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Sent by email to: Roxana.damianov@esma.europa.eu

7 November 2018

Dear Ms Damianov,

EU Securitisation Regulation – Proposed ESMA Q&A

The Alternative Investment Management Association Limited (AIMA)[1] and the Alternative Credit Council (ACC)[2] have been working with their members to understand the obligations for asset managers under Regulation (EU) 2017/2402 (the 'Securitisation Regulation'). Following discussion with members, we have found that the intended scope of the requirements is a source of uncertainty for our members and other market participants. It is our view that a clarification of the application of the institutional investor definition will help promote a successful and sustainable securitisation market by removing this uncertainty.

To this end, AIMA and the ACC respectfully request that the European Securities and Markets Authority (ESMA) publish a Q&A to clarify the application of the 'Institutional investor' definition within the Securitisation Regulation for non-EU Alternative Investment Fund Managers ('Non-EU AIFMs').

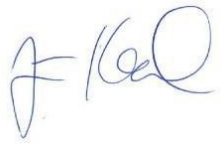
We have prepared a Q&A for ESMA's consideration (Annex 1) that we believe will provide clarity for our members in a manner that is consistent with the policy objectives of the Securitisation Regulation. We have also included in Annex 2 an explanatory note that provides further detail on this issue, and the uncertainty this causes for our members.

[1] AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA works closely with its members to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes, and sound practice guides. Providing an extensive global network for its members, AIMA's primary membership is drawn from the alternative investment industry whose managers pursue a wide range of sophisticated asset management strategies. AIMA's manager members collectively manage more than $2 trillion in assets.

[2] ACC, the Alternative Credit Council, is a group of senior representatives of alternative asset management firms and was established in late 2014 to provide general direction to AIMA's executive on developments and trends in the alternative credit market with a view to securing a sustainable future for this increasingly important sector. Its main activities comprise of thought leadership, research, education, high–level advocacy and policy guidance.

We would be pleased to discuss this matter further with you or your colleagues or provide any additional information you may require.

Yours sincerely,



Jiří Król
Deputy CEO
Global Head of Government Affairs

Annex 1 – Proposed Q&A

Question

The definition of "institutional investor" as set out in Article 2(12) of Regulation (EU) No 2017/2402 (the Securitisation Regulation) includes 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*". Does this reference to AIFMs cover only those AIFMs that are authorised in accordance with Directive 2011/61/EU (the "AIFMD") and which manage and/or market alternative investment funds in the Union, or is it also intended to cover third country AIFMs that manage and/or market AIFs in the Union but are not authorised in accordance with the AIFMD?

Answer

The reference to 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*" in Article 2(12) of the Securitisation Regulation should be understood to cover only an AIFM that is authorised in accordance with the AIFMD and which manages and/or markets alternative investment funds in the Union. Third country AIFMs that manage and/or market alternative investment funds in the Union, but which are not authorised in accordance with the AIFMD, should not be considered as institutional investors.

Annex 2 – Explanatory note

A. Introduction

Article 5 of the Regulation (EU) 2017/2402 (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*".

B. Executive Summary

The portion of the definition of "institutional investor" in Article 2(12)(d) of the Securitisation Regulation should be understood to mean only AIFMs that are *authorised* in accordance with Directive 2011/61/EU (the "**AIFMD**") and not also third country AIFMs that manage EU AIFs (in member states where AIFMD authorisation is not required for such activity) or third country AIFMs that market AIFs in the EU under Article 42 of the AIFMD (together, "**Third Country AIFMs**").

This view is supported by considerations related to the scope of the AIFMD, principles of legislative interpretation, and evidence of the policy intent of the Securitisation Regulation.

In particular:

Scope of the AIFMD

- **Reason 1.** The Securitisation Regulation implies clearly that the AIFMs within its scope are those which are currently subject to Article 17 of the AIFMD, which applies only to AIFMs *authorised* under the AIFMD. Third country AIFMs are not subject to Article 17 of the AIFMD.

- **Reason 2.** Article 17 of the AIFMD, once amended by the Securitisation Regulation, will complement and reflect the due diligence requirements set out in Article 5 of the Securitisation Regulation by placing an obligation on AIFMs to consider taking remedial action in respect of non-compliant securitisations to which their AIFs are exposed. However, as set out above, Article 17 only applies to AIFMs authorised under the AIFMD. The intention cannot have been to apply the Article 5 due diligence requirements to both authorised AIFMs and Third Country AIFMs, but the Article 17 obligation regarding remedial action only to authorised AIFMs. Therefore, Article 5 of the Securitisation Regulation was not intended to apply to Third Country AIFMs.

- **Reason 3.** The Securitisation Regulation does not provide for a competent authority to supervise compliance of Third Country AIFMs with Article 17 of the AIFMD or Article 5 of the Securitisation Regulation, further making clear that these provisions are not intended to apply to Third Country AIFMs.

Legislative Interpretation

- **Reason 4**. As a matter of EU legislative interpretation, as applied to the definition of an "institutional investor", the definition should only be interpreted as including AIFMs *authorised* under the AIFMD, which would exclude Third Country AIFMs.

- **Reason 5**. The reference to "and/or markets" in the definition of "institutional investor" as it relates to AIFMs points to the extension of the definition to Third Country AIFMs only upon the activation of Article 37 of the AIFMD.

Policy Intention

- **Reason 6.** At no stage in the legislative process was there any stated intention to widen the scope of the existing rules on risk retention so that they should apply to Third Country AIFMs. Any such intention 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 Third Country AIFMs.

C. Detailed Explanation

Scope of the AIFMD

Reason 1

The relationship between Article 17 (*Investment in securitisation positions*) of the AIFMD and the transitional provisions of the Securitisation Regulation make clear that the reference to "AIFMs" in the definition of "institutional investor" in the Securitisation Regulation should be read as referring solely to AIFMs authorised under the AIFMD and not also to Third Country AIFMs. In this regard it is noted that:

(i) in respect of securitisations the securities of which are issued before 1 January 2019, the transitional provisions in Article 43(6) of the Securitisation Regulation provide that:

> "*alternative investment fund managers (AIFMs) as defined in point (b) of Article 4(1) of Directive 2011/61/EU* ***shall continue to apply*** *… Article 51 of Delegated Regulation (EU) No 231/2013*"; (Emphasis added)

and

(ii) Article 41 of the Securitisation Regulation provides that Article 17 of the AIFMD is replaced with the following text:

> "*Where AIFMs are exposed to a securitisation that no longer meets the requirements provided for in Regulation (EU) 2017/2402 of the European Parliament and of the Council, they shall, in the best interest of the investors in the relevant AIFs, act and take corrective action, if appropriate*".

It is clear from the bold text emphasised under sub-paragraph (i) above that AIFMs within scope of the Securitisation Regulation "***shall continue***" to apply Article 51 of Delegated Regulation (EU) No 231/2013 in respect of securitisations the securities of which are issued before 1 January 2019. However, Article 17 of the AIFMD and Article 51 of Delegated Regulation (EU) No 231/2013, which derives from Article 17 of the AIFMD, only applies to AIFMs *authorised* under the AIFMD and not to Third Country AIFMs. In particular, Article 42 of the AIFMD makes clear that the only provisions of the AIFMD that apply to third country AIFMs marketing AIFs under the private placement regime are Articles 22-24 and 26-30 of the AIFMD.[3] Therefore, it follows that the AIFMs within scope of the Securitisation Regulation are only those which are currently subject to Article 17 of the AIFMD and Article 51 of Delegated Regulation (EU) No 231/2013, *i.e.* AIFMs which are authorised under the AIFMD and not Third Country AIFMs.

Reason 2

As set out above, Article 41 of the Securitisation Regulation will replace Article 17 of the AIFMD. The amended version of Article 17 of the AIFMD complements the due diligence and ongoing monitoring requirements set out in Article 5 of the Securitisation Regulation[4], in that it will require AIFMs to consider taking corrective action in respect of securitisation positions which are identified as no longer meeting the risk retention criteria stipulated in the Securitisation Regulation.

It is clear that Article 17, both currently and post-amendment, will not apply to Third Country AIFMs. It cannot be the case that the co-legislators intended for Third Country AIFMs to be subject to the due diligence requirements of Article 5 of the Securitisation Regulation but, at the same time, not to be subject to the obligation to consider corrective action where such diligence and monitoring identifies that securitisations to which their AIFs are exposed are non-compliant. In fact, there is little purpose in meeting the ongoing monitoring and stress testing requirements under Article 5 of the Securitisation, if this is not coupled with the Article 17 requirement to consider corrective action in the event that the securitisation in question does not meet the relevant requirements.

Therefore, it follows that "institutional investors", to which the Article 5 due diligence requirements apply, do not include Third Country AIFMs.

Reason 3

[3] There is a possibility that certain Member States may have gold-plated the minimum requirements stipulated under Article 42 of the AIFMD so as to include Article 17. However, the key point is that the AIFMD does not require Article 17 to apply to third country AIFMs under the National Private Placement Regimes and in practice this is rarely, if ever, the case.

[4] This is further demonstrated by Article 54 of Delegated Regulation (EU) No 231/2013, which sets out the current obligation on authorised AIFMs to consider taking corrective action with regard to non-compliant securitisation positions. This obligation clearly goes hand-in-hand with the provisions of that Delegated Regulation which set out the existing requirements on securitisations which authorised AIFMs must verify are met, including the 5% risk retention requirement. Please see Articles 51-54 of Delegated Regulation (EU) No 231/2013.

The only sanctions and remedial measures that can be imposed on institutional investors for a breach of Article 5 of the Securitisation Regulation are those imposed by competent authorities under Article 29 of the Securitisation Regulation;[5] there is no other mechanism set out in the Securitisation Regulation for the imposition of such sanctions and remedial measures.

Article 29 (*Designation of competent authorities*) of the Securitisation Regulation provides that the competent authority for purposes of supervising the compliance by institutional investors with Article 5 of the Securitisation Regulation is, in the case of AIFMs, "the competent authority responsible designated in accordance with Article 44 of Directive 2011/61/EU."

Pursuant to Article 42 of the AIFMD, the competent authorities for a third country AIFM marketing its AIFs under the AIFMD national private placement regime are the competent authorities of the Member States where the AIFs are marketed. However, as noted above, those competent authorities only supervise the third country AIFM's compliance with Articles 22-24 and 26-30 of the AIFMD, and not to other Articles of the AIFMD, including Article 17 of the AIFMD.

As for third country AIFMs that manage EU AIFs without a local requirement for authorisation, such AIFMs are by definition not supervised by the competent authority in the EU AIF's domicile.

Accordingly, there is no competent authority to supervise compliance by a Third Country AIFM with Article 17 of the AIFMD (both as drafted in the original AIFMD and as amended by Article 41 of the Securitisation Regulation), and thus with Article 5 of the Securitisation Regulation.

Legislative Interpretation

Reason 4

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

[5] Sanctions and remedial measures for originators, sponsors, original lenders and SSPEs are set out in Article 32 (*Administrative sanctions and remedial measures*) of the Securitisation Regulation.

"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, and compliance with Articles 22-24 and 26-30 in the case of third country AIFMs marketing AIFs under Article 42 of the AIFMD.

Reason 5

The reference in the Securitisation Regulation to AIFMs that "market" AIFs in the Union should be understood to refer to third country AIFMs authorised under Article 37 of the AIFMD, if / when that article becomes applicable in all Member States, and not to Third Country AIFMs currently marketing AIFs in the Union pursuant to Article 42 of the AIFMD.

As noted above, Article 2(12)(d) of the Securitisation Regulation defines "institutional investor" to mean, in relation to the AIFMs, an AIFM:

> "… that manages ***and/or markets*** alternative investment funds in the Union". (Emphasis added)

Article 2 (*Scope*) of the AIFMD provides that the AIFMD shall apply to:

"(a) EU AIFMs which ***manage*** one or more AIFs irrespective of whether such AIFs are EU AIFs or non-EU AIFs;
(b) non-EU AIFMs which ***manage*** one or more EU AIFs; and
(c) non-EU AIFMs which ***market*** one or more AIFs in the Union irrespective of whether such AIFs are EU AIFs or non-EU AIFs." (Emphasis added)

As applied to third country AIFMs, until Article 37 of the AIFMD applies in EU Member States:

- third country AIFMs that *manage* one or more EU AIFs (but do not market such AIFs in the Union) are not subject to any authorisation or other requirements under the AIFMD; and
- third country AIFMs that *market* AIFs in the Union are regulated only to the extent set out in Article 42 of the AIFMD (as discussed above), but not otherwise (and in particular, not in relation to Article 17 of the AIFMD).

That is, it is only when third country AIFMs become authorised under Article 37 of the AIFMD that such third country AIFMs would be fully regulated under the AIFMD.

Article 37(1) of the AIFMD provides:

> "*Member States shall require that non-EU AIFMs intending to manage EU AIFs* ***and/or to market AIFs*** *managed by them in the Union in accordance with Article 39 or 40 acquire prior*

authorisation by the competent authorities of their Member State of reference in accordance with this Article." (Emphasis added) [6]

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 all Member States, the reference to "institutional investor" could accommodate such third country 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 third country AIFMs, being those that manage EU AIFs and/or market AIFs into the Union, but only when Article 37 of the AIFMD is activated. However, the definition of "institutional investor" is not intended to capture third country AIFMs marketing AIFs into the Union under Article 42 of the AIFMD, which is the only provision that currently applies to third country AIFMs.

Policy Intention

Reason 6

The Explanatory Memorandum in the Commission Proposal for the Securitisation Regulation[7] (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. 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)

[6] The reference to third country AIFMs that "manage and/or market" AIFs is also found throughout the Recitals – see Recitals (4), (15), (18), (19), (65), (66), (84), (85) and (88).

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0472&from=EN.

At no stage in the legislative process was there any stated intention to widen the scope of the existing rules on risk retention so that they should apply to Third Country AIFMs. Any such intention 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 Third Country 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:[8]

> "***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.*"

As noted above, the AIFMD was amended solely in respect of Article 17, which applies only to authorised AIFMs, and not to Third Country AIFMs.

D. Conclusion

In conclusion, the due diligence requirements in Article 5 of the Securitisation Regulation apply only in respect of AIFMs authorised in accordance with the AIFMD that manage and/or market AIFs in the EU, and do not apply to third country AIFMs that manage and/or market AIFs in the EU, but which are not authorised in accordance with the AIFMD.

[8] That is, the Commission is clearly contemplating EU institutional investors only, not non-EU ones, even if it is possible for non-EU AIFMs to be brought into scope at a later date as a result of the Article 37 AIFMD regime as described above.