

Comments of Clifford Chance Securitisation Group on Proposed Prospectus Directive in relation to Asset-Backed Securities

Comment No.	Para. No.	
1.		<p>General Comments on Level 1 and Level 2 Documents</p> <p>(a) Trust Structures</p> <p>Both of these documents largely contemplate the issuance of debt securities by a corporate entity. They do not contemplate the situation where a professional trust company issues debt securities as trustee of a trust into which have been transferred the relevant assets collateralising the issue.</p> <p>There have been several issues like this, in particular the Swiss property securitisations rely on this structure for Swiss tax reasons.</p> <p>In these structures there is very little disclosure in relation to the issuer (i.e. the trust company), for example, its financial status is not relevant as repayment of the debt is solely out of the assets of the trust which are legally separate from the assets of the trust company. The current Level 1 and Level 2 documents do not allow this kind of structure. If this is not permitted these types of debt securities are likely to be listed on an exchange outside of the EU.</p> <p>We have indicated below in our detailed comments where the disclosure requirements would give rise to problems with this type of trust structure.</p> <p>(b) Programme Asset-Backed Structures</p> <p>Both of these documents largely contemplate the issuance of a single series of debt securities by a corporate entity. They do not contemplate the situation where the issuer enters into a programme under which it can issue separate series of debt securities each collateralised and secured by a separate portfolio of different assets.</p> <p>Usually this type of issuer will issue a base prospectus describing the programme and itself and a supplemental prospectus for each series. There is concern that the disclosure requirements would require the supplemental prospectus for each series to contain information regarding every series rather than only in relation to that particular series and its particular assets.</p> <p>We have indicated below in our detailed comments where the disclosure requirements would give rise to problems with this type of structure.</p>
<p>Comments on CESR Feedback Statement on Level 2 Implementing Measures - annexes to the Technical advice (Ref. 03-066B) [April 2003]</p>		

Minimum Disclosure Requirements for the Debt Registration Document (ANNEX D)		
2.	1.1	Either the name of the natural person or the name and registered office of the legal person responsible for the registration document should be included but not both. Why is this information required both in the Registration Document and the Securities Note?
3.	3.1	The period for requiring historical financial information should be stated
4.	5.1.5	It is not clear what is meant by "a description of recent events relating to the issuer's solvency". Does this mean the issuer's recent financial history? As most issuer's of Asset-backed securities will be newly incorporated special purpose vehicles, they will not have any financial history. How is this to be dealt with? In relation to the trust structure referred to above, the financial history of the issuer itself - being the trustee is irrelevant, what is relevant is merely the assets the subject of the trust.
5.	5.2 6.1 8.1 8.2	<p>These items deal with the investments made by the Issuer and the principal activities of the Issuer. They focus on one type of issuer which is that of conducting a business of a manufacturing or trading company.</p> <p>In an asset-backed transaction, an Issuer's sole activity is usually to invest in assets, which can be of a wide variety such as receivables or securities or a loan to an operating company which carries on a business activity.</p> <p>We are concerned that the language of these sections does not fit particularly well with the activities of an asset-backed issuer.</p>
6.	9	In an asset-backed transaction using a special purpose vehicle, the transaction will be structured so that no profit or very little profit will be made. A profit forecast is thus irrelevant in this context.
7.	11.1	In relation to the trust structure referred to above, the audit committee for the Issuer itself - the Trustee is not relevant, the relevant entity is the trust itself.
8.	12.1	In relation to the trust structure referred to above, the ownership of the Trustee is not relevant, the relevant entity is the trust itself.
9.	13.1	In relation to the trust structure referred to above, the historical financial information of the Issuer itself - the Trustee is not relevant, the relevant entity is the trust itself and the financial information regarding the assets of the trust.
10.	14.1	In relation to the trust structure referred to above, the share capital of the Issuer itself - the Trustee is not relevant, the relevant entity is the trust itself and the financial information regarding the assets of the trust.
Minimum Disclosure Requirements for the Debt Securities Note (ANNEX E)		

11.	11.1	<p>See point no. 2 above. Why is this information required both in the Registration Document and the Securities Note?</p> <p>This is particularly an issue with a programme transaction where the supplemental offering document should only contain the information relating to the particular issue under the programme.</p>
12.	12.1	<p>In the current market, no specific disclosure of "risk factors" would normally be given in relation to a corporate bond issue. The current market only provides this type of disclosure for asset-backed transactions. What is the particular need to extend this to the corporate bond market?</p>
13.	13.1	<p>What is meant by this paragraph? Is it a description of those persons which are parties to the transaction entered into by the Issuer and described in the offering documents such as the trustee, paying agents etc?</p>
14.	14.8	<p>Presumably the reference to "loan" should correctly be to "debt securities issued".</p>
15.	14.9 14.7	<p>What is meant by "yield"? Is this different from interest required to be disclosed by paragraph 14.7?</p> <p>Disclosure will be made as to the interest rate which the debt securities issued will bear whether fixed/floating/indexed linked. Does yield mean something different? If not, we suggest to delete. In addition, the applicable interest rate for the debt securities will be determined by market rates of interest at the time of issue and it would not be possible to state how this was calculated.</p>
16.	14.14	<p>This paragraph requires there to be disclosure on taxes to be paid by the investors in connection with the offer.</p> <p>It is impossible to satisfy this requirement as it will not always be known in which jurisdictions the investors will be situated or the nature of those investors and accordingly the relevant information required to be disclosed cannot be ascertained.</p> <p>Requiring the offering document to disclose this would be a hugely burdensome requirement out of all proportion with current disclosure requirements or investor expectation. Investors should be responsible for determining their own tax position and should not rely on the Issuer.</p> <p>In addition, the requirement to update this information annually will prove hugely costly and time consuming (even if it could be ascertained as to what information to disclose) as the Issuer would need to re-investigate tax laws in many jurisdictions annually. The cost of doing this is likely to be prohibitive.</p>

17.	15.1.7	In the context of an offer of debt securities what is meant by "the results of the offer". Debt securities are not like equity investments which may not all be subscribed, most debt issues are fully underwritten and the proposed full amount of the issue will be made.
18.	15.1.8	In the context of an offer of debt securities what is meant by "any right of pre-emption"? Debt securities are not like equity investments and rights of pre-emption are not relevant in the context of debt securities.
Minimum Disclosure Requirements for Asset Backed Securities Registration Document (ANNEX G)		
19.	General	How does the wholesale debt securities requirements and the Debt Registration Document and the Debt Securities Note inter-relate with these asset backed securities requirements?
20.	1.1	See point no. 3 above.
21.	1.3	See point no. 8 above.
22.	2.6	In relation to the trust structure referred to above, the documents required to be displayed should be capable of being restricted to those relevant to the trust only as this information in relation to the Trustee itself is not relevant, the relevant entity is the trust itself and the information regarding the assets of the trust.
23.	2.7	See point no. 11 above.
24.	3.2	In relation to the trust structure referred to above, information on any proceedings should be capable of being restricted to those relevant to the trust only as this information in relation to the Trustee itself is not relevant, the relevant entity is the trust itself and the information regarding the assets of the trust.
25.	3.4	See point no. 10 above.
26.	3.5	See point no. 26 above.
Minimum Disclosure Requirements for Asset Backed Securities SN Building Block (ANNEX H)		
27.	1.1	What is meant by "minimum denomination"? Is this just the denominations of the debt securities?
28.	1.2	<p>What is meant by "an undertaking/obligor which is not involved in the issue"? Does this mean, for example, a reference obligor in a synthetic or credit linked transaction where there is no contractual involvement of such entity in the transaction?</p> <p>Information on any such undertaking/obligor may have been obtained from publicly available sources and not the obligor itself and the required statement would thus be incorrect.</p>

29.	2.1	<p>How is it intended that the prospectus should demonstrate that the assets backing the issue have characteristics that demonstrate capacity to produce funds to service any payments due and payable on the securities?</p> <p>This may require the equivalent of a spread sheet type analysis of all income to be produced over the life of the assets. This may be complex and not easy to understand by investors.</p> <p>Where the assets are short term but collateralise a longer-term debt securities issue, the current assets will not be able to demonstrate this capacity as they will be replaced by substitute assets during the substitution period.</p>
30.	2.2.2	<p>(a) - this appears to overlap and be inconsistent with paragraph 2.2.11. It is also a subjective test and does not provide an objective test (as paragraph 2.2.11 does) as to the number of obligors which require specific or generic disclosure. This should be deleted or merged with paragraph 2.2.11.</p>
31.	2.2.11	<p>What is the purpose of the reference to "which are legal persons"? An obligor can be a natural person, such as under a residential mortgage loan. This reference should be deleted.</p> <p>Why are there two concurrent tests as to the number of obligors which require specific as opposed to generic disclosure, both a test of 20% and the test of a "material portion", the latter test should be deleted.</p> <p>In (b) it should be specified that the securities referred to can be either equity or debt securities.</p>
32.	2.2.13	<p>This paragraph seems to provide for some overriding disclosure of the assets if they are not traded, how does this fit in with the more specific requirements of paragraphs 2.2.1 to 2.2.11?</p>
33.	2.2.14	<p>Should this paragraph apply also to debt securities backing an issue?</p>
34.	2.2.16	<p>What does "material" mean in this paragraph? It is also a subjective test and does not provide an objective test for disclosure purposes.</p> <p>It might be usual to disclose aggregate levels of loan to value ratios in relation to mortgage loans but the actual valuations of each property would not be disclosed. This requirement should be amended to reflect this reality.</p>
35.	2.4	<p>This paragraph should be redrafted to reflect the fact that an issuer may issue further securities backed by assets having the same or similar characteristics as those currently disclosed but not by the "same" assets.</p>

36.	3.4.1	<p>See point 29 above.</p> <p>Although it is expected that the assets backing an issue will meet the Issuer's obligations, there can be no certainty that this will be so and accordingly the reference to "will meet" should be changed to "are expected to meet".</p> <p>What is meant by a "financial service table"? As discussed at point 29 above, this may require the production of an extensive, complex and voluminous table which may not ultimately give potential investors much assistance in understanding the cash flow of the transaction.</p> <p>In addition, as explained above, producing such a table will be impossible with a transaction where assets are subject to replacement or substitution, such as where short term revolving receivables such as credit cards back an issue and it will also be impossible in an actively managed deal such as those referred to in paragraph 2.3.</p>
37.	3.4.2	It may be impossible to predict where "material potential liquidity shortfalls may occur" other than that if the assets backing the issue don't perform to expectations. The issuer may have liquidity problems.
38.	3.4.3	There is no (b) referred to in this paragraph.
39.	3.5	This requirement could be merged with that in paragraph 2.7
40.	3.6	This is, presumably, meant to deal with synthetic or credit-linked issues but in many circumstances, the information required by paragraphs 2.2 and 2.3 will be impossible for a third party to obtain. What degree of derogation from this requirement is possible?
41.	3.2 3.7 3.8	All these paragraphs seem to deal with the same type of information, that is, other entities providing services to the transaction. However they each overlap and are inconsistent and should be merged and conformed.

Clifford Chance

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Chris Oakley

CLIFFORD CHANCE LLP

Clifford Chance Limited Liability Partnership
200 Aldersgate Street
London EC1A 4JJ

☎:direct dial +44 (0)20 7006 2027

☎:fax +44 (0)20 7600 5555

✉:chris.oakley@cliffordchance.com

