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To: European Securities and Markets Association
103 Rue de Grenelle
75345 Paris Cedex 07
France

Submitted online at www.esma.europa.eu

Dear Sirs

Re. Discussion Paper on CRA3 Implementation, 10 July 2013/ESMA/2013/891 (the "Consultation Paper".

On behalf of the Loan Market Association (**"LMA"**),we would like to thank you for the opportunity to comment on the Consultation Paper, and more particularly the issues surrounding implementation of Article 8b of Regulation (EC) No 1060/2009 on Credit Rating Agencies (**"CRA"**) as amended by Regulation (EU) No 462/2013 (**"CRA3"**) (**"Article 8b"**).

The LMA is the trade body for the European syndicated loan market and was founded in December 1996 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. Membership of the LMA currently stands at over 500 organisations from over 50 countries and consists of banks, non-bank investors, law firms, rating agencies and service providers. 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.

Introduction – the CLO market

The growth of the non-bank institutional lending market has been an important focus of governmental authorities. As CRD IV comes into effect, non-bank institutional lending will be necessary in order to inject much needed credit into the loan markets. The continuing development of the CLO market is, in the view of the LMA, a key component of this initiative.

As the well-publicised €122bn [1]"refinancing wall" approaches, there is a significant risk that many European corporate borrowers will be unable to refinance their existing debt via traditional methods, such as as through relationship banks and the syndicated loan market. Further we believe the "refinancing wall" estimates substantially understate the challenge facing the European corporate market, as studies only include widely-syndicated loan facilities - they exclude many loans which have been made available to non-investment grade corporates by relationship banks either on a bilateral or club basis and which are reaching a peak maturity period.

[1] Moodys – July 2013

At the same time as there is a peak in refinancing, the European loan market faces reduced lending capacity. Banks in particular are less able to lend under revised regulatory regimes. In addition, investment capacity for CLOs is drastically diminishing. The incumbent CLO universe is reaching the end of its permitted reinvestment capability, whilst new CLO issuance has been low due to European-specific regulatory change.

The lower lending capacity will be further impacted by the regulatory capital treatment of European credit institutions following the implementation of CRD IV, which is likely to make lending to the sub-investment grade sector less attractive for European credit institutions. Furthermore, it is not feasible for borrowers in Europe to access retail loan funds, which have proven an important source of credit and liquidity in the United States ($110.4 billion supply of loans)[2] as the current UCITS requirements do not permit a significant portion of loans in a UCITS compliant fund.

Whilst the high yield bond market or the IPO market can fill a portion of this refinancing gap, many borrowers will be unable to access these markets for a number of reasons, such as their enterprise value, size or credit profile. Therefore, as European corporate refinancing requirements substantially increase, there is a concurrent risk of refinancing options and investment capacity substantially diminishing.

The LMA believes that new issue CLOs are a key component to ensuring that there is adequate credit to refinance the existing debt of these European corporates. As such it is critical that regulation strikes the correct balance between addressing the concerns of regulators while taking into account the unique structure of CLOs in order to allow for a robust and functional CLO market.

Summary of our concerns relating to Article 8b

1) *Scope*

The Consultation Paper's proposed application of Article 8b to all structured finance instruments traded in the EU gives us significant cause for concern. In our view, the intention of the legislature in CRA3 is to set out in Article 8b "obligations for issuers, originators and sponsors established in the Union regarding structured finance instruments"[3], as this is expressly stated in Article 1. This reference in Article 1 can only be interpreted as applying to Article 8b as there is no other provision of CRA3 which imposes obligations on issuers, originators and sponsors. Thus it is our view that the wording of Article 8b cannot be interpreted to extend to structured finance instruments traded in the EU. The word "established" in Article 8b refers to the issuers, originators and sponsors, and not to the instruments themselves, as clarified by the intention expressed in Article 1.

Extending the requirements of Article 8b to instruments traded in the EU but issued and sponsored by entities outside the EU creates a significant additional burden on, for example, issuers and sponsors already subject to Rule 17g-5 of the rules of the U.S. Securities and Exchange Commission. Rule 17g-5 requires such entities to maintain a password-protected website, accessible to registered rating agencies, including all information provided to the credit rating agency rating the structured finance instrument. There is no sensible rationale behind extending the requirements of Article 8b to issuers and sponsors from the U.S. and other non-E.U. jurisdictions where there are already sweeping disclosure requirements applicable to issuers and sponsors of structured finance instruments. In our view the scope of the Level 1 text, as expressed in Article 1 of CRA3, is clear and should not be altered by ESMA under Article 8b.

In answer to Question 2 of the Consultation Paper, and as an additional point on scope to that made above, the obligations on issuers, originators and sponsors in Article 8b should apply only to structured finance instruments for which a prospectus is required to be published under the Prospectus Directive. In the absence of such a limitation, the concept of "trading" is too unclear to provide any certainty as to the scope of Article 8b. Failure to limit scope in this way would lead in effect to the imposition of disclosure requirements to instruments which are either exempt or

[2] Source: S&P, 12-Aug-13

[3] Article 1 of CRA3

outside the scope of the Prospectus Directive, which has been an established framework within the EU for the last eight years, through Level 2 text which we believe to be unsupported by the wording of CRA3 itself.

2) *Confidentiality*

CLO managers purchase and sell loans which are often based on market standard documents, including the LMA recommended forms, although as they are negotiated on a bilateral basis they can contain a variety of restrictions around confidentiality. It would be usual to see a restriction on the disclosure of confidential information about the Borrower. In some circumstances, confidential information can be disclosed when required by law or by a regulatory body, but due to broader legal requirements around bank confidentiality duties to clients, banks are extremely cautious when disclosing information even where such provisions appear in the loan agreement. For example, if information is published which could, either on its own or in conjunction with other publicly available information, identify the borrower, confidentiality duties could be breached. The extensive and public nature of the disclosure contemplated by Article 8b gives us cause for concern that CLO issuers will be required to disclose information to the market which would be in direct breach of their duties of confidentiality to borrowers, whether these duties are set out in the loan documentation or arise under the general law in any particular jurisdiction. Furthermore, in some jurisdictions it may not be possible to agree contractually to disapply such duties of confidentiality. This concern is magnified in the context of the suggested application of Article 8b beyond the EU.

This is of particular concern in the CLO market, where the number of underlying borrowers is limited, and it may be possible to identify underlying borrowers in a CLO portfolio when information disclosed on the ESMA website is combined with other publicly-available information provided by data providers such as Debtwire. In light of this concern, we would stress the need either for a principles-based approach to disclosure, or provision of information on a "comply or explain" basis, where information subject to a legal or contractual duty of confidentiality can be omitted from publication whilst comprehensive data on the composition of the pool and its constituent obligations is nevertheless provided.

In answer to Question 9 of the Consultation Paper therefore, we would suggest caution when seeking disclosure of loan-by-loan level data. Instead, we would urge ESMA to adopt the approach taken in currently-provided CLO investor reports, where confidential information on Borrowers can be omitted or redacted. CLO investor reports contain a great deal of detail on each loan, including principal balances, purchase price, whether the loan is performing etc. However, this information is subject to any confidentiality requirements applicable to lenders.

In answer to Question 19 of the Consultation Paper, our view is that local law as well as standard market documentation must be considered fully before setting the disclosure requirements. As the Level 1 text is not prescriptive, we feel that there is plenty of scope for ESMA to set disclosure requirements which take into account confidentiality restrictions. ESMA should interpret the provision in Article 8b (2) which ensures that the disclosure requirements do not require "publication which would breach national or Union law governing the protection of confidentiality of information sources or the processing of personal data", as protecting the confidentiality of borrowers in respect of underlying assets whether those borrowers are corporate entities or individuals, and whether the confidentiality obligation arises under law or regulation or under the loan documentation itself.

3) Template disclosure

In answer to Question 17 of the Consultation Paper, there are not currently disclosure templates which apply to CLO transactions in the suite of ECB open market repo documentation. Our view is that care should be taken in producing any equivalent documentation for CLOs in light of the confidentiality concerns outlined above.

Current disclosure to investors in the CLO market

If it would assist ESMA, we would be very happy to supply some more detail around the types of information included in CLO investor reports. Our view is that this should be the basis of information supplied on the ESMA website for potential investors also.

In order that ESMA can put these disclosure items into context, below is a brief explanation as to how assets qualify for and become part of a managed CLO portfolio.

Warehousing

During the warehousing period, prior to issue of bonds by the CLO vehicle, the CLO vehicle accumulates assets which meet the eligibility criteria. Once these assets reach a critical mass, the CLO vehicle "securitises" them by issuing notes to investors in the market. The prospectus describes the eligibility criteria, but loan-level data is not provided to investors at this time due to the continuing "ramp-up" of the portfolio to reach the target amount of the portfolio for the transaction.

Ramp-up

Following closing, the manager continues to purchase assets on behalf of the CLO vehicle using bond proceeds until the target value of the portfolio is reached. The ramp-up period may continue for up to six months. During this period, investor reports are issued monthly to bondholders. These reports provide, subject to any confidentiality restrictions binding on the CLO vehicle, the principal balances of underlying loans, the location of the security, the domicile of the obligor, the rating, the industry category and the stated maturity.

Reinvestment

During the reinvestment period (typically four to five years after closing), the manager can reinvest principal proceeds from the assets in buying new assets. Again during this period, the investors will receive monthly reports containing the information set out in the Prospectus and described above.

In answer to Question 10 of the Consultation Paper, our view is that for CLOs, periodic reporting is preferable to and more familiar to investors than event-based reporting. CLO investors receive monthly reports in any event, due to the actively-managed nature of the portfolio. Besides the loan level information described above, these reports include the status of collateral quality tests, overcollateralization tests and concentration limitation tests (the "Tests") - rigorous rating agency tests measuring overcollaterisation and various portfolio characteristics which the manager is required to comply with in order to continue to be able to reinvest in new assets. These portfolio-level tests are already industry-standard and are particular to managed CLOs as opposed to securitisations of static portfolios.

The Tests are designed to provide detailed and transparent disclosure in respect of the portfolio. They cover data such as diversity of obligor by industry and geography, weighted average spread on the assets, weighted average fixed rate coupon, weighted average rating and weighted average life of the underlying assets. The Collateral Manager then has to meet the Tests on an ongoing basis or cash will be used to redeem the transaction. Compliance with the tests will be confirmed in the monthly investor reports along with the loan disclosure already provided. In this way, investors receive a wealth of information on the loans in the CLO portfolio on which to base their due diligence. Additional loan-by-loan information is of little additional value as there is no assurance that an individual loan will remain in the portfolio from month to month – what investors are really buying is the expertise of the Collateral Manager to manage a portfolio of loans in accordance with certain parameters.

Event-based reporting is therefore unnecessary as well as an additional burden on the CLO manager. Our view is that the current monthly periodic reporting will lead to more consistency in the disclosure under Article 8b than event-based reports.

Other issues

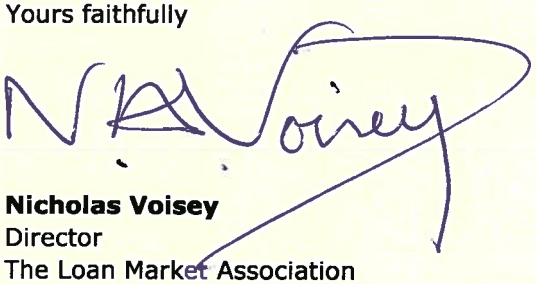
We understand that other trade associations are dealing with the wider concerns of the structured finance industry, so our responses are limited to the questions addressed in this letter.

Conclusion

The managed nature of a CLO portfolio is particular to this asset-class, and accordingly these transactions are not subject to loan-by-loan reporting with the ECB as any individual loan will not necessarily continue in the portfolio. Existing investor reports are provided monthly, in contrast with the quarterly reporting to investors which is usual in securitisations of static portfolios. In our view, the issues set out in this letter need to be considered before ESMA finalises additional disclosure requirements for CLO transactions.

We would be very happy to assist ESMA further in developing any requirements which apply to CLOs, and if you would like us to do so, please contact Nicholas Voisey of the LMA (nicholas.voisey@lma.eu.com), or David Quirolo (david.quirolo@ashurst.com) or Anne Tanney (anne.tanney@ashurst.com) of Ashurst.

Yours faithfully



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