulfilled by the sale at a discounted value of the underlying exposures by the originator or original lender, where each of the following conditions is satisfied:

(a) the amount of the discount is not less than 5 % of the nominal value of each exposure;

(b) the discounted sale amount must be refundable to the originator or original lender if, and only if, such discounted sale amount is not absorbed by losses related to the credit risk associated to the securitised exposures.

Article 10

Measurement of the level of retention

1. When measuring the level of retention of net economic interest, the following criteria shall be applied:

(a) origination shall be considered as the time at which the exposures were first securitised;

(b) the calculation of the level of retention shall be based on nominal values and the acquisition price of assets shall not be taken into account;

(c) excess spread shall not be taken into account when measuring the retainer's net economic interest;

(d) the same retention option and methodology shall be used to calculate the net economic interest during the life of a securitisation transaction, unless exceptional circumstances require a change and that change is not used as a means to reduce the amount of the retained interest.

2. In addition to the criteria set out in paragraph 1, provided that there is no

embedded mechanism by which the retained interest at origination would decline faster than the interest transferred, the fulfilment of the retention requirement shall not be deemed to have been affected by the amortisation of the retention via cash flow allocation or through the allocation of losses, which, in effect, reduce the level of retention over time. A retainer shall not be required to constantly replenish or readjust its retained interest to at least 5 % as losses are realised on its retained exposures or allocated to its retained positions.

Article 11

Measurement of retention for the undrawn amounts of exposures in the form of credit facilities

The calculation of the net economic interest to be retained for credit facilities, including credit cards, shall be based only on amounts already drawn, realised or received and shall be adjusted in accordance with changes to those amounts.

Article 12

Prohibition of hedging or selling the retained interest

1. The obligation in the [first subparagraph] of Article [6(1)] of Regulation [(EU) XXX/201X] that the retained net economic interest shall not be subject to any credit risk mitigation or hedging shall be applied having regard to the purpose of the risk retention requirement and taking account of the economic substance of the transaction. The retainer shall not sell, transfer or otherwise surrender all or part of the rights, benefits or obligations arising from the retained net economic interest. Hedges of the net economic interest shall not be considered to be a hedge for the purposes of the [first subparagraph of Article 6(1) of Regulation (EU) XXX/201X] and may accordingly be permitted only where they do not hedge the retainer against the credit risk of either the retained securitisation positions or the retained exposures.

2. The requirements set out in paragraph 1 shall not prevent the retainer from hedging, selling, transferring or otherwise surrendering such part of the retained interest, if any, which is in excess of the material net economic interest of not less than 5% required to be retained on an ongoing basis pursuant to Article [6] of Regulation (EU) [XXX/201X], as disclosed to investors in the final offering document or prospectus, provided, in each case, that, where applicable, the selection of the relevant part of the retained material net economic interest is made in accordance with the method initially chosen for the retention of a material net economic interest.

3. The retainer may use any retained exposures or securitisation positions as collateral for secured funding purposes, as long as such use does not transfer the credit risk of these retained exposures or securitisation positions to a third party.

Article 13

Exemptions to Article [6(1)] of Regulation (EU) [XXX/201X]

The transactions referred to in Article [6(6)] of Regulation (EU) [XXX/201X] shall include securitisation positions in the correlation trading portfolio which are reference instruments satisfying the criterion in Article 338(1)(b) of Regulation (EU) No 575/2013 or are eligible for inclusion in the correlation trading portfolio.

Article 14

Retention on a consolidated basis

A mixed financial holding company established in the Union within the meaning of Directive 2002/87/EC, a parent institution or a financial holding company established in the Union satisfying, in accordance with Article [6(4)] of Regulation (EU) [XXX/201X], the retention requirement on the basis of its consolidated situation shall, in the case the retainer is no longer included in the scope of supervision on a consolidated basis, ensure that one or more of the remaining entities included in the scope of supervision on a consolidated basis assumes exposure to the securitisation so as to ensure the ongoing fulfilment of the requirement.

Article 15

Initial disclosure of the level of the commitment to maintain a material net economic interest

1. The retainer shall disclose to investors within the final offering document or prospectus at least the following information regarding the level of its commitment to maintain a net economic interest in the securitisation:

   (a) confirmation of the retainer's identity, of whether it retains as originator, sponsor or original lender and, where the retainer is the originator, of how it meets the conditions set out in Article 3(6);

   (b) which of the modalities provided for in points (a), (b), (c), (d) or (e) of Article [6(3)] of Regulation (EU) [XXX/201X] has been applied to retain a material net economic interest;

   (c) confirmation of the level of retention at origination and of the commitment to retain on an on-going basis, which shall relate only to the continuation of fulfilment of the original obligation and shall not require data on the current nominal or market value, or on any impairments or write-downs on the retained interest.

2. Where the exemptions referred to in paragraph [5 or 6] of Article [6] of Regulation (EU) [XXX/201X] apply to a securitisation transaction, the originator, sponsor or original lender shall disclose within the final offering document or prospectus information on the applicable exemption to investors.

3. The disclosure referred to in paragraphs 1 and 2 shall be appropriately documented within the final offering document or prospectus and made publicly available, except in bilateral or private transactions where private disclosure is considered by the parties to be sufficient. The inclusion of a statement on the retention commitment

in the prospectus for the securities issued under the securitisation programme shall be considered an appropriate means of fulfilling the requirement.

Article 16

Assets transferred to the SSPE

1. Originators and sponsors shall have the right to select assets to be transferred to the SSPE that ex-ante have a higher than average credit risk profile compared to the average credit risk profile of assets which, with the exception of their average credit risk profile, are comparable and which remain on the balance sheet of the originator, provided that the higher credit risk profile of the assets transferred to the SSPE is clearly and conspicuously communicated in writing to the competent authorities, investors and potential investors prior to the investment being made.

2. For the purposes of the prohibition in Article [6(2)] of Regulation (EU) [XXX/201X] assets shall be deemed to be comparable if, when carrying out the selection of assets, they share similar characteristics in terms of the most relevant factors determining their expected performance and it could thus reasonably have been expected, on the basis of indications such as past performance or applicable models, that, over the time period set out in Article [6(2)] of Regulation (EU) [XXX/201X], their performance would not be significantly different.

3. Where no communication as set out under paragraph 1 has been made, an originator shall, in the absence of evidence to the contrary, not be considered to have satisfied the intention requirements in Article 6(2) of Regulation (EU) [XXX/201X] and, therefore, shall not be in breach of the prohibition in that paragraph if it proves that it has established and applied policies and procedures to ensure that the securitised assets would reasonably be expected not to lead to higher losses than the losses on comparable assets held on the balance sheet of the originator, provided that the criteria defined in the originator's policies and procedures are appropriate to that end.

Article 17

Change of retainer

Where the retainer is, due to the transfer of a direct or indirect holding in the retainer or for legal reasons beyond its control and beyond the control of its shareholders, unable to continue acting as retainer, the remaining retained material net economic interest shall, instead, be retained by another entity which, had the securitisation been closed as of the date when such entity becomes the retainer, would have satisfied all relevant conditions for constituting the retainer (except, where relevant, for any requirement for the relevant entity to have established the ABCP programme or other securitisation).

Article 18

Entry into force

1. This Regulation shall enter into force on the twentieth day following that of its publication in *the Official Journal of the European Union.*

2. [On and from the date of entry into force of this Regulation, Commission Delegated

Regulation (EU) No 625/2014[8] shall be repealed, with the exception of chapter 1, 2 and 3 and Article 22 of that Regulation, which shall continue to apply in the circumstances set out in Article [43(6)] of Regulation (EU) [XXX/201X]].

3. This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[*For the Commission*
On behalf of the President
[*Position*]]

[8] Commission Delegated Regulation (EU) No 625/2014 of 13 March 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council by way of regulatory technical standards specifying the requirements for investor, sponsor, original lenders and originator institutions relating to exposures to transferred credit risk.

5. Accompanying documents

5.1 Draft cost-benefit analysis / impact assessment

Problem identification

1. The financial crisis has shown that, in securitisation transactions, the following problems could materialise:

   (a) originators, sponsors or original lenders may have had little incentive to adequately screen the credit risk characteristics of the exposures they intended to securitise, given that the credit risk of the securitised exposures was transferred to securitisation investors and credit enhancement providers; and

   (b) some securitisation transactions proved to be particularly opaque concerning the information on the credit risk features of the securitised exposures. Such information was not sufficiently available and accessible to investors.

2. Misaligned incentives and the lack of information and transparency in some securitisation transactions contributed to excessive risk-taking in parts of the securitisation industry and to a broad lack of confidence in securitisation transactions. These outcomes not only led to losses and to the drying up of liquidity and funding in the securitisation markets, but also contributed to the overall freezing of the interbank markets.

3. Articles 405-409 of Regulation (EU) No 575/2013 established requirements on both investor institutions and sponsor or originator institutions engaging in securitisation transactions. An institution becoming exposed to the credit risk of a securitisation was required to ensure that the originator, sponsor or original lender retained a material net economic interest in the securitisation transaction, according to specific criteria, and was under an obligation to apply due diligence before entering the transaction and thereafter. Sponsor and originator institutions were required to apply the same sound credit-granting criteria to the loans they intended to securitise as they did to loans not to be securitised and to disclose to investors all relevant information on the retention of net economic interest in the transaction, as well as on the risk characteristics of the securitised exposures. Additional risk-weights were established for those institutions assuming exposure to a securitisation that did not comply with the mentioned requirements and for originators, sponsors or original lenders that did not comply with their disclosure requirements.

4. These provisions addressed the fundamental problem of the possible misalignment of interests and incentives in securitisation transactions between the investors, on the one hand, and the originator, sponsor or original lender, on the other. Diverging interests among the parties of a

financial contract can lead to moral hazard behaviour when certain information on relevant features of the contract is only available to one party, but not to other parties (i.e., there is an asymmetry of information). Moral hazard occurs when the party that has more or better information takes on excessive risk knowing that the other party in the transaction will bear the costs of those risks without being equally informed about such risks.

5. By ensuring more aligned interests (through the retention requirements and the criteria for credit granting) and by increasing transparency, availability and the use of information (disclosure and due diligence requirements), Articles 405-409 of Regulation (EU) No 575/2013 aimed at restoring confidence in securitisation markets and contributed to the realisation of the general regulatory objective of enhanced financial stability.

6. Article 410 of Regulation (EU) No 575/2013 mandated the EBA to develop draft regulatory technical standards to specify in greater detail, amongst other things, the retention requirement set out in Article 405. Based on the draft submitted by the EBA, the Commission adopted Commission Delegated Regulation (EU) No 625/2014.

7. Following the adoption of Commission Delegated Regulation (EU) No 625/2014, the STS Regulation was enacted. The Regulation laid down a general framework for securitisation. The Regulation defined securitisation and established due diligence, risk retention and transparency requirements for parties involved in securitisations and, furthermore, provided a framework for simple, transparent and standardised securitisation.

Problem definition and objectives of the RTS

8. Article [6] of the STS Regulation sets out the requirements for risk retention. Those requirements are broadly consistent with those set out in Article 405 of Regulation (EU) No 575/2013, however the mandate for the RTS is narrower than the mandate which had be foreseen in Article 410 of Regulation (EU) No 575/2013.

9. Thus, pursuant to Article [6] of the STS Regulation, the EBA is mandated to develop draft regulatory technical standards to specify in greater detail the risk retention requirement, in particular with regards to:

   (a) the modalities of retaining risk pursuant to paragraph 3 of Article [6] of the Regulation, including the fulfilment through a synthetic or contingent form of retention;

   (b) the measurement of the level of retention referred to in paragraph [1] of Article [6] of the Regulation;

   (c) the prohibition of hedging or selling the retained interest;

   (d) the conditions for retention on a consolidated basis in accordance with paragraph [4] of Article [6] of the Regulation; and

(e) the conditions for exempting transactions based on a clear, transparent and accessible index referred to in paragraph [6] of Article [6] of the Regulation.

10. Taking into account the ambit of the mandate in the STS Regulation and the existing Commission Delegated Regulation (EU) No 625/2014, the proposed technical standards should ensure that, unless deviations appear to be necessary in light of the new provisions of the STS Regulation or otherwise, the existing rules should be carried over into the new technical standards. Furthermore, potential instances of lack of legal clarity affecting securitisation transactions within a few specific segments of securitisation business should be solved within the flexibility which is appropriate for directly applicable technical standards.

Cost-Benefit Analysis

11. Taking into account the foregoing, the new technical standards have largely replicated many of the existing provisions in the STS Regulation. However, taking into account the scope of the mandate set out for EBA in Article [6] of the STS Regulation, as well as the mandates set out in that Regulation for ESMA, a number of provisions in Commission Delegated Regulation (EU) No 625/2014 were not reflected in the new technical standards. Such provisions include Chapter IV (*Due diligence requirements for institutions becoming exposed to a securitisation position*), Article 21 (*Policies for credit granting*) and Article 23 (*Disclosure of materially relevant date*) of Commission Delegated Regulation (EU) No 625/2014.

12. In addition, the new technical standards aim to clarify certain matters which were not sufficiently addressed in the existing regulation, as well as to deal with certain new provisions in the STS Regulation. The provisions in the Regulatory Technical Standards which are new compared to Commission Delegated Regulation (EU) No 625/2014 relate, in particular, to the circumstances when an entity shall be deemed not to have been established or to operate for the sole purpose of securitising exposures, the prohibition on adverse selection set out in Article [6(2)] of the STS Regulation and the change of the retainer.

13. Against this background, the proposed technical standards are not expected to involve any material costs for supervisors and institutions or to have a material impact on transactions that are currently being structured or carried out within the most relevant segments of active securitisation markets, given the following considerations:

(a) most of the provisions proposed in the draft technical standards have already been implemented (at least in part) pursuant to Commission Delegated Regulation (EU) No 625/2014; and

(b) the changes brought about by the new technical standards are either meant to address discrete issues in the market or to reflect the changes brought about by the STS Regulation which, in the area of risk retention, do not constitute a major overhaul of the pre-existing regulatory framework.

5.2 Overview of questions for consultation

Question 1: Do you have any general comments on the draft technical standards?

Question 2: Considering the mandate granted to ESMA in Article [7(3)] of the STS Regulation, do you believe that these technical standards should include disclosure-related provisions relevant to risk retention and, if so, do you agree with the scope of the obligations set out in the draft technical standards?

Question 3: Do you believe that the provisions in Article 11 of the draft technical standards (relating to the measurement of retention for the undrawn amounts in exposures in the form of credit facilities) are needed?

Question 4: Do you consider the provisions of Article 12(3) of the draft technical standards to be useful and how would you see such a transaction working in practice, including following a default by the retainer under the secured funding arrangements?

Question 5: Do you believe that the provisions of Article 16 of the draft technical standards relations to assets transferred to the SSPE are adequate?

Question 6: Do you consider that the provisions of Article 17 of the draft technical standards relating to a change of retainer are adequate?

Question 7: Should the draft technical standards contain any additional guidance on the operation of Article 14 of Regulation (EU) No 575/2013?

Question 8: Do you consider that wording similar to that which is set out in Article 5(1)(a) of Commission Delegated Regulation (EU) No 625/2014 relating to revolving securitisations should be maintained in these technical standards?

Question 9: Do you consider that guidance is required on what constitutes a significantly lower performance for the purposes of Article [6(2)] of the STS Regulation and, if so, what would you propose?