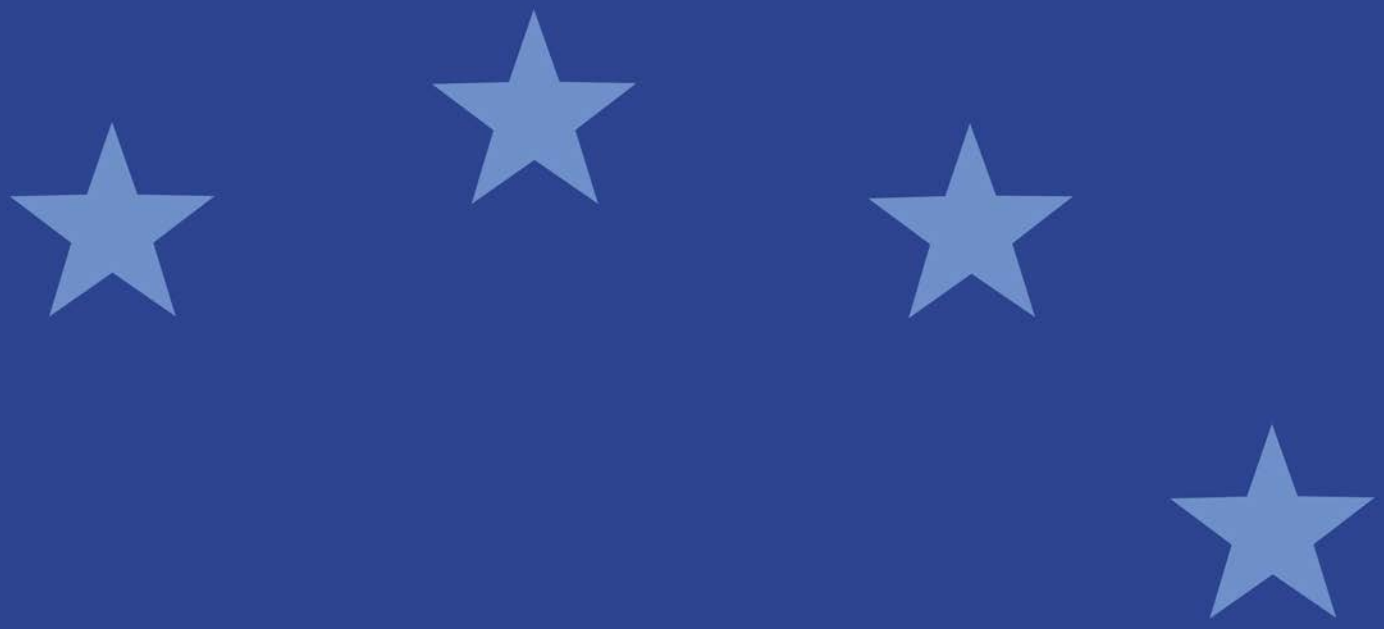
esma European Securities and Markets Authority

Call for Evidence

The extension of the disclosure requirements to private and bilateral transactions for Structured Finance Instruments



20 March 2015 | ESMA/2015/ 558

Responding to this call for evidence

This call for evidence should be read by all those involved in the EU securitisation markets. It is particularly targeted at the following market participants and the groups and trade associations who represent them:

- Issuers, originators and sponsors of Structured Finance Instruments (SFIs);
- Investors acting in the securitisation markets;
- Market intermediaries other than the issuers, originators and sponsors of SFIs.

Responses are most helpful to ESMA when they clearly indicate which question is being answered and provide evidence in support of the response, such as concrete examples of practices experienced, data or costs estimates. Should respondents feel that the distinction provided for by the two proposed categories (issuers vs. investors) is not suitable to their particular situation, ESMA welcomes these contributions in alternative format.

ESMA will consider all responses that have been received by **20 May 2015.**

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the call for evidence, unless you request otherwise. Please clearly and prominently indicate in your submission any part that you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading Legal Notice.

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Acronyms used

CRA Regulation	Regulation (EC) No 1060/2009 of the European Parliament and of the Council (as last amended by Regulation (EU) No 462/2013).
Disclosure requirements in CRA 3 RTS	COMMISSION DELEGATED REGULATION (EU) 2015/3 of 30 September 2014 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards on disclosure requirements for structured finance instruments.
ESMA	European Securities and Markets Authority
SFIs	Structured Finance Instruments
EU	European Union

1 Executive Summary

Reasons for publication

This call for evidence is being published to collect information from market participants about the approach to disclosure for SFIs originated and/or traded on a private and/or bilateral basis. The replies to the consultation will serve as an input for the "phase-in approach" on the extension of the disclosure requirements of the CRA 3 RTS for private and bilateral transactions in SFIs. The first objective is to seek the views of market participants and gather information that may help ESMA to define private and bilateral transactions in SFIs and to establish whether the two categories should be kept separate. The second objective is to gather evidence to assess whether the disclosure requirements could be used in their entirety for private and bilateral SFIs transactions or whether they should be adapted.

Contents

Sections 2 and 3 of the call for evidence explain its background and purpose. In section 4 of this call for evidence, issuers, originators and sponsors are asked to provide views in order to identify private and bilateral transactions in SFIs and to explain which categories of information, among those laid out in the CRA 3 RTS, are deemed problematic to publicly disclose and why. Finally, section 5 investigates the point of view of investors with respect to the key characteristics of private and bilateral SFIs transactions.

Next Steps

ESMA will carefully consider all responses to the Call for Evidence received by the deadline of 20 May 2015. The evidence obtained will be analysed by ESMA as part of the revision of the existing CRA 3 RTS.

2 Background

1. Article 8b of the CRA Regulation establishes the obligation for issuers, originators, and sponsors of SFIs in the Union to publicly disclose certain information to allow investors to make an informed assessment of the creditworthiness of the transaction. The provision introduces, in particular, a joint obligation on issuers, originators and sponsors to publish information on the credit quality and performance of the underlying assets of SFIs.

2. On this basis, the CRA 3 RTS identifies in greater detail what kind of information shall be disclosed, with which periodicity and in which form, and provides specific disclosure templates (the "Disclosure Requirements").

3. The provision in Article 8b is not limited in scope and applies to all SFIs where either the issuer, the originator or the sponsor are established in the EU, including private and bilateral SFIs. Such transactions cannot, therefore, be exempted from the disclosure requirements in Article 8b by means of "level 2 legislation" such as a Delegated Commission Regulation.

4. However, there may be legitimate cases for which the disclosure requirements could be adapted to the specificities of private and bilateral transactions in SFIs. This may be the case where certain prerogatives of the issuer (such as the protection of trade secrets) come into play. In such cases, a proportionate application of the obligation contained in Article 8b might be justified. However, such adaptations should be envisaged only if they do not preclude the attainment of the overarching objective of Article 8b, i.e. allowing investors to make an informed assessment of the creditworthiness of the transaction.

3 Purpose

5. The purpose of this call for evidence is to collect information from market participants as an input into the "phase-in approach" regarding the extension of the disclosure requirements of the CRA 3 RTS to private and bilateral transactions in SFIs.

6. This call for evidence has therefore two purposes:

    - The first objective is to seek the views of market participants and gather information that may help ESMA define private and bilateral transactions in SFIs and establish whether it would be desirable to distinguish between these two categories.

- The second objective is to gather evidence to assess whether the disclosure requirements laid down in CRA 3 RTS could be used in their entirety for private and bilateral SFIs transactions and, if not, what are the key issues to be taken into account (e.g. in terms of protection of trade secrets/confidentiality) and what tools can be devised.

7. In section 4 of this call for evidence issuers, originators and sponsors are asked to identify the categories of information, among those laid out in the CRA 3 RTS, for which public disclosure is deemed problematic and to explain why. For example, if concerns arise with respect to disclosing information that may qualify as trade secrets, this should be explained in detail. At the same time, respondents should indicate whether the identified concern relates to all types of private and bilateral transactions in SFIs or only to some of them.

8. Where challenges are identified, respondents are asked whether specific solutions can be devised to protect information for which full public disclosure may create a concern. As an example, the use of ranges instead of specific figures or other tools such as anonymisation of confidential data could allow disclosure of this information without creating concerns for the issuer, originator or sponsor.

9. Any such tool, however, should be fully in line with the requirements of Article 8b of the CRA Regulation, which aim at ensuring that investors are provided with sufficient information to make an informed assessment of the creditworthiness of an SFI. In this context, the questions in Section 5 aim to gather information from investors to understand what information they consider essential to carry out their due diligence process and what information can be provided in a less specific form without impairing their ability to assess the creditworthiness of the SFI.

10. In the remainder of this document, each section and subsection is introduced separately in order to help respondents understand the type of evidence that ESMA is seeking in response to each group of questions. A summary of each set of questions is also provided in Annex 1 and 2 of the call for evidence for ease of reference.

4 Questions for issuers, originators and sponsors

4.1 Introduction

11. The aim of the questions provided below is to understand the benefits and costs of extending the current Disclosure Requirements to private and bilateral transactions in SFIs, as well as the kind of information to which those requirements shall refer.

12. The questions in this section are addressed to issuers, originators and sponsors of structured finance instruments (hereinafter ‘you’ or ‘your’).

4.2 About your organisation

13. The questions in this part aim to obtain information about the nature of the organisation you represent and the different markets in which you are active. This information will enable ESMA to put your responses in context and to compare responses from similar respondents.

Q1: Please provide the name of your organisation.

Q2: Please explain whether you issue/structure SFIs on a private and bilateral basis. If yes, please indicate:

- what are the main categories/types of SFIs you usually issue/structure; and
- what is your motivation for issuing such instruments?

Q3: Please indicate whether you intend to make greater or lesser use of private and bilateral transactions in SFIs and outline the main reasons.

4.3 Defining private and bilateral SFIs

14. The purpose of the questions below is to allow ESMA to identify the key characteristics of private and bilateral SFIs transactions, to assess whether "private" SFIs transactions should be defined separately from "bilateral" ones, and also to assess the extent to which the standardised disclosure templates defined in the CRA3 RTS should apply to these specific instruments.

15. In addition, the questions in this part aim to allow ESMA to assess which categories of private and bilateral transactions in SFIs could Intra-group transactions be associated with.

Q4: In your opinion, how should private and bilateral transactions in SFIs be defined for the purpose of applying the above indicated CRA 3 RTS and/or developing additional templates?

Q5: Which are in your opinion the key elements that should be used as a basis to identify private and bilateral SFIs:

- the type of procedure used for the placement of the SFIs (e.g. private placement or public offer by reference to Article 3 of the Prospectus Directive)?

- the transferability of the SFIs?

- the nature and/or the number of parties involved in the transaction?

- other elements? Please provide details.

Q6: Do you think private transactions in SFIs should be defined separately from bilateral transactions in SFIs? If yes, please provide reasons.

Q7: Are you aware of differences with respect to the definitions of the terms used in private and bilateral transactions in SFIs or with respect to the data provided for such transactions (e.g. Loan-To-Value data is provided for certain transactions while Loan-to-Foreclosure data is provided for others)? Please provide examples.

Q8: Do you consider that intra group transactions should be treated as a separate sub-category of private and/or bilateral transactions? If yes, please provide a detailed justification/explanation.

4.4 Disclosure Requirements for private and bilateral transactions in SFIs

16. The questions in this part aim to identify the challenges linked to the extension of the Disclosure Requirements to private & bilateral transactions in SFIs. This will allow ESMA to assess what types of information could create concerns for market participants.

Q9: Do you consider that the disclosure requirements as outlined in the CRA 3 RTS with respect to issuers, originators and sponsors of SFIs established in the Union can be used in full and with the same level of detail for private and/or bilateral transactions in SFIs? If yes, please explain what would be the advantages of this option.

Q10: If your answer to question 9 is no, please provide detailed answers to the following additional questions:

- what specific types/categories of information among those listed in the CRA 3 RTS could be problematic in the context of private and bilateral transactions in SFIs?

- please provide some examples as to why disclosure of specific data fields would be problematic with respect to private and bilateral SFIs, indicating in particular:

- which data fields are most likely to be problematic;

- for what reason (e.g. protection of trade secrets) and under what circumstances;

  Please do this on a case by case basis and with clear explanations.

- for which asset classes and/or for what type or group of private and bilateral transactions in SFIs would the application of the disclosure requirements laid out in CRA3 RTS be problematic?

- please indicate what kind of safeguards (e.g. use of ranges instead of specific figures) could be put in place in order to address the above concerns, while still ensuring an appropriate level of information for investors, in line with the requirements of Article 8b of the CRA Regulation.

Q11: Please provide an estimate of the likely costs to your business of complying with Article 8b in the event that the current disclosure requirements of the CRA 3 RTS were to be extended to private and bilateral transactions in SFIs. Please provide some detailed information on the types of costs involved and indicate whether these costs are likely to be particularly high for specific categories of assets.

5 Questions for investors

17. The purpose of the questions below, which mirror the questions in Section 4.3, is to investigate the point of view of investors with respect to the key characteristics of private and bilateral SFI transactions and to assess whether private SFI transactions should be defined separately from bilateral ones.

5.1 About your organisation

18. The questions in this part aim to obtain information about the nature of the organisation you represent and the different markets in which you are active. This information will enable ESMA to put your responses into context and to compare responses from similar respondents.

19. ESMA is also seeking information on the benefits of these disclosures requirements from an investor's perspective and, depending on the cases, the type of information that an investor would consider most valuable.

Q12: Please provide the name of your organisation.

Q13: Please explain whether you invest in private and bilateral transactions in SFIs and if so, in which type/categories of SFIs.

5.2 Defining private and bilateral SFIs

Q14: In your opinion, how should private and bilateral transactions in SFIs be defined for the purpose of applying the above indicated CRA 3 RTS and/or developing additional templates?

Q15: In your opinion, what are the key elements that should be used as a basis for identifying private and bilateral transactions in SFIs:

- the type of procedure used for the placement of the SFIs (e.g. private placement or public offer by reference to Article 3 of the Prospectus Directive)?
- the transferability of the SFI?
- the nature and/or the number of parties involved in the transaction (e.g. the presence of professional investors and/or retail investors)?
- other elements? Please provide details.

5.3 Disclosure Requirements for private and bilateral SFIs

20. The purpose of the questions below is to acquire a better understanding of the due diligence process carried out by investors with respect to private and bilateral SFIs transactions. In particular, it is important for ESMA to understand what are the key elements which are taken into account by an investor when deciding on the costs and benefits of a certain private or bilateral SFIs transaction.

21. The questions laid out below also aim to understand whether investors would prefer the entire set of the disclosure requirements as laid down in CRA 3 RTS to apply to private and bilateral SFIs transactions.

22. These questions aim to identify the information required under CRA 3 RTS, which is essential or helpful for investors to carry out their creditworthiness assessment of a transaction, and what information could be provided in a less specific form without impairing the due diligence process, while guaranteeing an adequate level of protection as per Article 8b of CRA Regulation.

Q16: Please explain the due diligence process you follow and the types of information you consider in order to decide whether to invest in private or bilateral transactions in SFIs.

Q17: Do you think that the extension of the current disclosure requirements laid down under CRA 3 RTS with the same level of detail to private and bilateral transactions in SFIs would bring additional value to your due diligence?
Please provide a detailed explanation.

Q18: If your answer to question 17 is no, do you think that the current disclosure requirements laid down under CRA 3 RTS could be simplified with respect to private and bilateral SFIs without impairing your due diligence process, and while still guaranteeing an adequate level of investor protection in line with the requirements of Article 8b of the CRA Regulation?
In particular:

- what specific data fields of the current Disclosure Requirements are essential or most helpful for investors?

- which categories of information in the current disclosure requirements could be provided in less detail (e.g. providing ranges instead of specific figures) or in a redacted form (e.g. without reference to information that may constitute a trade secret)?

6 Summary of questions for issuers, originators and sponsors

About your organisation

Q1: Please provide the name of your organisation.

Q2: Please explain whether you issue/structure SFIs on a private and bilateral basis. If yes, please indicate:

- what are the main categories/types of SFIs you usually issue/structure; and
- what is your motivation for issuing such instruments?

Q3: Please indicate whether you intend to make greater or lesser use of private and bilateral transactions in SFIs and outline the main reasons.

Defining private and bilateral SFIs

Q4: In your opinion, how should private and bilateral transactions in SFIs be defined for the purpose of applying the above indicated CRA 3 RTS and/or developing additional templates?

Q5: Which are in your opinion the key elements that should be used as a basis to identify private and bilateral SFIs:

- the type of procedure used for the placement of the SFI (e.g. private placement or public offer by reference to Article 3 of the Prospectus Directive)?
- the transferability of the SFI?
- the nature and/or the number of parties involved in the transaction?
- other elements? Please provide details.

Q6: Do you think private transactions in SFIs should be defined separately from bilateral transactions in SFIs? If yes, please provide reasons.

Q7: Are you aware of differences with respect to the definitions of the terms used in private and bilateral transactions in SFIs or with respect to the data provided for such transactions (e.g. Loan-To-Value data is provided for certain transactions while Loan-to-Foreclosure data is provided for others)? Please provide examples.

Q8: Do you consider that intra group transactions should be treated as a separate sub-category of private and/or bilateral transactions? If yes, please provide a detailed justification/explanation.

Disclosure Requirements for private and bilateral transactions in SFIs

Q9: Do you consider that the disclosure requirements laid out in the CRA 3 RTS with respect to issuers, originators and sponsors of SFIs established in the Union can be used in full and with the same level of detail for private and/or bilateral transactions in SFIs? If yes, please explain what would be the advantages of this option.

Q10: If your answer to question 9 is no, please provide detailed answers to the following additional questions:

- what specific types/categories of information among those listed in the CRA 3 RTS could be problematic in the context of private and bilateral transactions in SFIs?

- please provide some examples as to why disclosure of specific data fields would be problematic with respect to private and bilateral SFIs, indicating in particular:

- which data fields are most likely to be problematic;

- for which reason (e.g. protection of trade secrets) and under which circumstances;

Please do this on a case by case basis and with clear explanations.

- for which asset classes and/or for which type or group of private and bilateral transactions in SFIs would the application of the disclosure requirements laid out in CRA3 RTS be problematic?

- please indicate what kind of safeguards (e.g. use of ranges instead of specific figures) could be put in place in order to address the above concerns, while still ensuring an appropriate level of information for investors, in line with the requirements of Article 8b of the CRA Regulation.

Q11: Please provide an estimate of the likely costs to your business of complying with Article 8b in the event that the current disclosure requirements of the CRA 3 RTS were to be extended to private and bilateral transactions in SFIs. Please provide some detailed information on the types of costs involved and indicate whether these costs are likely to be particularly high for specific categories of assets.

7 Summary of questions for investors

About your organisation

Q12: Please provide the name of your organisation.

Q13: Please explain whether you invest in private and bilateral transactions in SFIs and if so, in which type/categories of SFIs.

Defining private and bilateral SFI

Q14: In your opinion, how should private and bilateral transactions in SFIs be defined for the purpose of applying the above indicated CRA 3 RTS and/or developing additional templates?

Q15: Which are in your opinion the key elements that should be used as a basis for identifying private and bilateral transactions in SFIs:

- the type of procedure used for the placement of the SFI (e.g. private placement or public offer by reference to Article 3 of the Prospectus Directive)?
- the transferability of the SFI?
- the nature and/or the number of parties involved in the transaction (e.g. the presence of professional investors and/or retail investors)?
- other elements? Please provide details.

Disclosure Requirements for private and bilateral SFIs

Q16: Please explain the due diligence process you follow and the types of information you consider in order to decide investing in private or bilateral transactions in SFIs.

Q17: Do you think that the extension of the current disclosure requirements laid down under CRA 3 RTS in full and with the same level of detail to private and bilateral transactions in SFIs would bring additional value to your due diligence? Please provide a detailed explanation.

Q18: If your answer to question 17 is no, do you think that the current disclosure requirements laid down under CRA 3 RTS could be simplified with respect to private and bilateral SFI without impairing your due diligence process, and while still guaranteeing an adequate level of investor protection in line with the requirements of Article 8b of the CRA Regulation?

In particular:

- what specific data fields of the current Disclosure Requirements are essential or most helpful for investors?

- which categories of information in the current disclosure requirements could be provided in less detail (e.g. providing ranges instead of specific figures) or in a redacted form (e.g. without reference to information that may constitute a trade secret)?