European Banking Authority.

17 July 2018

Re: EBA/CP/2018/05 Consultation Paper Draft Guidelines
on the STS criteria for non-ABCP securitisation.

This paper has been compiled by the Irish Debt Securities Association (IDSA), which is an industry organisation, established to promote and develop Ireland as the premier European location for activities to support the global structured finance, debt securities and the specialist securities industries. The membership of the IDSA includes corporate administrators, trustees, audit firms, legal advisors, listing agents, and other parties involved in the structuring and management of Securitisations and SPVs in the industry in Ireland. The IDSA promotes a responsible, sustainable and effective environment within which debt securities and other specialist securities can be used to facilitate transactions, to create investment products and to raise capital funding, similar to that of the European Commission's Capital Markets Union (EC CMU) initiative.

The IDSA welcomes the opportunity to reflect the views of the industry and to provide input into this consultation process into EBA/CP/2018/05 Consultation Paper Draft Guidelines on the STS criteria for non-ABCP securitisation.

Answers to the specific question are contained below.

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Requirements related to simplicity Q1 -Q18

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.

The guidelines introduce the necessity to provide a legal opinion by a qualified legal counsel to confirm the transfer of exposures, and assess clawback, re-characterisation, commingling and set-off risks related to the transaction. The Guidelines require these opinions to be accessible to third parties (including third party certifiers and competent authorities). There is a concern that the requirement to provide these legal opinions is in excess of what is required under Article 20 of the STS Regulation and could lead to practical difficulties as many external legal counsel will not agree to their legal opinions being accessible to third parties.

The ESMA consultation on *Draft technical standards on content and format of the STS notification under the Securitisation Regulation* (ESMA33-128-33), already includes requirements for concise explanation to be included in the expected content of the STS notification in relation to true sale or assignment, no severe clawback provisions, clawback provisions in national insolvency laws and transfer performed by means of an assignment and perfected at a later stage.

Article 20 (1) Transfer of the underlying exposures by true sale or assignment:
The STS notification shall confirm and include a concise explanation on whether there is no circumstance in which a liquidator or creditor of the originator could seek to unwind the securitisation and claim that the receivables are available to the general creditors of the originator. The explanation shall specify whether the transfer of the underlying exposures is made by means of true sale assignment (legal or equitable), by declaration of trust or by way of novation.

Article 20 (2) No severe clawback provisions:
The STS notification shall include a concise explanation that none of the situations referred to in Article 20 (2) (a) and (b) or Article 24(2) are found in the securitisation, unless the requirements laid down in Article 20 (3) or 24 (3) apply.

Article 20 (3) Clawback provisions in national insolvency laws:
The STS notification shall include a concise explanation on which of the clawback provisions in national insolvency laws form an exception to the severe clawback provisions as provided for in Article 20(2) of the Securitisation Regulation.

Article 20 (5) Transfer performed by means of an assignment and perfected at a later stage:
Where the transfer of the underlying exposures is performed by means of an assignment and perfected at a later stage than at the closing of the securitisation, the STS notification shall include a concise explanation on whether the means by which the SSPE has acquired the underlying exposures has the same legal effect as an acquisition of underlying exposures by means of true sale. The STS notification shall also provide a concise explanation on how and whether that perfection is effected at least through the required minimum pre-determined event triggers as listed in Article 20(5) of the Securitisation Regulation. Where alternative mechanisms of transfer are used, the STS notification shall confirm that an insolvency of the originator would not prejudice or prevent the SSPE from enforcing its rights.

The expansion of the scope of the required legal opinion to cover re-characterisation, commingling and set-off risks related to the transaction are in excess of what is required by the STS Regulation.

This will involve additional significant work for the qualified legal counsels in relation to clawback, re-characterisation, commingling and set-off risks and a consequent increase in legal costs for the issuer.

Commingling and set-off risks are features of many non-ABCP deals and these risks are disclosed in the deal documentation. More importantly they are mitigated by structural features such as periodic cash sweeping and reserve account sizing as well as being factored into the levels of credit enhancement.

Given the scope of the "concise explanations" due to be included in the proposed STS notification it is felt that the EBA should reduce its emphasis on legal opinions.

In addition, the requirement that the legal opinion be accessible by third parties goes far beyond what is required by STS. Article 7 of STS specifically excludes legal opinions from the scope of the transaction documents which must be made available to investors. This recognises the fact that legal opinions are transaction specific carefully tailored documents and may contain confidential or proprietary information. In some jurisdictions, a legal opinion may be relied upon by anyone to whom it is disclosed even if non-reliance language is included in the legal opinion. If the guidelines require that a legal opinion be made publicly available, given the risks involved for law firms in doing so, it is likely that many law firms will simply refuse to give legal opinions in these transactions thereby restricting the ability of buyers to securitise the underlying exposures.

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?

See 1 Above.

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.

See 1 Above.

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?

See 1 Above.

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.

There is a concern with regard to a situation where an original lender is no longer in existence and the subsequent buyer of the portfolio may not be in a position to provide the relevant representations and warranties. This could exclude a portfolio of assets from being securitised and attaining the STS designation.

A possible solution would be to include a "sunset provision" and for the existing seller to make a full disclosure. A sunset provision, in relation to the original origination could come into effect after a reasonable period of time, such as 36 months, and be contingent on a positive credit performance of the underlying loans. Credit issues related to the original quality of underwriting of the loan should become apparent within a 36-months of the loan drawdown.

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.

There is some concern with regard to guidelines in relation to "*the eligibility criteria to be applied to exposures transferred to the SSPE after the closing as part of substitution, repurchase, replenishment and ramp-up periods in accordance with paragraph 18, should be no less strict than the eligibility criteria applied to the initial underlying exposures. Eligibility criteria to be applied to such exposures should be specified in the transaction documentation. This criterion refers to eligibility criteria applied at exposure level."* The concern here is that the eligibility criteria could refer to the original underwriting criteria as the guidelines state "t*his criterion refers to eligibility criteria applied at exposure level."* This would imply that the original underwriting would continue to apply to new assets added to the collateral pool after closing, under the conditions outlined above.

This provision makes sense for a short and limited period where assets are being ramped-up and there is a desire to ensure a homogeneity of the pool. However, underwriting criteria evolve with the market over time and such a strict application of fixed eligibility criteria at the exposure level could prevent the addition of assets to the pool substitution, repurchase and replenishment reasons. Traditionally the addition of new assets to a collateral pool, for these reasons, have been governed by the maintenance of certain collateral pool level criteria, for example, a cap on the maximum weighted average LTV rate, a maximum exposure size or a maximum maturity profile. Changing the criteria from exposure level to pool level would be in keeping with market practice.

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?

See 6 Above.

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.

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?

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.

Q11. 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?

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.

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.

The use of the phrase "material damages" is open to interpretation and could result in some parties taking contrary vires on the same credit exposure. A tighter definition would ensure consistency in the interpretation of this element.

Q14. Do you agree with the interpretation of the criterion with respect to exposures to a credit impaired debtor or guarantor?

We agree with this interpretation.

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?

We agree with this interpretation.

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.

We agree with this interpretation.

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.

We agree with this interpretation.

Q18. Do you agree with the interpretation of the predominant dependence with reference to 30% of total initial exposure value of securitisation positions?

Requirements related to standardisation Q19 – Q28

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.

The stipulation that interest rate and currency risks need not be perfectly hedged to be considered "appropriately mitigated" but can be mitigated through the use of reserve funds or other measures with the mitigation considered from an economic rather than accounting point of view.

However, the conditions attached to the use of traditional interest rate and foreign exchange rate derivatives is significantly more onerous than those for non-derivative based mitigants. For derivatives *"the appropriateness of the mitigation of interest rate and currency risks through the life of the transaction must be demonstrated through quantitative information including the fraction of notional amounts that are hedged, as well as a concise sensitivity analysis that illustrates the effectiveness of the hedge under extreme but plausible scenarios".* However, for risk mitigation not carried out through derivatives, there is no requirement to provide quantitative information and sensitivity analysis. But there is a requirement that these measures should be fully funded and available at all times. From an information disclosure and transparency perspective, it would be appropriate for similar quantitative information and sensitivity analysis to be carried out and disclosed to facilitate investors, in particular, to fully understand the risks and the mechanisms used to mitigate these risks.

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.

The guidelines are considerably more restrictive than the STS Regulation in relation to the use of sectoral rates reflective of the cost of funds allowable reference rates. The guidelines require institutions to provide sufficient data to allow investors to assess their relation to other market rates. While some institutions disclose the factors which they use in setting their SVR's, the actual data and formula are not actually published.

Indeed, there is an additional issue in relation to the proposed definition of a *"complex formulae"* which is determined by meeting the definition of an exotic instrument by the Global Association of Risk Professionals (GARP). It defines a financial asset or instrument as one with features making it more complex than simpler, plain vanilla, products. But this is a definition by exception and relies on the concept of a plain vanilla product, which is not defined! It is likely that the formula used in setting bank SVR's would be defined as complex formulas!

The more restrictive approach adopted by the guidelines relative to the STS Regulation means that deals back by loans linked to bank SVR rates would be precluded these deals from achieving an STS certification, which would seem contrary to the aims of the STS Regulation.

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.

We agree with this interpretation.

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.

We agree with this interpretation.

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.

We agree with this interpretation.

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.

We agree with this interpretation.

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.

We agree with this interpretation.

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?

We agree with this interpretation.

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.

We agree with this interpretation.

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 agree with this interpretation.

Requirements related to transparency Q29 – Q35

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 agree with this interpretation.

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.

We agree with this interpretation.

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.

The guidelines do not state how the liability cashflow model should be made available to potential investors. We agree that the model must accurately represent how cash is applied through the waterfall and therefore the model's code should be open for inspection and review so that investors can access whether or not the cash flow model is reflective of the deal structure as outlined in the deal documentation. Users should have the ability to perform their own user defined stresses and also have the ability to save or download the results of their analysis.

Any barrier to entry in the provision of the model should be precluded and access should be free of charge to all potential investors.

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.

We agree with this interpretation.

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.

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.

We agree with this interpretation.

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 agree with this interpretation.