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GESCHÄFTSFÜHRUNG

DR. HARTMUT BECHTOLD

TELEFON: 069 – 2992 1710
TELEFAX: 069 – 2992 1717
HARTMUT.BECHTOLD@TSI-GMBH.DE

True Sale International GmbH – Mainzer Landstr. 51 – 60329 Frankfurt a.M.

European Commission
DG Internal Market and Services

Kai.Spitzer@ec-europa.eu

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TSI Comments on CRD Potential Changes on Securitisation (Article 122a) - Second public consultation paper

Dear Sir or Madam,

We are pleased that, on the basis of the opinions on the previous proposal, the Commission is again consulting the market players on the matter of securitisation. We would like to comment on the new proposal as follows:

The aim of draft Article 122a is clearly to avoid moral hazard structures in the transfer of credit risk, for example from the originator to third parties. As a general rule, linking the originator to the loan portfolio by means of servicing and risk sharing counteracts moral hazard and strengthens investor confidence. Therefore, if the aim of Article 122a is to ensure (indirectly) that the original originator does not transfer a minimum of 10% of the original credit exposure, this approach could be an improvement on the former proposal. The first proposal imposed a global obligation on the originator to retain 15% of the equity of the original, unsecuritised loan portfolio even in case of full risk transfer. However, also with regard to this new proposal, a strengthening of the market forces is generally to be preferred to the imposition of such a restriction.

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The function of the market forces could be strengthened by tightening disclosure criteria rather than by restricting investment opportunities. In our opinion, it is sufficient (e.g. by virtue of appropriate amendments to the Prospectus Directive or the Implementing Regulation) for the securities prospectus and current investor information to include the rules. This would require the originator to document the extent to which he retains risk (either from the securitised loan portfolio or the securitised assets or by risk assumption in the context of a securitisation transaction, e.g. in the form of first loss pieces). This requirement would allow the aim to be achieved with the least undesired side effects and the lowest possible burden for the industry.

In contrast to the present draft Article 122a, no restrictions would be imposed on the flexibility of investors if investors can obtain up-to-date information about the current status of the originator's or sponsor's participation in the risk associated with the securitised assets. Imposing rigorous limitations on investors could well put Europe at a competitive disadvantage as a financial centre, as the relevant business would shift to unregulated markets (and be carried out, for example, by off-balance-sheet off-shore vehicles).

Attention must also be drawn to the fact that, in accordance with the Basel II regulations, investors that are subject to Basel II as stipulated in the CRD (in Germany, the Banking Act (KWG) and the Solvency Ordinance) are required to provide regulatory capital for securitisation exposures. This capital cover is determined in line with the risk, in accordance with the system of securitisation rules. If, in individual cases, the risk is not given appropriate capital cover, this is dealt with under Pillar 2 of the Basel II rules. We would therefore like to see matters relating to moral hazard dealt with there. It

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would be a completely new regulatory approach to deny banks securitisation business irrespective of the risk content.

The subject of risk transfer through securitisation is already governed by various rules – some of them regulatory: Basel II/CRD, and some of them under accounting principles: IFRS, national accounting rules. The risk is that new provisions as per the draft text could jeopardise on-balance-sheet risk transfer.

Furthermore, as it is at present, Article 122a is not clearly formulated. The lack of clarity concerns paragraph 1, according to which a bank may only be exposed to credit risk in which the persons and entities involved, directly or indirectly, in "negotiating, structuring and documenting the original agreement which created the obligations or potential obligations" or those which "manage or purchase such obligations directly or indirectly on behalf of a credit institution" hold at least 10% in positions having the same risk profile as that on the balance sheet. It is not clear who the parties concerned are and what is meant by the expressions "credit risk of an obligation or potential obligation" and "original agreement". In our view, the present wording would incur the risk of making all parties involved in a securitisation transaction indirectly obliged to hold part ("of **in sum** at least 10%) of the 10% "in positions having the same risk profile" and to confirm this to the investor. The expression "having the same risk profile" is also unclear, as is the point from which the 10% threshold would apply (e.g. if only uncollateralised parts of assets are the subject of a securitisation transaction).

We would also like to draw attention to the fact that public sector entities have been omitted from paragraph 3. These entities should not be placed in a worse position than other zero-weighted counterparties.

True Sale International GmbH
Mainzer Landstraße 51
60329 Frankfurt a.M.
www.true-sale-international.de

Handelsregister:
Sitz: Frankfurt a.M.
Gericht: Frankfurt a.M.
HR.-Nr.: HRB 73065

Geschäftsführer:
Dr. Hartmut Bechtold

Bankverbindung:
Naspa
BLZ 510 500 15
Konto-Nr. 803220700

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To sum up, the following points should be noted:

- Direct interventions in the business activities of credit institutions, as proposed in Article 122a, are to be rejected from a market economy perspective and also do not appear feasible to implement.

- In order to avoid moral hazard, it would be sufficient to secure comprehensive transparency and investor information – also about the current status of the exposure held by the originator or sponsor in the risks associated with the securitised assets – as well as an appropriate implementation of Pillar 2 in the credit institutions.

Yours faithfully

True Sale International GmbH

Dr. Hartmut Bechtold

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