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## **Milbank Briefing Note:** **Public Hearing on EBA Consultation Paper on draft Regulatory Technical Standards and Implementing Technical Standards on securitisation retention rules (the “RTS/ITS”)**

James Warbey and John Goldfinch, of Milbank’s London office, this morning attended the Public Hearing on the EBA’s recently published Consultation Paper on draft Regulatory Technical Standards and Implementing Technical Standards on securitisation retention rules.

**ATTENDANCE**

The panel was represented by:

- Isabelle Vaillant, Director of Regulation, EBA
- Christian Moor, Policy Expert, Securitisation, Covered Bonds and Market Risk, EBA
- Ashley Kibblewhite, Senior Risk Specialist, Prudential Regulation Authority
- Benjamin King, Associate, Prudential Regulation Authority
- Massimo Suardi, European Commission

The “public” were in strong attendance and filled the EBA meeting room at Tower 42 to capacity with around fifty representatives from banks, asset managers and law firms.

**FORMAT**

The format of the public hearing led with a presentation on the background to the Consultation Paper with an overview of its key provisions. In doing so the EBA confirmed upfront two points that are not explicitly stated in the RTS/ITS, being that:

- (i) the EBA had intended for there to be no grandfathering and they were aware that this meant a small number of existing deals would be adversely impacted as a consequence, though investors in current deals deemed non-compliant in future should not be penalised, provided they were not negligent at the time of investment; and
- (ii) the prohibition on subjecting the risk retention piece to “any credit risk mitigation or any short positions or any other hedge” did not preclude the use of a “macro-hedging” strategy, suggesting that the restriction in Article 405 of the CRR should be narrowly construed, though no further guidance or elaboration on this point was provided.

The floor was then turned over to questions for approximately an hour.

#### QUESTIONS

Questions from the audience were broad-ranging and covered:

- Clarification requested on Article 19 (*Exposures in the trading book and non-trading book*) and the breadth of the market-making exemption;
- Objection that the EBA did not sufficiently communicate that the RTS/ITS would not deviate or supplement the provisions of the Level 1 text in the CRR;
- Query as to whether the EBA had considered possible conflicts with the Volker rule;
- Query over meaning of “for its own account” in the definition of “originator” (Milbank);
- Query over approach to possible split in retention where there is more than one sponsor (Milbank);
- Level of “management” required in order to qualify as a “sponsor” (Milbank);
- Request to correct the apparent anomaly in the CRR meaning only MiFID regulated firms could act as “investment firm” sponsors;
- Request that the RTS/ITS contain the same or similar guidance as was contained in the Guidelines on Article 122a (the “**Guidelines**”) on what will be a new, as opposed to existing, securitisation.

By and large the EBA panel were reluctant to engage in the minutiae of the answers to the above questions and participants were asked instead to put their queries in written form and submit them as part of the consultation process before the deadline on 22

August, 2013. Nothing new therefore came from the responses to the above questions. Further, it was stressed repeatedly that the EBA had no mandate to deviate from, supplement, or expand upon the text of the CRR itself. This of course contrasts sharply with the approach taken previously by the EBA, then as the CEBS, in respect of the Guidelines and gives a clear indication on how far the EBA will be prepared to go in amending the current draft form.

Interestingly the EBA confirmed that its current Q&A platform on the CRR, available on its website and which has been live for the past couple of weeks, would be extended to also cover the RTS/ITS. However, this will only accept queries following the publication of the final RTS/ITS in the Official Journal, expected to occur by the end of March 2013 following their submission to the Commission by no later than 31 December, 2013. This may be a useful forum to obtain greater clarity on certain issues going forwards in 2014.

#### **FINAL THOUGHTS**

Whilst in one sense the Public Hearing was a disappointment, in that no real new ground was covered, equally there was no suggestion that there would be sweeping changes made to the current draft of the RTS/ITS. Whilst the same are sub-optimal in many respects, particularly with respect to the CLO market, market participants might take some comfort from the fact that we will probably see few if any significant further changes and thus we have the “devil-we-know”. Please refer to our earlier briefing paper - *“Risk Retention Reinvention: Some Questions Answered”* - for further details.

As a final point, it was noted by one attendee representing a large European investment bank that the market appeared to be pricing in about a 10-15bps spread on the AAA tranche of non-compliant CLOs. We would be interested to hear if this accords with your experiences.

**Milbank, Tweed, Hadley & McCloy LLP**

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