

EBA Clarifies Conditional Sale Agreements Cannot Confer Originator Status Under EUSR

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PRACTICES Asset Securitization

Overview

On Aug. 8, 2025, the European Banking Authority (“EBA”) published a response to a 2021 query concerning whether an entity that manages or establishes a securitisation could qualify as an “originator”¹ (and thereby be an eligible “risk retainer”) under the EU Securitisation Regulation (Regulation (EU) 2017/2402, as amended; the “EUSR”) by entering into a conditional sale agreement with a CLO issuer under which the “originator” agrees for a seasoning period to purchase up to a certain percentage of the CLO issuer’s assets, if such assets default during the seasoning period.²

Key Takeaway

The EBA—via the European Commission’s Q&A—concluded that such an entity does not qualify as an originator under limb (b) of Article 2(3) of the EUSR, where its exposure to assets arises only through a conditional sale agreement. In essence, since the entity has not purchased the assets but is merely obliged to acquire them upon a default, it fails the “purchased on its own account” requirement in limb (b) of Article 2(3).

Background and Industry Impact

Conditional sale agreements have been a common mechanism in the U.S. CLO market for U.S. collateral for E.U. and U.K. risk-retention-compliant transactions to season assets and enable an entity—often the U.S. CLO manager—to meet the requirements under limb (b) of Article 2(3) of the EUSR (and thereby be an eligible “risk retainer”) by exposing itself to collateral risk during a seasoning period. However, the EBA’s interpretation now disrupts this widely used practice for EUSR-compliant CLOs. U.S. CLO managers should consider revisiting structures for transactions that have closed, or have been priced but not yet settled, so as not to rely on conditional sale agreements. For already-closed CLOs that have relied upon a conditional sale agreement, U.S. CLO managers should consider putting in place the alternative structure set forth below.

Alternative Structure

One viable alternative to the conditional sale agreement is a forward purchase arrangement, under which the originator truly purchases the assets on its balance sheet during the seasoning period and then sells them to the CLO issuer (assuming they remain non-defaulted). Because this reflects an actual purchase and sale, it meets EUSR’s definition of “originator.”

U.K. Regulator Position

To date, U.K. regulators have not issued any guidance or opinion on this issue. U.S. collateral managers operating dual-risk-retention-compliant transactions (E.U. and U.K.) should anticipate

potential divergence or future clarification in U.K. rules but may nonetheless wish to align with the EBA's interpretation, given market prudence.

Recommendations for U.S. CLO Collateral Managers

- Avoid reliance on conditional sale agreements to satisfy the “originator” limb (b) requirement under the EUSR.
- Deploy forward purchase agreements in which the originator purchases the requisite percentage of the collateral portfolio needed for limb (b) compliance, and season those assets in accordance with usual market practice.
- Review transactions priced but not yet closed for material adverse consequences; consider re-documentation or remedial structuring.
- Monitor U.K. and E.U. regulatory developments closely for any alignment, divergence or grandfathering relief.

Conclusion

The European Commission's recent clarification marks a critical shift in how E.U.-compliant and cross-border CLO originator retention can be structured. U.S. CLO collateral managers should act swiftly to transition to forward-purchase seasoning mechanisms to ensure compliance and mitigate structural risk.

¹ Article 2(3) of Regulation (EU) 2017/2402 defines an “originator” as an entity which (a) itself or through related entities is involved in the original agreement creating the exposures, or (b) purchases a third party's exposures on its own account and then securitises them.

² EBA Single Rulebook Q&A response, final publishing date Aug. 8, 2025, to a 2021 question regarding the use of conditional sale agreements to qualify as an originator under EUSR.