EBA Consultation Paper on the Draft Guidelines on on the STS criteria for non-ABCP securitisation
This document provides the response of the Dutch Securitisation Association ("DSA") on the EBA Consultation Paper dated 20 April 2018.
We welcome the opportunity to commend on this Consultation Paper.

DSA Background
The Dutch Securitisation Association was established in 2012 as representative body of the Dutch securitisation industry. Our membership includes issuers of securitisations both from the insurance and banking industry, and we are operating in close cooperation with the Dutch investor community.
Our purpose is to create a healthy and well-functioning Dutch securitisation market.
We try to achieve this i.a. by providing a standard for documentation and reporting of Dutch RMBS and Consumer ABS transactions, promoting (in close cooperation with PCS) further standardisation and improvements in transparency, and active involvement in consultations about future regulation of the securitisation market.
Against this background, we would like to commend, on behalf of all Dutch issuers joined in the DSA, on the EBA Consultation Paper on the Draft Guidelines on the non-ABCP STS criteria (individual DSA members may also provide their own comments).

Our comments:

Requirements related to simplicity

True sale, assignment or transfer with the same legal effect (Article 20(1), 20(2), 20(3), 20(4) and 20(5))

Q1. Do you agree with the interpretation of these criteria, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 10: We have serious concerns about the requirement to provide legal opinions, given the sensitivity and confidentiality of such opinions. Rather we would like to see the content as suggested in Par. 10 be covered in the representations and warranties. Especially commingling risk and set-off risk are usually not covered by true sale opinions.
Par. 11(b): Perfection (at a later stage) is not a legal concept in all jurisdictions. Further clarification would be helpful.
Par. 13: Please clarify how and to whom the accessibility and availability of the legal opinion should be arranged: at request, on a (pass-word protected) website, to which third parties ? If other than "third party certification agents and competent authorities" should get access, we would prefer to see a limited list. Alternatively, can we use the "confidentiality reasons" to limit the availability of the opinion outside the group of third party certification agents and competent authorities ?
Par. 15: We note that "seller's insolvency" or "insolvency of the seller" or "insolvent" appear in Article 20(1), (2) and (5), 20(11), 21(6) and 21(7), but is only interpreted for the purpose of Article 20(5).
We would prefer to have one interpretation of insolvency to apply to all STS criteria.
Other comments: Please add "material" between "unremedied" and "breaches".

Q2. Do you agree with the clarification of the conditions to be applicable in case of use of methods of transfer of the underlying exposures to the SSPE other than the true sale or assignment? Should examples of such methods of such transfer be specified further?
Par. 11(a): We do agree with the clarification; examples are not needed.

Q3. Do you believe that in addition to the guidance provided, additional guidance should be provided on the application of Article 20(2)? If yes, please provide suggestions of such severe clawback provisions to be included in the guidance.
We do believe that the provided guidance is sufficient and that there are no additional severe clawback provisions to be added.

Q4. With respect to the interpretation of the criterion in Article 20(5), should the severe deterioration in the seller credit quality standing, and the measures identifying such severe deterioration, be further specified in the guidelines? Do you believe that the interpretation should refer to the state of technical insolvency (i.e. state where based on the balance sheet considerations the seller reaches negative net asset value with its the liabilities being greater than its assets, without taking into account cash flows or events of legal insolvency), and if yes, should it be specified whether it should or should not be considered as the trigger effecting perfection of transfer of underlying exposures to SSPE at a later stage?
Par. 12: No further specification is needed; technical insolvency without legal insolvency (or resolution) may not necessarily have to trigger perfection in our view, so we prefer the interpretation as provided.

Representations and warranties (Article 20(6))

Q5. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 16: We do agree, although we note that the original lender may not always be (any longer) in a position to provide these representations and warranties.

Eligibility criteria for the underlying exposures/active portfolio management (Article 20(7))

Q6. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 18: Can you confirm that further advances are included in Par. 18(b) or add them to Par. 18 ?
Par. 21: Since this Article only requires a confirmation and a cross-reference to the Prospectus (according to the ESMA RTS/ITS on the STS notification), it seems to be relevant that the eligibility criteria are specified in the Prospectus (rather than specification in the transaction documentation, which is not cross-referenced).

Q7. Do you agree with the techniques of portfolio management that are allowed and disallowed, under the requirement of the active portfolio management? Should other techniques be included or excluded?
Par. 19: There are many types of sale outside the ones mentioned under Par. 18 that nevertheless are not intended to actively manage a portfolio (sale for redemption of the notes, sale to facilitate the recovery process etc.). So we propose to delete Par. 19(b).

Homogeneity, obligations of the underlying exposures, periodic payment streams, no transferable securities (Article 20(8))

Q8. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 24: We do agree, but would appreciate if you could indicate that the exposures you mention in Par. 24 are examples and not an exhaustive list.

Q9. Do you believe that additional guidance should be provided in these guidelines with respect to the homogeneity requirement, in addition to the requirements specified in the Delegated Regulation (EU) 2018/.... further specifying which underlying exposures are deemed homogeneous?
As we have indicated in our response (like on Q8) on the Consultation on this Delegated Regulation, there remains a lack of clarity on how the definitions will work out for mixed pools of interest only and amortising (mortgage) loans. We would appreciate if the guidelines could list some more specific examples of homogeneous pools, including mixed pools of interest only and amortising mortgage loans.

Underwriting standards, originator's expertise (Article 20(10))

Q10. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 28(a): We do not understand the rationale for looking back at changes in past underwriting standards. Investors prefer to see different vintages of exposures in one pool in order to mitigate the impact of economic cycles and the resulting (countercyclical) changes in underwriting standards.
Other comments: We need more guidance on how "any material changes from prior underwriting standards shall be fully disclosed to potential investors without undue delay": how should this be disclosed (in investor reports ?), what is undue delay (in the next Investor Report ?) and especially how do we determine who is a potential investor ?

Q11. Do you agree with this balanced approach to the determination of the expertise of the originator or original lender? Do you believe that more rule-based set of requirements should be specified, or, instead, more principles-based criteria should be provided? Is the requirement of minimum of 5 years of professional experience appropriate and exercisable in practice?
Par. 37: We do agree with the principles-based approach and, more specifically, the principles as described in Par. 37.
With regard to Par. 37(d), can you please confirm that this implies that if an originator holds a proper license from a competent authority it meets the requirement of having expertise ?
Can you please confirm that if the origination is outsourced to a sufficiently experienced (according to Par. 37) third party, this criterion is also met ?
Par. 38: We are somewhat surprised by the 5 year requirement in Par. 38, especially where the level 1 text does not refer to time periods. In practice it will be very unlikely that 2 members of the management body and all senior staff responsible for the origination of an entity will have at least 5 years of experience with similar exposures.
Well run organisations typically build their senior teams around people with different backgrounds and not just (f.i.) mortgage originators, so this requirement increases the entry barrier for new entrants.

Q12. Should alternative interpretation of the "similar exposures" be provided, such as, for example, referencing the eligibility criteria (per Article 20(7)) that are applied to select the underlying exposures? Similar exposure under Article 20(10) could thus be defined as an exposure that would qualify for the portfolio, based on the exposure level eligibility criteria (not portfolio level criteria) which has not been selected for the pool and which was originated at the time of the securitised exposure (e.g. an exposure that has repaid / prepaid by the time of securitisation). Similar interpretation could be used for the term "exposures of a similar nature" under Article 20(10), and "substantially similar exposures" under Article 22(1). The eligibility criteria considered should take into account the timing of the comparison. Please provide explanations which approach would be more appropriate in providing clear and objectively determined interpretation of the "similarity" of exposures.
Par. 25: For the purpose of comparing underwriting criteria it is better to look at asset categories. Eligibility criteria are not taken into account when exposures are underwritten and are reflective of a mix of factors (investor appetite, funding needs) that are not always directly related to underwriting.

No exposures in default and to credit-impaired debtors/guarantors (Article 20(11))

Q13. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 40: The interpretation creates a problem for legacy transactions, since it looks back to "at the time of selection" and legacy transactions may have used different default definitions and other criteria at the time of selection.
Par. 47 and Par. 49: The terminology "at the origination of the securitisation" is confusing. Can you please confirm that this refers to "at the time of origination of the exposures", since credit checks are performed at the time of origination of the exposure and it is impossible to do a credit check for all exposures at the time of selection for a securitisation.
Par. 50: We would appreciate some more guidance on what determines a "significantly higher than the average credit score".

Q14. Do you agree with the interpretation of the criterion with respect to exposures to a credit impaired debtor or guarantor?
Par. 42: Reporting as per Article 20(11)(a)(ii) of "time and details of the restructuring as well as their performance since the date of restructuring" will have to be within the infrastructure of the Loan Level Data requirements (Article 7(1)(a)) and in aggregated format in the Investor Report (Article 7(1)(e)(i)).
Par. 43: "neither the debtor nor the guarantor" is very restrictive. This way, the availability of a guarantee as additional security, would become an additional risk of not getting STS status. This cannot be the intention, so please replace this by "either the debtor or the guarantor".

Q15. Do you agree with the interpretation of the requirement with respect to the exposures to credit impaired debtors or guarantors that have undergone a debt-restructuring process?
Par. 44 and Par. 45: For the avoidance of doubt, can you please confirm that not all potential sources of information have to be checked at origination of an exposure ?
Par. 46: The reference to all exposures of an obligor rather than the restructured exposure for determining credit impairedness, is not in line with market practice and very detrimental to debtors, and especially retail and SME debtors.

At least one payment made (Article 20(12))

Q16. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 51: We would like to see an exception for "ramp-up" or "warehousing" structures, where it is not really possible to meet this requirement.

No predominant dependence on the sale of assets (Article 20(13))

Q17. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 54: While Par. 47 of the Background and rationale states that "this criterion should not aim to exclude ….interest only residential mortgages from STS securitisation", we do not see this reflected explicitly in the guidelines.
In our view, (Dutch) interest only residential mortgage loans fall outside the scope of Article 20(13) since:
-the contractual terms do not provide for a sale of the mortgaged asset for the redemption of the loan;
-only in case the debtor cannot repay its debt (from refinancing, own resources etc.) the mortgage asset will be foreclosed;
-the mortgaged receivables are securitised, not the mortgaged asset, so there is no "residual value", but only a residual claim.
We would appreciate if this could be conformed in the guidelines.

Q18. Do you agree with the interpretation of the predominant dependence with reference to 30% of total initial exposure value of securitisation positions? Should different percentage be set dependent on different asset category securitised?
Par. 53: A fixed percentage for all asset classes does not reflect the different nature of the asset classes and especially not the different maturity profiles of asset classes.
So we would be in favor of more differentiation in asset classes.

Requirements related to standardisation

Appropriate mitigation of interest-rate and currency risks (Article 21(2))

Q19. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 56: Can you give further guidance on "not unusually limited", and especially what determines a "major share" and "relevant scenarios"?
Par. 57(e): We would appreciate more elaboration on the "concise sensitivity analysis". What are the required scenarios?
Par. 58: Hedging multiple risks with one measure can be beneficial to the investor if not all the risks fully materialise and as long as the measure is large enough to cover the sum of the potential risks.
Par. 59: Can you please indicate how and to whom information/reasoning should be disclosed on a continuous basis ? Can this be done in the Investor Report ?

Referenced interest payments (Article 21(3))

Q20. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
We do agree.

Requirements in case of enforcement or delivery of an acceleration notice (Article 21(4))

Q21. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 69: Instead of "a seller's default", we would prefer reference to "an unremedied and unwaived seller's default", since a simple seller's default will not always lead to enforcement or acceleration.
Principal payments will not exclusively be used to repay investors when there are obligations ranking higher in the waterfall (taxes, corporate services).
The reference to Article 20(12) does not seem to be correct. Should it be Article 20(7) ?

Non-sequential priority of payments (Article 21(5))

Q22. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 71: So we understand that for a confirmation (triggers yes/no) as indicated in the ESMA draft of the STS Notification, it will not be required to indicate which triggers (which "may include" the triggers described in the Guidelines) will be applied ?

Early amortisation provisions/triggers for termination of the revolving period (Article 21(6))

Q23. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 72: An insolvency-related event with the servicer should not automatically trigger a replacement of the servicer.

Transaction documentation (Article 21(7))

Q24. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 73: This paragraph is confusing and can better be deleted.

Expertise of the servicer (Article 21(8))

Q25. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 77: For "exposures of a similar nature" we refer to our comments on Q12 (Par. 25)
Par. 78: We would appreciate to receive more guidance on the proof (of well documented and adequate policies, procedures and risk management controls) to be "substantiated by a third-party review"; who could be a third party, what should the review exactly cover ?

Q26. Do you agree with this balanced approach to the determination of the expertise of the servicer? Do you believe that more rule-based set of requirements should be specified, or, instead, more principles-based criteria should be provided? Is the requirement of minimum of 5 years of professional experience appropriate and exercisable in practice?
Par. 74: We do agree with the principles-based approach and, more specifically, the principles as described in Par. 74.
With regard to Par. 74(d), can you please confirm that this implies that if a servicer holds a proper license from a competent authority it meets the requirement of having expertise ?
Can you please confirm that if the servicing is outsourced to a sufficiently experienced (according to Par. 74) third party, this criterion is also met ?
The references to origination, originating and underwriting should be replaced by references to servicing.
Par. 75: We are somewhat surprised by the 5 year requirement in Par. 75, especially where the level 1 text does not refer to time periods. In practice it will be very unlikely that 2 members of the management body and all senior staff responsible for the servicing of an entity will have at least 5 years of experience with similar exposures.
Well run organisations typically build their senior teams around people with different backgrounds and not just (f.i.) mortgage servicers, so this requirement increases the entry barrier for new entrants.
And the reference to Par. 7(a) in Par. 75(b)(iii) does not seem to be correct. Should it be Par. 75(a) ?

Remedies and actions related to delinquency and default of debtor (Article 21(9))

Q27. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 79: We do agree that this confirmation is required, but wonder whether a simple yes/no will be sufficient or that more explanation may sometimes be needed.
Would it be sufficient to provide a generic description or summary?
Remedies and actions can be very client specific and it might be difficult to specify these in advance.

Resolution of conflicts between different classes of investors (Article 21(10))

Q28. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
We would appreciate further clarification of the terms "fiduciary duties" and "clearly identified".

Requirements related to transparency

Data on historical default and loss performance (Article 22(1))

Q29. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
We do agree.

Verification of a sample of the underlying exposures (Article 22(2))

Q30. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 85: The pool audit does not cover the eligibility criteria, so Par. 85(a) should be deleted.
Ineligible exposures will be bought back by the seller, based on the representations and warranties.
Par. 86: This confirmation should be provided in the Prospectus.

Liability cash flow model (Article 22(3)

Q31. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 87: This raises the question what are "potential investors" and who determines that a party is getting this status. Is it allowed to have this information in a pass-word protected environment ?

Environmental performance of assets (Article 22(4))

Q32. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 89: It is not completely clear whether the information should be disclosed to the extent available (it is often not available for more seasoned exposures) or only if available for all exposures.
Can you clarify whether "energy performance certificates" are within the meaning of EU Directive 2010/31 ?

Q33. Please provide further details and suggestions what type of information is available for residential loans and auto loans and leases, that could be provided under this requirement.
Par. 89: For residential loans, additional sources are currently under development in several European initiatives.

Compliance with transparency requirements (Article 22(5))

Q34. Do you agree with the interpretation of this criterion, and the aspects that the interpretation is focused on? Should interpretation be amended, further clarified or additional aspects be covered? Please substantiate your reasoning.
Par. 90: In this context we would like to mention our general concerns about the lack of clarity to whom (who qualifies as "potential investor" ?), where (Documentation, Prospectus, Investor Report, (password protected) website) and with what frequency information has to be disclosed.
Please see also our comments on Q6, Q10, Q15, Q19 and Q30.
For this specific question, we wonder how to interpret providing information "upon request" (what procedure will apply for a request ?) to "potential investors" (again, how to identify them ?) as required by Article 7(1).
It would also help if you could clarify the meaning of making the Loan Level Data and Investor Report available "simultaneously each quarter".

Non-specified Articles of the Regulation (EU) 2017/2402

Q35. Do you agree that no other requirements are necessary to be specified further? If not, please provide reference to the relevant provisions of the STS Regulation and their aspects that require such further specification.
We do agree.