

Alert

EBA Publishes Final Draft Risk Retention RTS

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The European Banking Authority (“EBA”) on 12 April 2022 published the final draft technical standards on the risk retention requirements for securitisations (the “RTS”). This follows on from last year’s consultation on the proposals (the “Consultation”). In order to become law, the RTS is required to be adopted by the European Commission, and will come into force on the twentieth day following that of its publication in the Official Journal of the European Union.

The RTS largely replicates the Consultation, including provisions concerning the securitisation of non-performing exposures, recognising synthetic excess spread as a form of risk retention and contemplating the authorisation of resecuritisations for legitimate purposes. However, it is worth noting the following in particular:

- The EU Securitisation Regulation stipulates that an entity shall not be considered to be an originator (for risk retention purposes) where the entity has been established or operates for the sole purpose of securitising exposures. The Consultation and RTS provide guidance to be taken into account when determining this, including that “the entity does not rely on the exposures to be securitised, on any interests retained or proposed to be retained in accordance with this Regulation or on any corresponding income from such exposures and interests as its sole or predominant source of revenue”. It had been hoped, and requested by market participants, that the reference to “or predominant” would be deleted but the EBA has instead retained this wording. In the EBA’s analysis of the responses to the Consultation, which accompanies the RTS, it explicitly rejects that request. However, in our view, this is not necessarily a requirement that is obliged to be satisfied by an entity in order for it to be an originator risk retainer provided there are sufficient other elements which demonstrate it is an entity of substance.
- The RTS also clarifies the circumstances when the risk retainer entity can transfer or sell the retained interest, such that this would now be permissible both in the event of the retainer’s insolvency and “when the retainer is, for legal reasons beyond its control and beyond the control of its shareholders, unable to continue acting in that capacity”.
- Some amendments have also been made in the RTS around when fees payable to the risk retainer may be construed as reducing the retained interest below that required. By and large, the intention here is to remove vagueness present in the language of the Consultation.
- When observing the “no cherry picking” provisions of the EU Securitisation Regulation, the RTS now states that only assets retained on an originator’s balance sheet which satisfy the particular securitisation’s eligibility criteria are to be taken into account. It is also provided that exposures which an originator has contractually committed to securitise will also be excluded.

- In the EBA's analysis of the responses to the Consultation, it also refers to receiving enquiries as to whether origination structures seemingly akin to CLO conditional sale arrangements are permissible for creating an originator to act as risk retainer. Unsurprisingly, the EBA responded that such questions are outside the scope of the mandate for the RTS.

Authored by [Phillip J. Azzollini](#), [Daniel V. Oshinsky](#), [Martin Sharkey](#) and [Craig Stein](#).

If you have any questions concerning this *Alert* or would like assistance with risk retention structures, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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London | New York | Washington DC
www.srz.com

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