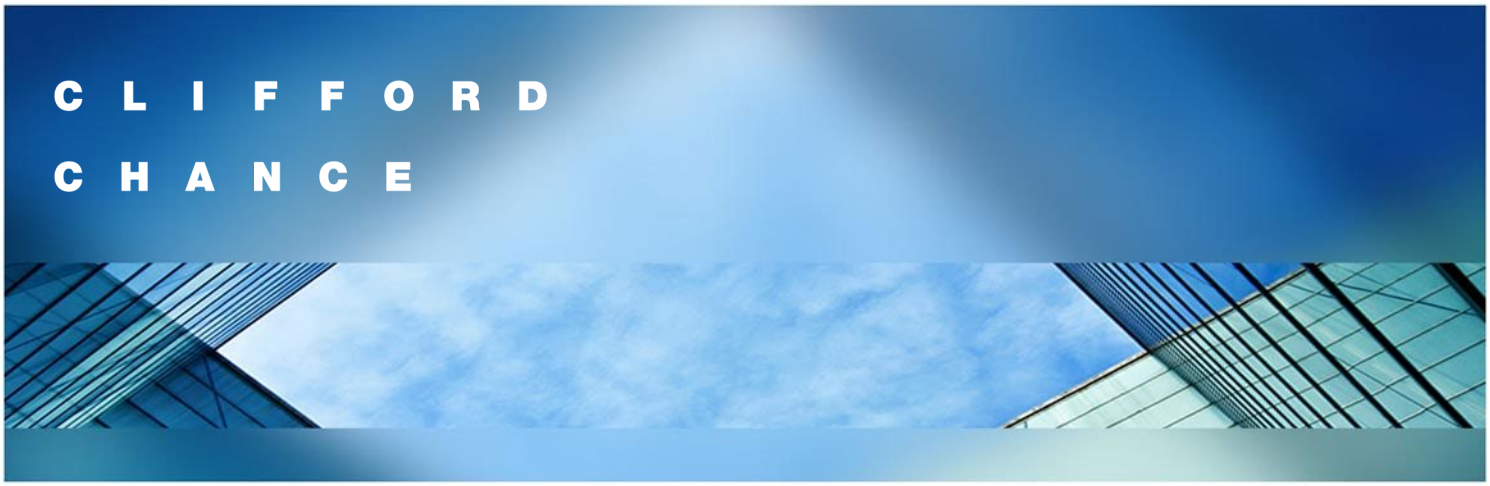

PRA LAUNCHES CONSULTATION ON ITS PROPOSALS TO REPLACE RETAINED EU SECURITISATION REGULATION REQUIREMENTS

On 27 July 2023, the Prudential Regulation Authority ("PRA") launched its consultation on its proposed rules to replace the retained EU Securitisation Regulation requirements on PRA-authorised persons, currently contained mainly in the UK Securitisation Regulation or "UKSR". This comes following the enactment of the Financial Services and Markets Act 2023 earlier this year. In this briefing, we will consider the PRA's proposed new rules and how they will change the existing regulatory framework for securitisation in the UK.

The PRA's proposals largely look to preserve the current requirements under the UK Securitisation Regulation with some targeted adjustments as summarised below. The implementation date for the new PRA rules is expected to be Q2 2024, subject to the progress of HM Treasury's draft Securitisation Regulations 2023. Responses to the PRA consultation are requested by Monday 30 October 2023.

The FCA have announced on their website that they will launch their own consultation on 7 August 2023. The PRA and FCA are required the "have regard" to the coherence of the overall securitisation regulatory framework, so we expect that the FCA will likely consult on similar terms to the PRA in areas of overlapping responsibility. However, the FCA also has responsibility in a number of areas not covered by the PRA rules, including STS securitisation and the supervision of both securitisation repositories and third-party verifiers of STS status.

The PRA's proposed rules relate to the provisions of the UK Securitisation Regulation for which the PRA has supervisory responsibility and the related technical standards.

The proposals can be summarised as follows:

- **Clarification of the person scope of requirements on manufacturers:** With respect to the rules which will replace Articles 6-9 of the UKSR, the PRA proposes to make clear that, alongside the application to PRA-authorised CRR firms (broadly, banks and investment banks) and Solvency II firms (broadly, insurers and reinsurers), the scope of the rules also captures other PRA-authorised firms that manufacture securitisations. This preserves (so far as PRA-authorised firms are concerned) the existing scope of the UKSR. The PRA also proposes to extend the scope of the

The PRA currently supervises compliance of PRA-authorised persons with requirements in Articles 5-9 of the UKSR in relation to post-2019 securitisations, including: (i) due diligence requirements for institutional investors in securitisations, and (ii) risk retention requirements, transparency requirements, credit granting standards, and restrictions on resecuritisations for manufacturers of securitisations. The PRA also supervises compliance of PRA-authorised persons with requirements in Article 43(5) and (6) of the UKSR in relation to pre-2019 securitisations.

supervisory expectations set out in Supervisory Statement 10/18 so they will in future capture these firms.

- **Adjustments to diligence requirements:** The UKSR distinguishes between UK and non-UK securitisations when imposing due diligence requirements on institutional investors. With UK securitisations, institutional investors have to check the manufacturers are fully complying with UKSR disclosure rules. With respect to non-UK securitisations, there is a bit more wiggle room, but institutional investors still have to check they are getting "substantially the same" information they would have got from a UK manufacturer. The PRA is proposing to replace these separate requirements with a unified, principles-based approach. The proposed new rules would require UK institutional investors to verify that they have sufficient information independently to assess the risks of the investment. That requirement goes on to specify certain categories of information institutional investors must receive. Those categories broadly mirror the disclosure requirements on manufacturers, but without the accompanying detailed templates. We expect that this should facilitate investment by UK manufacturers in non-UK securitisations as compared to the present approach.
- **Delegation of due diligence:** The PRA is proposing to clarify in its rules replacing Article 5(5) UKSR that if a delegating party instructs a managing party to fulfil any of its due diligence obligations, then the delegating party would not bear responsibility for a failure to comply with the delegated obligations. The rules are also being changed so that only FCA- or PRA-supervised institutional investors be a managing party for the purposes of these rules. Pension funds can still accept delegation theoretically, but the delegating party will not benefit from the same formal transfer of regulatory responsibility. In any case, we are not aware of pension funds taking on this type of management role for other institutional investors in practice to date.
- **Non-performing exposures securitisations and the non-refundable purchase price discount:** The PRA proposes to allow for the 5% risk retention on non-performing exposure securitisations to be measured on the value at which they are securitised (e.g. the price at which the issuer acquires the assets). These changes largely reflect changes made in the EU as part of the Capital Markets Recovery Package in April 2021. The PRA's changes do not, however, adopt all the EU NPE securitisation measures. They do not, e.g., permit risk retention by a servicer.
- **Clarification of timelines for manufacturers making available certain information:** There is various information which the UKSR requires to be provided prior to pricing but which is impractical or impossible to provide at that time, such as the final prospectus or final deal documents (both of which contain pricing information). In practice, these documents are only ever provided in draft form prior to pricing and the proposed new rules would acknowledge this reality. Final versions of this information will be required at the latest 15 days after closing.
- **Confidentiality provisions?** We note, however, that the PRA's draft rules for consultation have omitted an important provision from the UK Securitisation Regulation. There does not appear to be any explicit acknowledgement anymore that transaction parties can decline to report confidential information where it would otherwise be required by the

disclosure rules. While the PRA will clearly not be expecting its firms to disclose information that they are ***by law*** prohibited from disclosing, the current version of the rules would not seem to permit its firms to decline to report (or to anonymise or aggregate their reporting) on the basis of e.g., contractual confidentiality provisions.

- **Replacing relevant provisions in the Risk Retention Technical Standards with PRA rules:** The PRA proposes to replace the relevant provisions in the currently applicable risk retention technical standards (still the old 2014 ones made under the CRR) with PRA Rules. In the process, the PRA proposes to make some changes to align with the EU Risk Retention Regulatory Technical Standards adopted by the EU Commission in July 2023 (but not yet in force). Some key changes include:
    - Allowing for a change of risk retainer in event of retainer's insolvency (but not "where the retainer, for legal reasons beyond its control and beyond the control of its shareholders, is unable to continue acting as a retainer" as would be permitted under the EU text).
    - Introduction of criteria to assess whether a retainer is a 'sole purpose' originator (and therefore ineligible to hold the retention). The approach taken by the PRA is more similar to the European Banking Authority's Final Draft Risk Retention Regulatory Technical Standards dated April 2022 in this respect in that the PRA consultation reads "the following would have to be taken into account" before listing the relevant factors. There is a subtle difference between that and the wording included in the EU Commission-adopted Regulatory Technical Standards which reads "*where all* of the following applies".
    - Specification of how the risk retention requirements apply in resecuritisations.
    - Permitting, all CRR and Solvency II firms to retain risk in synthetic/contingent form without fully collateralising it in cash and holding it on a segregated basis as clients' money. Currently only credit institutions may do this.
    - Specification of how the comparability between the securitised assets remaining on an originator's balance sheet and the ones transferred to a securitisation special purpose entity should be assessed.
- **Replacing the relevant provisions in the Disclosure Technical Standards with PRA rules:** The PRA proposes to preserve the requirements in the existing disclosure technical standards under the UKSR and provide further details on some of the transparency requirements.
- **Transparency requirements:** The PRA is also considering how the transparency requirements could be improved. On this they have not included any proposals but have made some remarks about how the distinction between 'public' and 'private' securitisations might be redrawn in order to support the development of more risk-sensitive disclosure requirements. The current divide depends on whether an approved prospectus is required under UK law which is in turn largely determined by whether a securitisation is to be admitted to a UK regulated market.
- **Restrictions on re-securitisations:** The ban on resecuritisation is being restructured, but the practical impact of this seems likely to be limited, not

least because resecuritisations are no longer common in the markets today. The rules simply ban resecuritisations except where the PRA has granted a "permission or direction" allowing it. There is a provision in the Financial Services and Markets Act 2023 (s. 138BA) under which the PRA expects HM Treasury will give it permission powers and the PRA have published a draft statement of policy setting out the procedure to apply for such a permission. The factors the PRA says it will consider in granting permission include the same "permitted resecuritisations" currently listed in Article 8 of the UKSR.

For access to our full client briefing on the draft Securitisation Regulation 2023 titled "Changing Times: Recent developments in the UK and EU securitisation regulatory frameworks", please click here.

CLIFFORD CHANCE

AUTHORS

Andrew Bryan
Knowledge Director, London

T +44 207006 2829
E andrew.bryan @cliffordchance.com

Adam Craig
Partner, London

T +44 207006 8862
E adam.craig @cliffordchance.com

Purvi Doshi
Senior Associate Knowledge Lawyer, London

T +44 207006 4758
E purvi.doshi @cliffordchance.com

CONTACTS

Simi Arora-Lalani
Partner, London

T +44 207006 8282
E simi.arora-lalani @cliffordchance.com

Timothy Cleary
Partner, London

T +44 207006 1449
E timothy.cleary @cliffordchance.com

Kevin Ingram
Partner, London

T +44 207006 2416
E kevin.ingram @cliffordchance.com

Jessica Littlewood
Global Operations and Business Transformation Partner, London

T +44 207006 2692
E jessica.littlewood @cliffordchance.com

Emma Matebalavu
Global Head of Global Financial Markets, London

T +44 207006 4828
E emma.matebalavu @cliffordchance.com

Simeon Radcliff
Partner, London

T +44 207006 2786
E simeon.radcliff @cliffordchance.com

CONTACTS CONTINUED

William Sutton
Partner,
London

T +44 207006 3400
E william.sutton
@cliffordchance.com

Julia Tsybina
Partner,
London

T +44 207006 4368
E Julia.tsybina
@cliffordchance.com

Christopher Walsh
Partner,
London

T +44 207006 2811
E christopher.walsh
@cliffordchance.com

Maggie Zhao
Partner,
London

T +44 207006 2939
E maggie.zhao
@cliffordchance.com