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Dear Madam and Sir

ESMA's Final Report on the technical standards on disclosure requirements under the Securitisation Regulation

We are writing regarding ESMA's Final Report on the technical standards on disclosure requirements ("**Draft Technical Standards**") under the Securitisation Regulation (the "**Final Report**") published on 22 August 2018.

We wrote to ESMA on 19 March 2018 in response to the December consultation paper. We are grateful to ESMA for having commented in the Final Report on the points we raised in our letter. We appreciate the complexities of ESMA's work in producing disclosure templates and are grateful for the early attention that has been directed to this task.

The Loan Market Association[1] wish to highlight a few key issues arising from the Final Report and the Draft Technical Standards. Our points on the Final Report generally appear in the first part of this letter. In the second part, we address more specifically the potential

[1] Please see Appendix 1

problems presented to corporate loans and CLOs by the disclosure obligations. Some concerns around confidentiality of the data to be disclosed remain. There also appear to be a few errors in the templates. As will be explained, most prevalently, while ESMA have made many improvements from the perspective of non-bank lenders, significant issues remain due to the templates not fully reflecting the nature of corporate loans in the loan market. These may lead to the inability of any CLOs to comply with reporting requirements.

In addition, in view of the timing of the Final Report and the level of changes included, it does not seem feasible operationally for the market to be ready to function under the new regime on 1 January. For these reasons, the LMA would strongly advocate delayed implementation (as already acknowledged by ESMA), together the issuance of guidance from ESMA wherever possible to address individual issues.

We would highlight the role that CLOs play in the economy. CLOs securitise the debt of sub-investment grade (including SME) corporates. Corporates need capital in order to grow their businesses. A robust corporate debt market is an essential component to grow economies particularly in an environment where traditional lenders are capital constrained. CLOs offer this much needed capital to corporates.

PART I – POINTS ON THE FINAL REPORT

Our letter dated 19 March 2018 and the disclosure templates

One of the points on which we focused in our letter dated 19 March 2018 regarded CLO reporting. We proposed that a separate reporting template is prepared for CLOs, or that the Corporate Loans Underlying Exposures Template be modified so as to make it appropriate for CLOs. We emphasised in particular that the templates should be appropriate for non-bank originators, as well as for bank originators and that compliance with the reporting obligations in the templates should be practicable for reporting entities that are not original lenders. We are pleased that ESMA made modifications to the templates to take account of these points.

ESMA's proposed approach to CLO reporting

ESMA have explained in the Final Report that the reporting arrangements regarding CLO securitisations are as follows:

(a) CLO securitisations should complete the applicable underlying exposure template for each underlying exposure in the pool (this would normally be the corporate underlying exposures template);

(b) CLO securitisations should complete an additional securitisation information section, which contains fields of particular relevance for due diligence and monitoring of CLO securitisations; and

(c) CLO securitisations should also complete an additional CLO manager information template, for each CLO manager.

There is not a separate template for CLOs, but the draft template for significant events annexed to the Draft Technical Standards contains a "CLO Securitisation information section" and a "CLO Manager information section".

Issues arising from CLO reporting template being part of the Significant Events template

Is CLO reporting really a "Significant Event"?

Article 7(1)(g) of the Securitisation Regulation, which sets out the disclosure obligations for significant events, says:

"where point (f) does not apply, any significant event such as:

(i) a material breach of the obligations provided for in the documents made available in accordance with point (b), including any remedy, waiver or consent subsequently provided in relation to such a breach;

(ii) a change in the structural features that can materially impact the performance of the securitisation;

(iii) a change in the risk characteristics of the securitisation or of the underlying exposures that can materially impact the performance of the securitisation;

(iv) in the case of STS securitisations, where the securitisation ceases to meet the STS requirements or where competent authorities have taken remedial or administrative actions;

(v) any material amendment to transaction documents."

It is difficult to understand how the "CLO Securitisation information section" and the "CLO Manager information section" are "significant events" within the above definition and wonder whether this template is the appropriate place in which to report this information? We also believe that this goes beyond the scope of the Level 1 Regulation as to what constitutes a "significant event". Putting CLO reporting in the significant events template may also have unintended consequences, as outlined below.

As for Annex 16, whilst we can see that SESS3-7 can be construed as "significant events" within the meaning of the Securitisation Regulation, it is not clear that this can be said for all the other fields of Annex16.

"Significant event" reporting appears only to apply in limited circumstances

Article 7(1)(f) of the Securitisation Regulation concerns the reporting of any inside information relating to the securitisation that the originator, sponsor or SSPE is obliged to make public in accordance with the Market Abuse Regulation. The reporting obligations in the Market Abuse Regulation apply to securities traded or admitted to trading on an EU regulated market or on a multilateral trading facility ("**MTF**").

Article 7(1)(g) of the Securitisation Regulation concerns the reporting of any significant event *"where point (f) does not apply"*. Although the wording is not unambiguous, we understand that Article 7(1)(g) only applies where there is no obligation to report inside information in accordance with the Market Abuse Regulation. In other words, we understand that that there is only an obligation to report significant events where the transaction is outside the scope of the inside information reporting obligations in the Market Abuse Regulation. If this interpretation is correct, the significant events reporting obligation is an alternative to the inside information reporting obligation and they are not cumulative obligations. We understand that this is the generally accepted interpretation of these provisions (but please let us know if ESMA disagrees with this).

The implications of this interpretation are that:

1. the significant events reporting template only applies to transactions outside the scope of the inside information reporting obligations in the Market Abuse Regulation; and

2. it does not apply to transactions within the scope of the inside information reporting obligations in the Market Abuse Regulation.

This has practical implications for the scope of the reporting obligations in the significant events reporting template in the Draft Technical Standards.

RTS Article 7 Information on significant events

We also note that Article 7 of the Draft Regulatory Technical Standards ("**RTS**") says that:

"A submission of information set out in Articles 2 [underlying exposure information] *and 3* [investor report information] *shall be considered a significant event for the purposes of Article 7(1)(g) of Regulation (EU) 2017/2402."*

However, underlying exposure information and investor report information are not in the list contained in Article 7(1)(g) and are specifically set out in different subparagraphs of Article 7(1).

It is not clear whether Article 7 of the Draft RTS is saying that the submission of underlying exposure reporting templates and investor report templates are deemed to be a "significant event", but that such a submission is not a significant event that appears in the significant events reporting template.

We wondered if the reason for Article 7 of the Draft RTS was to make the submission of the Quarterly Reports a trigger for the submission of the Significant Events template in Annex 16 which includes the CLO reporting fields? However, this is not clear.

For the above reasons, we think that the RTS as currently drafted could cause significant confusion in the scope of their application as regards significant events reporting. We would invite ESMA and the Commission to consider these points. We would also have thought that Article 7 of the RTS needs some rewording to clarify its application.

Jurisdictional scope of the disclosure obligations

As we noted in our March letter, the Securitisation Regulation Article 7 obligation is not stated to be limited to EU established originators, sponsors and SSPEs. We presume that the transparency requirements are not intended to apply where none of the originator, sponsor or SSPE is established in the EU. The reference in the due diligence requirements in Article 5 of the Securitisation Regulation to investors ensuring that the originator, sponsor or SSPE has *"where applicable"* made available the information required by Article 7, and the absence of a provision for a competent authority to supervise compliance with Article 7 for a reporting entity established outside the EU, both indicate that this was not the intention. However, we are not aware of this having been made clear anywhere in the legislation or in any guidance. We cannot see any policy reason for these disclosure obligations to apply to securitisations which have no connection with the EU and presume that this is not the intention of the legislation. However, the current position is unsatisfactory in that the jurisdictional scope of these obligations in the Securitisation Regulation remains unclear.

We asked in our March letter whether, if ESMA feels that their mandate for the Draft Technical Standards does not extend to clarifying this jurisdictional issue, this point could be clarified in some other way by ESMA and/or the EBA and/or the Commission. In this context, we were pleased that ESMA noted in their Final Report these points regarding the potential jurisdictional uncertainty in the Article 7 obligations and that ESMA have passed on this issues to the responsible legislative bodies.

A similar issue has arisen in the context of the jurisdictional scope of the risk retention obligation. In their Final Draft Regulatory Technical Standards report published on 31 July 2018 the EBA, in a similar way to ESMA, also noted that the scope of application and jurisdictional scope of the "direct" retention obligation relates to a general interpretation issue of the Securitisation Regulation and was outside the scope of those EBA draft RTS. However, the EBA helpfully noted their view on this point:

"The EBA agrees however that a 'direct' obligation should apply only to originators, sponsors and original lenders established in the EU as suggested by the Commission in the explanatory memorandum."

Would it be possible for ESMA (or the Commission) to express a view that the disclosure requirements should only apply where one of the originator, sponsor or SSPE is established in the EU - which is consistent with the way the due diligence obligations are drafted and which we understand was the intention of the legislators – in a similar way to the EBA's statement in the risk retention context? This would go some way to help reduce the uncertainty in this area.

Transaction documentation to be made available before pricing

Another point mentioned in our March letter is that Article 7(1) of the Securitisation Regulation provides that all underlying transaction documentation is to be made available before pricing. We noted that the timing of this transaction documentation disclosure obligation will potentially be problematic given that documents are typically still in draft form, and often incomplete, at the time of pricing. In practice, it will therefore normally only be draft information that can be provided before pricing. We also noted that Article 22(5), in relation to STS Securitisations, provides that transaction documentation shall be made available before pricing in *"at least in draft or initial form"*. There does not seem to a clear basis for this apparently less onerous obligation for STS securitisations.

In their Final Report, ESMA acknowledged this issue and said that, although it falls outside ESMA's technical mandates, ESMA have ensured that this issue has been passed on to the responsible legislative bodies.

We would hope that this inconsistency in the legislation can be resolved and that this potentially problematic provision can be amended by the legislative bodies. If that is not possible, perhaps ESMA could issue some guidance to note that, in practice, the transaction documentation to be made available before pricing may be in *"at least in draft or initial form"*?

Transitional issues

The potential impact of the Securitisation Regulation's transitional provisions

In our March letter we noted the potential complications that would arise (for example, in terms of developing reporting systems) from market participants having to comply with the Article 8b CRA3 RTS requirements, and then the Draft Technical Standards, and how important it is that the Draft Technical Standards apply from 1 January 2019. We are pleased that ESMA have recognised the importance of this issue and have specifically written to the Commission on this point and have highlighted it in the Final Report.

Phased implementation

In our March letter we also highlighted the significant practical challenges for the reporting entities in developing the reporting systems required to fulfil all the disclosure obligations in the Draft Technical Standards. Systems will need to be developed to collect all of the information required in the applicable templates and to input that information in the specified format. This will necessitate significant time and cost resources and may cause disruption in the securitisation market. We noted that other EU legislative initiatives have contained phased implementation periods, or delayed implementation, to take account of such practical systems development issues.

Market participants have essentially only been able to start their preparations since ESMA's Final Report was published. The Final Report contained a number of material changes from the December consultation paper. As we have explained elsewhere in this letter, with regard to corporate loans and CLOs there remain significant issues outstanding from the consultation and certain new items in the Final Report are also problematic. CLO market participants are still working through the templates and other issues may come to light.

In this connection, we also note that the RTS attached to the December 2017 consultation stated that the reporting templates did not apply to "private securitisations". The position changed substantially in the RTS attached to the Final Report in which it was stated that the underlying exposure templates and investor report templates applied to *all* securitisations. There has therefore been very little time in which to consider the contents of these templates as they apply to private securitisations, since it had been assumed until August 2018 that they would not apply to private securitisations.

It would be incredibly challenging operationally to put all the systems and process in place in time even without the uncertainties and problems that we have highlighted. Accordingly, to avoid a potential cessation of issuance and market disruption, we consider that a phased implementation is essential.

We recognise that ESMA have said that they do not have a legal mandate to propose a transitional period for the implementation of the Disclosure Technical Standards. However, ESMA have also highlighted that compliance with the Disclosure Technical Standards may require substantial time and effort. ESMA proposed a transition period for the implementation of the Disclosure Technical Standards so that they could apply in a gradually increasing manner – though they made clear that this a matter for the Commission. ESMA consider that 15-18 months appear to be necessary as a transition period. We note our support for ESMA's proposal. Although there are only a few months left before the application of the Securitisation Regulation, we are hopeful that the Commission will act on ESMA's proposal and put in place such a transitional implementation period.

We would be grateful if ESMA could strongly encourage the Commission to adopt these ESMA implementation proposals as far as is possible. In addition, and particularly in the event that the Commission is not able to put in place such a phased implementation,

we would request that ESMA assist with the resolution of the outstanding issues highlighted in this letter, by providing any guidance that ESMA are able to provide, in the way that ESMA have indicated that they will endeavour to do in paragraph 62 of the Final Report.

PART II – POINTS ON THE DISCLOSURE OBLIGATIONS

Disclosure obligations – protection of confidentiality

We mentioned in our March letter that Article 7(1) of the Securitisation Regulation provides that when complying with their disclosure obligations, the originator, sponsor and SSPE of a securitisation shall comply with national and EU law protecting the confidentiality of information, as well as any confidentiality obligation relating to customer, original lender or debtor information, unless such confidential information is anonymised or aggregated. We have asked if could be clarified that the transaction documentation to be disclosed can redact such confidential information. We wondered if it would it be possible for ESMA to produce some guidance to this effect (which would be consistent with the provisions of the Securitisation Regulation).

Disclosure obligations – anonymisation of obligors – risk of breach of confidentiality

We also would highlight that although some of the fields ask for a unique underlying exposure identifier or a unique obligor identifier in order to ensure the anonymity of the obligor, the reality is that such anonymity may be difficult to maintain in practice in relation to some asset classes, particularly where the asset class is small – for example, broadly syndicated corporate loans. It may in practice be possible to identify borrowers even with the use of identifiers.

This could cause significant breaches of confidentiality obligations. Not only would this be a breach of contractual confidentiality obligations, but could also breach Article 7 of the Securitisation Regulation. Article 7 provides that the originator, sponsor and SSPE must comply with national and EU law governing the protection of confidentiality of information as well as any confidentiality obligation relating to customer, original lender or debtor information, unless such confidential information is anonymised or aggregated. If the identifiers allow, in practice, the identification of the obligor, then the templates could cause the reporting party to breach this provision in the Securitisation Regulation.

The volume of data sought in the templates

We would also highlight the volume of data sought in the templates and the practical operational difficulties that will be caused to market participants by the volume of such requests. We would also question whether all of this data will, in reality, be required by ESMA in order to monitor the EU securitisation markets.

The difficulties in obtaining information for originators who are not original lenders

It will, in practice, be difficult for originators who purchase a third party's exposures for their own account and then securitise them (a "**limb (b) originator**") to obtain much of the information sought in the templates. Following on from our March letter, we would ask ESMA to consider each of the fields in the reporting templates in connection with the position of limb (b) originators who purchase a third party's exposures. We would highlight the practical difficulties that limb (b) originators will face in having to comply with each of

reporting obligations in respect of underlying exposures that have been acquired from third parties. We note that ESMA considered this issue in its Final Report and said (at paragraph 33):

"ESMA is of the view that such information, which relates for example to the jurisdiction of the originator/original lender, origination channel of a loan, its origination date, and its original principal balance, are all important elements for potential investors to perform their due diligence, as well as for investors and public authorities listed in Article 17(1) to meet their monitoring tasks and mandates and, therefore, should always be available. Moreover, although such information may be challenging to retrieve at first, then by the time that the reporting requirements fully apply, it appears that this information would be able to be made available in a sufficiently broad manner."

We appreciate that ESMA have designed the templates to provide investors and public authorities with information that is viewed as important. Nevertheless, certain fields of the templates do not fully reflect the nature of corporate loan assets and the loan market. As such, corporate loan assets and CLOs will face significant difficulties in complying; it is almost impossible to complete certain fields. As noted above, we would emphasise that CLOs perform a major role in the economy, providing much needed financing to corporates (including SMEs). We have emphasised some of the key aspects of the corporate loan market in this respect in Appendix 2 to this letter.

The nature of CLOs (as more fully described in Appendix 2) is the reason for many of our comments on the specific data fields below. In particular, we would emphasise again that some of the information sought may not be available to originators who are not original lenders. We would reiterate our view that ESMA should add a no data field for limb (b) originators where data is not available because the original lender has not provided it, or should consider expanding the availability of ND5 options in those circumstances. It will not always be the case that, when it made the loan, the original lender obtained and recorded all the data required by the relevant templates.

Main difficulties on specific data fields in Annex 4

As regards specific data fields in Annex 4, we would highlight, as examples, issues with the fields described below. A number of these points were made in respect of the December 2017 templates and still apply:

a. CPRL 13 (Customer Type). There appears to be errors in the "Content to Report" text. The first description and second description are identical yet have different codes. The third description and the fourth description are identical yet have different codes. The code for the first item is the same as the code for the third item. The code for the second item is the same as the code for the fourth item. This field cannot therefore be properly completed. We note that this problem recurs in relation to the equivalent field in other asset classes.

b. CRPL 30: it is not clear from the text what 'also being managed by the CLO manager' means. Is what is being sought: (i) whether the asset was managed by the CLO manager prior to the securitisation; (ii) whether the CLO manager also manages a participation in the same loan that is not securitised; (iii) simply asking whether the transaction is a CLO (given the template is not CLO specific); (iv) whether the transaction is a managed CLO rather than a balance sheet or static CLO; or (v) whether this is this

trying to catch re-securitisations? Accordingly, CLO managers will not know how to complete this item.

c. CRPL 35 (origination channel). As described above, this does not reflect the nature of the asset (i.e. wholesale rather than retail) and may not be known by non-original lenders. A non-bank lender such as a fund would likely lend through an office. Would this be considered an "Office or Branch Network" or should this be "Other"?

d. CRPL 38 (balance on origination date), 40 (prior balances). A non-original lender in the loan market would not have access to this information. Furthermore, this information is not of significance to investors.

e. CRPL 60-66 would not be available for bond assets purchased (CLOs may purchase a limited percentage of bond assets).

f. CRPL 68: the number of payments before securitisation will be difficult to establish for a non-original lender in the loan market. It would be necessary to go back to the agent, who may not be responsive or be able to find the information easily. This adds further administrative burden and potential costs. This is also of no interest to an investor in corporate loans and so is not particularly useful information.

g. CRPL 69 and 74 (percentage of prepayments allowed per year, cumulative prepayments) are problematic for non-original lenders in the loan market, they are designed for original lenders and this data is typically not captured.

h. CRPL 98-100 (original lender information) will cause difficulty in the loan market. Loans are fungible and will almost always have multiple original lenders. It will in practice not be possible to trace this back in such circumstances.

i. CRPL 101-102 (originator information) - due to the nature of managed CLOs, which may buy assets from a variety of sources, there may be no originator as such. In the majority of transactions the risk retention interest is simply held by the CLO manager as sponsor. There is no viable option in this case. Two of the fields are not alphanumeric so cannot be completed as 'not applicable'. This needs to be fixed or a large number of CLO transactions will not be able to comply.

j. CRPL 103 (originator establishment country). It is unclear whether this means the originator for the securitisation or the original lender. Please see the point above for the former. For the latter, the original lender country may not be known due to the way the market operates.

Main difficulties on specific data fields in Annex 16

a. SESS7 (perfection) is somewhat unclear and its binary nature does not cater for CLOs: a managed CLO does not have a single transfer of assets from an originator as for the other asset classes, but rather purchases individual investments repeatedly on an ongoing basis, i.e. has a dynamic rather than static portfolio. In addition, the legal form of such investment is quite different from, say consumer assets. A CLO SSPE would invest in a corporate loan by granting or purchasing an interest in the loan. The SSPE would typically become the lender of record on the purchase of a loan, so legally speaking the sales will be perfected into the name of the SSPE. However, in a

managed CLO some investments are acquired at the time of the securitisation closing date and others are acquired afterwards and the field does not cater for this variability.

Further, a CLO may also invest in a limited number of sub-participations where the SSPE is not the lender of record with regard to the underlying borrower, rather the lender of record passes on the risk and reward relating to the participation behind-the-scenes. In that sense, a sub-participation is not perfected vis-à-vis the borrower. However, as between the SSPE and the grantor of the sub-participation, the SSPE has direct rights against the guarantor so that is arguably perfected. Accordingly, there is a whole mix of possibilities for different individual exposures which this field is not capable of capturing. It may be that in practice "No" can simply be selected, but that would not seem to provide a meaningful picture. This question should not really apply to CLOs as it does not provide any useful information for investors in this product. As such, ND5 should be made available for CLOs unless another solution is offered.

b. SESL 6-8 (employee information) causes additional administrative burden on top of the great volume of other information sought. This is not meaningful for investors. Service provider (e.g. servicers) employee information does not seem to be sought for any other class, and so this seems to not treat CLOs on a level-playing field. We would therefore ask for these fields to be removed.

Other uncertainties with template items

The following items give rise to uncertainties, but are less serious than the issues above. We hope that ESMA will note these examples of uncertainties that the templates are causing and can offer some explanation or confirmation on these points:

a. Annex 4, CRPL 15 (Basel III) is designed for banks rather than for non-bank lenders. Similarly, a non-bank lender may use a different definition for arrears in CRPL 80. We assume therefore that non-bank lenders can use ND5 in these cases.

b. Annex 4, CRPL 48 bullet is not an option, which is commonly found in large corporate loans. Is it necessary to use "Other"?

c. Annex 4, CRPL 49 as with CRPL 48, large corporate loans always have variable interest periods at the option of the borrower. In this case should the selection be the current frequency, as at the date of the report, or be 'Other'?

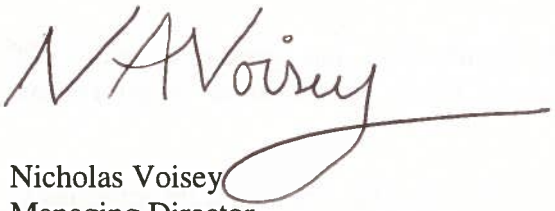
d. Annex 4, CRPC 10 (current valuation amount); CRPC 11 (current valuation method); and CRPC 13-15 (valuation dates and methods for collateral). These have an asset valuation focus, whereas corporate and leveraged lending is based on the corporate credit of the borrower and not asset based. This information is in any event not available to non-original lenders. We assume that ND5 can be used for this.

Conclusion

We would be pleased to answer any questions you may have and to meet if you wish or to discuss the points we have raised.

If you would like to do so, please contact Nicholas Voisey of the Loan Market Association (nicholas.voisey@lma.eu.com) or David Quirolo (david.quirolo@cwt.com) of Cadwalader, Wickersham & Taft LLP.

Yours faithfully



Nicholas Voisey
Managing Director
Loan Market Association

APPENDIX 1

The Loan Market Association

The Loan Market Association ("**LMA**") is the trade body for the European syndicated loan market founded by banks operating in that market. Its aim is to encourage liquidity in both the primary and secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice which are widely used and adopted.

Since the establishment of the LMA in 1996, membership has grown to over 700 organisations, comprising commercial and investment banks, institutional investors, law firms, service providers and rating agencies.

The LMA has gained substantial recognition in the market and has expanded its activities to include all aspects of the primary and secondary syndicated loan markets. It sees its overall mission as acting as the authoritative voice of the European loan market *vis à vis* lenders, borrowers, regulators and other interested parties.

APPENDIX 2

Loan Market Background

Although ESMA will be familiar with the corporate loan market, we wished to emphasise some of its features which will impact on the data sought in the templates. The market mainly consists of loans to enterprises which will very often be provided by a number of lenders together who each take different participations. There is an active secondary market in which fungible individual units of participations are traded. This means, for example, a purchaser can buy different participations in the same loan from different sellers. Thus, unlike say consumer assets, there is not just one original lender or originator. Each participant will do their own credit analysis before taking an interest in the loan, whether the investment is part of the initial grant of the loan or made in the secondary market.

The secondary market is much more developed than for say consumer assets, where whole portfolios of loans are sold in sale processes that can take several months. By contrast, in the loan market any number of participations in a single loan are traded on the secondary market. Such trades are much faster moving and generally conducted on the standard form documentation produced by the LMA. In this environment, as the secondary market purchaser does its own credit work on the borrower, the previous owners of the participations and historical details of the loan would not be of particular interest to such purchaser. Hence, information about such history would likely not be captured by the investors involved. Also, given the way participations that can be traded in any number of units, it is likely not possible to assign a single history of ownership to a particular interest in a loan.

Thus, the characteristics of loans and the loan market are significantly different from for say, consumer assets. Investors in managed CLOs are buying into the expertise of the CLO manager to select loans, including the manager's credit work on the assets selected. They are not concerned with details of the historical ownership of any particular loan. CLO investors are in the same position of any bank or other financial institution investing in the loan market. This is not a case of asymmetry of information between investor on one hand and the sponsor/originator on the other.