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The International Comparative Legal Guide to:

Securitisation 2014

7th Edition

A practical cross-border insight into securitisation work

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EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Securitisation*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of securitisation.

It is divided into two main sections:

Seven general chapters. These are designed to provide readers with a comprehensive overview of key securitisation issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in securitisation laws and regulations in 32 jurisdictions.

All chapters are written by leading securitisation lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Mark Nicolaides of Latham & Watkins LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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CLO 3.0: The Impact of Regulations

Schulte Roth & Zabel LLP

Craig Stein

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As 2011 began, the collateralised loan obligation ("CLO") market was poised to make a comeback. In a chapter in this publication titled "On the CLO Horizon — Regulations Expected to Impact CLOs", we discussed how new regulations might affect the growth of this market. And 2011 did in fact see a modest revival of CLOs, with new issuance for the year totaling approximately $12 billion. At the start of 2012, in a chapter in this publication titled "New Structural Features for Collateralised Loan Obligations", we discussed the structural changes made to the governing documents for a post-financial crisis CLO, which has become known as "CLO 2.0". Those changes helped foster the growth in the CLO market in 2012, when new issuance reached approximately $55 billion, and in 2013, when CLO issuance exceeded $81 billion. As we begin 2014, the CLO market is poised to enter a new phase — CLO 3.0 — in which some of the regulations we discussed in 2011 have been finalised and others, while not finalised, are gaining more clarity.

The Volcker Rule

Adoption of the Final Rule

Section 619 of the Dodd-Frank Act (commonly referred to as the "Volcker Rule")[1] prohibits a "banking entity"[2] from acquiring or retaining an ownership interest in, or sponsoring, any hedge fund or private equity fund. The terms "hedge fund" and "private equity fund" include any issuer that does not register with the U.S. Securities and Exchange Commission (the "SEC") as an investment company under the U.S. Investment Company Act of 1940 (the "Investment Company Act") based on the exceptions in Section 3(c)(1) or Section 3(c)(7) thereof, and any "similar fund". Most CLOs have been structured as "3(c)(7)" vehicles, which limit investors (or, in the case of CLOs domiciled outside of the United States, U.S. investors) to "qualified purchasers" (as defined in Section 2(51)(A) of the Investment Company Act). Therefore, managed or "arbitrage" CLOs could fall under the purview of the Volcker Rule, despite the fact that CLOs are not viewed by market participants as hedge funds or private equity funds.

On 10 December 2013, five U.S. federal regulatory agencies (the SEC, CFTC, Federal Reserve, FDIC and OCC) adopted regulations implementing the Volcker Rule (the "Final Rule").[3] The Final Rule goes into effect on 21 July 2015. The Final Rule provides for an exemption from the Volcker Rule for CLOs that qualify as "loan securitisations" by investing only in loans and not holding any securities other than short-term cash equivalents.

The Final Rule completely carved-out loan securitisations from the definition of a "covered fund", meaning that the Volcker Rule does not restrict banking entities from investing in, or entering into transactions with, CLOs which qualify as loan securitisations. It defined a loan securitisation as an asset-backed security ("ABS") whose assets are comprised solely of loans, "servicing" assets, and interest or foreign exchange derivatives that directly relate to the underlying loans. It specifically excludes as an "impermissible asset" any security, including an ABS (other than cash equivalents and securities received *in lieu* of debts previously contracted with respect to the loans) and any derivative (other than an interest rate or foreign exchange derivative that directly relates to the underlying loans). Thus, a CLO which does not have any securities or structured products in its portfolio is completely exempt from the Volcker Rule. As a result, banking entities are free to provide warehousing facilities to these CLOs and invest in the notes and equity issued by these CLOs, because they are not covered funds subject to the Volcker Rule.

Under the Volcker Rule, with limited exceptions, banking entities are not permitted to hold "ownership interests" in covered funds. The definition of "ownership interest" includes any equity security or partnership interest, but surprisingly also includes a debt security that contains certain "indicia of ownership". Among those indicia of ownership is the right to participate in the removal or replacement of the investment manager of the covered fund. Since most CLO debt tranches do give the noteholders those rights, they appear to fall within the definition of an ownership interest. The Final Rule recognises that, if the right to exercise replacement or removal rights arises out of an event of default or similar acceleration event, the security is not considered an ownership interest. However, the removal/replacement rights in most CLO management agreements are triggered not only by an event of default but also by certain actions taken by the manager and other events ("for cause" events) that fall short of an event of default. As a result, most CLO notes do qualify as ownership interests and thus banking entities may not hold them unless the issuing CLO qualifies for the loan securitisation exemption.

Effects on the CLO Market

Although loan securitisations will be exempt from all of the consequences of the Volcker Rule, most CLOs are permitted to invest in high yield bonds and other securities. A February 2014 study by Standard & Poor's concluded that, as of 31 December 2013, over 80 per cent of the CLOs for which data was available had invested in non-loan assets.[4]

CLOs which cannot qualify as loan securitisations nonetheless may avoid the Volcker Rule entirely by relying on another exemption from the Investment Company Act, such as Rule 3a-7. However,

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Rule 3a-7 imposes restrictions on the manager's discretion to sell assets and to reinvest and is best suited for static or lightly managed CLOs. For example, static balance sheet CLOs often rely on this exemption. An issuer relying on Rule 3a-7 cannot acquire or dispose of assets "for the primary purpose of recognizing gains or decreasing losses resulting from market value changes".

Alternatively, a traditional "open market" CLO which does rely on Section 3(c)(7) may qualify as a "loan securitisation" by eliminating its ability to purchase high yield bonds and other debt securities that do not meet the definition of a "loan". Indentures for some recent CLOs prohibit investment in a letter of credit transaction based on the concern that it may not be a loan. The indentures for recent CLO 3.0s prohibit the issuer from acquiring any bonds unless the issuer has been advised by counsel either that the rated notes are not "ownership interests", or that the issuer can rely on Rule 3a-7, or that the acquisition of bonds would not cause the issuer to be a "covered fund". In addition, the authorisations of the CLO to make temporary investments in "cash equivalents" and to enter into hedges in CLO indentures have been revised to ensure that the CLO fits within the loan securitisation exemption to the Volcker Rule.

U.S. Congressmen, banks and industry associations have criticised the regulatory agencies for implementing the Volcker Rule in this way, which restricts bank investment in CLOs that are not loan securitisations. As a result, the regulatory agencies are widely expected to revise the Final Rule so that it does not affect bank ownership of CLO notes — at least CLO notes that were issued prior to 2014.

Risk Retention

For many investors domiciled in the European Community, risk retention requirements for managers of CLOs are already in effect. On 31 December 2010, the European Banking Authority ("EBA") published its guidelines on the implementation of Article 122a of European Union Directive 2006/48/EC (as amended by Directive 2009/111/EC, "Article 122a"), commonly referred to as the Capital Requirements Directive ("CRD"), and in September 2011 published some additional guidance in the form of a question and answer document (collectively, the "Article 122a Guidelines"). Article 122a applies to credit institutions (and, from 1 January 2014, investment firms) established in a Member State of the EEA and consolidated group affiliates thereof (each, an "Affected 122a Investor") that invest in, or have an exposure to, credit risk in securitisations (including CLOs). Article 122a imposes a severe capital charge on a securitisation position acquired by an EEA-regulated credit institution unless, among other conditions, the originator, sponsor or original lender for the securitisation has explicitly disclosed that it will retain, on an ongoing basis, a material net economic interest of not less than 5 per cent of specified credit risk tranches or asset exposures.

In April 2013, the European Parliament adopted a new directive and a regulation, collectively referred to as "CRD4", which took effect on 1 January 2014. CRD4 replaces and, in certain respects, differs from the requirements in Article 122a, and extends the requirements described above to investment firms as well as credit institutions. In addition, in May 2013, the EBA published a consultation paper on draft regulatory technical standards and implementing technical standards which will replace the current Article 122a Guidelines (the "Draft Technical Standards"). There are significant differences between the Draft Technical Standards and the current Article 122a Guidelines, and there remains uncertainty as to the content of the final regulatory and implementing technical standards and how these will affect CLOs issued prior to their adoption.

Most U.S. CLOs have elected not to comply with the Article 122a Guidelines and have been restricted from marketing to Affected 122a Investors. However, in the future, risk retention requirements will become applicable to most CLOs. The Dodd-Frank Act amended the U.S. Securities Exchange Act of 1934 (the "Exchange Act") to add new Section 15G, which directs the SEC and U.S. federal banking agencies (the "Agencies") jointly to adopt regulations requiring a securitiser to retain an unhedged economic interest in at least 5 per cent of the credit risk of assets that the securitiser, through the issuance of an ABS, transfers to a third party. A securitiser is the issuer of the ABS or an entity that organised and initiated the ABS transaction by transferring assets, directly or indirectly, to the issuer. Section 15G also directed the Agencies to allocate risk retention obligations between a securitiser and an originator in the case of a securitiser that purchases assets from an originator. An originator is the person which, through the extension of credit or otherwise, creates a financial asset that collateralises an ABS and sells an asset directly or indirectly to a securitiser.

In March 2011, the Agencies jointly proposed rules (the "Original CRR Proposal")[5] to implement this credit risk retention requirement. Few (if any) CLOs have followed the "originate to distribute" model used by subprime mortgage securitisers with unfortunate results and, accordingly, there was reason to hope that the Agencies would not impose any risk retention requirement on the typical "open market" CLO. However, the Original CRR Proposal provided that a "sponsor" is the "securitiser" which must satisfy the risk retention requirement,[6] and identified the collateral manager as the sponsor of a CLO and, accordingly, as the entity which must satisfy the risk retention requirement, because "the CLO manager generally acts as the sponsor by selecting the commercial loans to be purchased by an agent bank for inclusion in the CLO collateral pool, and then manages the securitised assets once deposited in the CLO structure".[7]

The Original CRR Proposal included various options for satisfying the credit risk retention requirement: (i) vertical risk retention, which a sponsor may satisfy by retaining at least 5 per cent of each class of ABS interests issued as part of the securitisation transaction; (ii) horizontal risk retention, which the sponsor may satisfy by retaining an eligible residual interest (i.e., a first loss position, which in a CLO is usually in the form of unrated subordinated notes) equal to at least 5 per cent of all ABS interests issued or, alternatively, by funding a cash reserve account in the same amount to bear the first loss; and (iii) L-shaped risk retention, which the sponsor may satisfy by retaining a combination of vertical and horizontal exposures to the credit risk of the securitised assets.[8]

The Original CRR Proposal permitted a sponsor that used the vertical or horizontal risk retention options (but not the L-shaped option) to allocate a portion of its risk retention obligations to any originator that contributed at least 20 per cent of the assets in the securitisation. The Agencies concluded that only the original creditor under a loan could be the originator for these purposes.

In August 2013, the Agencies published a revised proposed credit risk retention rule (the "Revised CRR Proposal") which provided that CLOs must satisfy one of three alternative requirements: (i) the standard risk retention requirement; (ii) the qualifying commercial loan option; or (iii) the CLO-eligible loan option.[9] First, under the Revised CRR Proposal, the vertical, horizontal and L-shaped risk retention options were combined into a single, more flexible requirement. Under this new "standard" risk retention requirement, the sponsor would be permitted to hold an eligible vertical interest, an eligible horizontal interest, or any combination thereof, equal to at least 5 per cent of the fair value of all ABS interests issued as part

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of the securitisation transaction. The Revised CRR Proposal preserved the ability to allocate a proportionate amount of the retained risk to an originator that originated at least 20 per cent of the asset pool, and the option is now available when the sponsor retains a combination of vertical and horizontal interests. However, the Agencies also proposed a new restriction on the standard risk retention option, limiting the amount of cash payable to a manager that retains the risk in the form of a horizontal equity interest. Under this restriction, the manager could not receive distributions from the CLO on these retained subordinated notes at a faster rate than the rate at which principal is paid to investors in the senior notes issued by the CLO. As in the Original CRR Proposal, the manager of the CLO was: (i) prohibited from transferring any of the retained credit risk except to an affiliate whose financial statements are consolidated with it; and (ii) prohibited from purchasing or selling a financial instrument, or entering into an agreement, derivative or other position that hedges the retained credit risk. Although the manager or its affiliate could pledge as collateral for a loan any interest that it is required to retain, it could not be a nonrecourse loan in which the lender did not have full recourse to the manager or its affiliate.

Under a second alternative, a CLO could qualify for a zero risk retention requirement if it invested exclusively in commercial loans that satisfy strict underwriting standards ("qualifying commercial loans" or "QCLs"). The underwriting standards proposed by the Agencies require the originator to have determined, among other things, that during the two most recently completed fiscal years and the two-year period after the closing of the commercial loan, the borrower had, or is expected to have: (i) a total liabilities ratio of 50 per cent or less; (ii) a leverage ratio of 3.0 or less; and (iii) a debt service coverage ratio of 1.5 or greater. In addition, the loan documents for each commercial loan acquired by the CLO must satisfy minimum standards, including standards for repayment terms, maturity, security interests (if the loans are secured), and affirmative and negative covenants. The "depositor"[10] of the assets is required to make certifications regarding its process for ensuring that the securitised commercial loans satisfy the applicable requirements, which the sponsor is required to deliver to investors (and to the applicable Agencies upon demand). If a sponsor learns, after the closing of the securitisation transaction, that a loan does not satisfy the underwriting requirements, the sponsor will not lose the exemption if: (i) it repurchases the loan; (ii) it promptly provides notice of the repurchase to the investors; and (iii) the depositor has complied with the initial certification requirement. Finally, only a CLO that has no reinvestment period can utilise the QCL option.[11]

Third, to address the concern that many CLO managers do not have sufficient capital to purchase and hold a 5 per cent interest in their CLOs, the Revised CRR Proposal contains a new alternative risk retention exemption for "open market" CLOs, under which managers would be exempt from the risk retention requirement if the CLO limits its portfolio to "CLO-eligible" loans. CLO-eligible loans are loans in which the lead arranger holds 5 per cent of the face amount of the tranche of the loan purchased by the CLO until the maturity, payment in full, acceleration or payment or bankruptcy default of the loan. The lead arranger must have originated at least 20 per cent of the face amount of the credit facility, with no other member of the syndicate having a larger allocation or commitment. Moreover, the loan documents must give holders of a CLO-eligible tranche consent rights with respect to, among other things, material waivers and amendments of the loan documents. To take advantage of this alternative, the CLO must: (i) acquire only CLO-eligible loans and servicing assets; (ii) not purchase any ABS or synthetic securities (e.g., credit default swaps); (iii) purchase all assets in the open market; and (iv) provide a complete list of every asset held in the CLO (prior to CLO issuance, upon request from the Agencies and on an annual basis).

CLO Industry Response

Most of the asset management firms which act as the collateral managers for CLOs do not have adequate capital to purchase and hold 5 per cent of the notional amount of a CLO. For example, the manager of a $500 million CLO would have to purchase $25 million of notes. Larger managers that have access to adequate capital are unwilling to make capital commitments of this magnitude for the life of a CLO as part of their business plan, and complain that managers of mutual funds, business development companies and hedge funds, which also invest in the commercial loan market, are not subject to any similar requirement. Additionally, the restriction on the standard manager risk retention that prohibits the manager from receiving payments at a faster rate than the amortisation of the senior notes is inconsistent with the way in which CLOs are structured. The holders of the subordinated notes of a CLO receive distributions during the reinvestment period of a CLO, whereas the senior tranches typically receive no principal payments until after the reinvestment period. The zero risk retention option for a portfolio comprised solely of qualifying commercial loans is also unavailable in practice, because the underwriting standards proposed by the Agencies do not comport with the broadly syndicated loan market and most arbitrage CLOs do include a reinvestment period.

CLO Managers and the banks that originate loans have criticised the third alternative, "CLO-eligible loans", for open market CLOs, arguing that the lead arranger of a loan will not agree to hold a large portion of a loan without the ability to hedge or sell it for the life of the loan. This would be contrary to a bank's risk management policies (and to the policies of some of the Agencies that proposed the rule).

Effects on the CLO Market

If the Revised CRR Proposal is approved as the final rule, we could see significant consolidation of the managers in the CLO market because only larger, well capitalised managers will have the ability to purchase and hold indefinitely 5 per cent of the notional amount of the notes issued by each CLO which they manage. This, in turn, could result in a decline in the volume of new CLOs coming to market.

There is also significant uncertainty regarding how the requirements of the Revised CRR Proposal would be implemented. CLOs which have complied with Article 122a have required the originator, the manager or its consolidated affiliate to enter into a risk retention agreement in order to impose contractual obligations which embody the risk retention requirement. Counsel to future CLOs will need to translate the broad conceptual requirements of the Revised CRR Proposal (if it becomes the final rule) into the terms of this agreement. For example, if the manager is removed or resigns, would a successor manager be required to purchase the 5 per cent risk retention of the removed or resigned manager? If so, this requirement makes it more difficult to find a successor manager. If the restrictions on distributions to the manager on the retained subordinated notes described above remain, will managers purchase a vertical interest instead? If a manager does purchase an eligible horizontal residual interest, the CLO may need to structure the manager's subordinated notes so that they have different payment terms than the subordinated notes sold to third parties.

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And what happens to the excess interest that would otherwise be distributed to the manager? Will it be held in a separate reserve account only to be used under certain circumstances or will it be reinvested in additional assets?

Many industry associations have pointed out to the Agencies the adverse effects that the Revised CRR Proposal would have on the CLO market, and have proposed modifications to each of the three alternative options for CLOs to satisfy or escape the risk retention requirement. These proposals have ranged from modifications to the requirements for a commercial loan to qualify as a QCL or as a CLO-eligible loan to additional alternatives under which investors other than the collateral manager would retain the required risk. Several of the proposals have suggested that, for CLOs which satisfy strict requirements, the amount of risk required to be retained by the manager should be lower. The Loan Syndications and Trading Association ("LSTA") proposed that if a CLO meets the requirements for a "Qualified CLO", the manager would only be required to purchase and retain 5 per cent of the equity tranche (not 5 per cent of the notional amount of the CLO). For example, the manager of a $500 million CLO with a $50 million unrated subordinated note or equity tranche (which would be required to purchase $25 million of notes under the Revised CRR Proposal) would be required to purchase $2.5 million of the subordinated notes or equity tranche under the LSTA proposal. In order for a CLO to become a Qualified CLO to which this reduced risk retention would be applicable, the CLO must satisfy a detailed list of "industry best practices" including: (i) asset quality; (ii) portfolio concentration limitations; (iii) structural features; (iv) alignment of the interests of the manager and other investors in the CLO; (v) transparency and disclosure to investors; and (vi) regulatory oversight of the manager.

The Agencies will adopt the final regulations in the near future, and they will become effective two years after the date on which they are published in the Federal Register.

Foreign Account Tax Compliance Act

In General

On 17 January 2013, the U.S. Treasury issued final regulations implementing Sections 1471 through 1474 of the U.S. Internal Revenue Code of 1986 (commonly referred to as "FATCA"). FATCA generally requires "foreign financial institutions" ("FFIs") (including CLOs) to enter into information sharing agreements with the U.S. Internal Revenue Service (the "IRS") and to report certain information about their U.S. accounts to the IRS on an annual basis in order to avoid 30 per cent withholding on certain U.S.-connected payments (including U.S. source interests and gross sale proceeds from the disposition of U.S. debt obligations).

The final regulations provide that FATCA withholding generally will not apply to any U.S. debt obligations outstanding on 1 July 2014, unless such obligations are materially modified after that date.

The final regulations provide for the concept of withholding on a "foreign passthru payment", which will begin no earlier than 1 January 2017, in respect of "recalcitrant account holders" (generally, an account holder that fails to comply with requests for information under FATCA) or "non-compliant FFIs" (generally, an FFI that does not enter into an information sharing agreement with the IRS, comply with laws implementing an applicable IGA (as defined below), or otherwise benefit from an exception to these requirements). Preliminary guidance that was not included in the final regulations suggested that a payment with respect to a CLO note will be treated as a foreign passthru payment to the extent of (i) the amount (if any) of the payment that is treated as U.S. source income, plus (ii) the amount of the payment that is not treated as U.S. source income multiplied by a ratio equal to the CLO's average U.S. assets to its average total assets, determined as of specified testing dates. It remains to be seen what approach to foreign passthru payments will be adopted under FATCA.

IGAs

The U.S. Treasury has developed an alternative approach for FFIs resident in a country that has entered into an intergovernmental agreement ("IGA") with the U.S. The U.S. Treasury has entered into an intergovernmental agreement with the Cayman Islands (the "Cayman IGA") that, among other things, provides for direct information sharing between the Cayman Islands and the United States and modifies the requirements for foreign financial institutions located in the Cayman Islands that qualify for the Cayman IGA.

As a result, CLOs organised under the laws of the Cayman Islands will not be required to execute an individual FFI agreement with the U.S. Treasury. The Cayman Islands has not yet promulgated the legislation, rules and regulations to give effect to the term of the Cayman IGA.

Revisions to CLO Indentures

The transaction documents for post-FATCA CLOs generally contain provisions to address FATCA, such as the following:

- providing that a holder of CLO securities agrees or is deemed to agree to (i) provide any information and documentation and to take any other action necessary for the CLO to achieve FATCA compliance and avoid or reduce FATCA withholding taxes, and (ii) allow the CLO to provide any such information or documentation and any other information concerning the holder's investment in CLO securities to the IRS or other relevant tax authority ("Noteholder Reporting Obligations");
- providing for the ability of the CLO and its trustee to compel a holder of CLO securities which fails to meet its Noteholder Reporting Obligations to sell its CLO securities or to sell such securities on such noteholder's behalf;
- providing that the indenture may be amended without noteholder consent to the extent necessary or advisable for the CLO to achieve FATCA compliance; and
- separating out FATCA compliance costs and FATCA withholding tax from the general tax event redemption trigger and providing separate tax event triggers for FATCA-related costs.

Limited Life Debt Investment Entities

On 20 February 2014, the U.S. Treasury released the "last substantial package of regulations necessary to implement FATCA", which significantly modified the definition of "limited life debt investment entity" ("LLDIE") in the 17 January 2013, final regulations. Under the newly issued regulations, an FFI which meets the following requirements would be considered a "certified deemed compliant entity" (and, as a result, not have FATCA compliance obligations) if:

- the FFI is an investment entity that issued one or more classes of debt or equity interests to investors pursuant to a trust indenture or similar agreement and all of such interests were issued on or before 17 January 2013;

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- the FFI was in existence as of 17 January 2013, and has entered into a trust indenture or similar agreement that requires the FFI to pay to investors holding substantially all of the interests in the FFI, no later than a set date or period following the maturity of the last asset held by the FFI, all amounts that such investors are entitled to receive from the FFI;
- the FFI was formed and operated for the purpose of purchasing or acquiring specific types of debt instruments or interests therein and holding those assets subject to reinvestment only under prescribed circumstances to maturity;
- substantially all of the assets of the FFI consist of debt instruments or interests therein;
- all payments made to the investors of the FFI (other than holders of a *de minimis* interest) are either cleared through a clearing organisation or custodial institution that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution or made through a transfer agent that is a participating FFI, reporting Model 1 FFI, or U.S. financial institution; and
- the FFI's trustee or fiduciary is not authorised through a fiduciary duty or otherwise to fulfil the obligations of a participating FFI and no other person has the authority to fulfil the obligations of a participating FFI on behalf of the FFI.

It is anticipated that Cayman Islands legislation implementing the Cayman IGA will have a corresponding exemption from Cayman Islands compliance obligations. Pre-FATCA CLOs (i.e., pre-2010 CLOs) whose indentures do not contemplate FATCA are the CLOs that may be eligible to be treated as LLDIEs. Language added to the indenture for a 2011 or 2012 CLO to address FATCA compliance (and described above) could prevent such CLO from satisfying the LLDIE requirements if it is determined that the CLO's trustee, other fiduciary or other person is authorised to fulfil the compliance obligations under FATCA or an applicable IGA.

* * *

The CLO market is adapting to the new regulatory requirements which have been imposed as a result of the credit crisis by adopting a new transaction structure — CLO 3.0. The CLO market fared relatively well under FATCA and the Volcker Rule compared to the more onerous treatment of CLOs in the earlier proposals implementing those laws. Risk retention, on the other hand, could have a significant adverse impact on the CLO market if it is implemented in its current proposed form.

Endnotes

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 619 (2010).
2. The term "banking entity" means any insured depository institution, any company that controls an insured depository institution, or that is treated as a bank holding company under Section 8 of the International Banking Act of 1978, and any affiliate or subsidiary of any such entity.
3. Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 79 Fed. Reg. 5808 (31 January 2014).
4. S&P Capital IQ, "CLO Collateral Pool Review: Non-Loan Assets As Of First-Quarter 2014", 6 February 2014.
5. Credit Risk Retention, 76 Fed. Reg. 24090 (29 April 2011).
6. The proposed definition of the term "sponsor" in the Original CRR Proposal is a person who organises and initiates a securitisation transaction (defined as a transaction involving the offer and sale of ABS by an issuing entity) by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity.
7. See footnote number 42 of the Original CRR Proposal.
8. The Original CRR Proposal also included a fourth option — representative sample risk retention — which the sponsor may satisfy by retaining a randomly selected sample of assets equivalent to the assets which are securitised in an amount equal to at least 5 per cent of the unpaid principal balance of the pool of assets. However, this option would not have been practical for a CLO, and has since been withdrawn for consideration by the Agencies.
9. Credit Risk Retention, 78 Fed. Reg. 57928 (20 September 2013).
10. The term "depositor" is defined in the proposed rules as: (1) the person that receives or purchases and transfers or sells the securitised assets to the issuing entity; (2) the sponsor, in the case of a securitisation transaction where there is not an intermediate transfer of the assets from the sponsor to the issuing entity; or (3) the person that receives or purchases and transfers or sells the securitised assets to the issuing entity in the case of a securitisation transaction where the person transferring or selling the securitised assets directly to the issuing entity is itself a trust.
11. This was included in clause (a)(2) in the proposed rule for "Underwriting standards for qualifying commercial loans" in the Original CRR Proposal and in clause (a)(3) in the proposed rule for "General exception for qualifying assets" in the Revised CRR Proposal.

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