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January 30, 2015

Mr. Wayne Byres
Secretary General
Basel Committee on Banking Supervision (BCBS)
Bank of International Settlements
Centralbahnplatz2
CH-4002 Basel
Switzerland

Mr. David Wright
Secretary General
International Organization of Securities Commissions (IOSCO)
Calle Oquendo 12
28006 Madrid
Spain

Re: Criteria for identifying simple, transparent and comparable securitisations

Dear Mr. Byres and Mr. Wright:

ICI Global¹ appreciates the opportunity to comment on the consultative document issued by the BCBS and IOSCO regarding criteria for identifying simple, transparent and comparable securitisations (the “Consultation”).² Last year, BCBS and IOSCO established a joint Task Force on Securitisation Markets, which was charged with identifying the factors that may be hindering the development of sustainable securitisation markets and developing criteria to identify and assist in the financial industry’s development of simple and transparent securitization structures. Building on this work, BCBS and IOSCO have identified 14 non-exhaustive and non-binding criteria for simple, transparent and comparable (“STC”) securitisations to provide a basis for the industry and the regulatory community to identify certain features of securitisations that may lend themselves to less complex analysis and therefore could contribute to building sustainable securitisation markets.

¹ The international arm of the Investment Company Institute (“ICI”), ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US\$19.2 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

² Basel Committee on Banking Supervision and Board of the International Organization of Securities Commissions, Consultative Document, *Criteria for identifying simple, transparent and comparable securitisations* (Dec. 2014), available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD467.pdf>.

ICI Global members include regulated funds in jurisdictions around the world (collectively, “Regulated Funds,” or “Funds”).³ Regulated Funds, as significant purchasers of asset-backed securities (“ABS”) in the global markets, support BCBS’ and IOSCO’s goal of building sustainable securitisation markets. ICI Global believes that BCBS’ and IOSCO’s development of criteria for STC securitisations can serve as an important international framework to support this effort at a high level. We believe it is critical, however, that the criteria reflect differences in legal requirements and practices relating to ABS across, and within, jurisdictions, as well as allow for the significant variability among ABS asset classes. As discussed in more detail below, we therefore recommend that BCBS and IOSCO: (i) adopt STC criteria that are less prescriptive so that they can more readily serve as global principles; and (ii) not adopt separate STC criteria for asset-backed commercial paper (“ABCP”) and other short-term securitisations.

Criteria Based on Transparency, Comparability, and Simplicity

As a preliminary matter, we wish to offer our views on the elements of the STC criteria. ICI Global supports the development of standards that would enhance the quality and transparency of ABS disclosure, and promote comparability among ABS offerings. With regard to the U.S. market, ICI has consistently supported such goals in the context of ABS disclosure reforms by the U.S. Securities and Exchange Commission (“SEC”).⁴ The SEC recently adopted a number of significant ABS disclosure and registration reforms, many of which are consistent with the goals of the proposed STC criteria.⁵ These reforms included, among other things, requirements for standardized asset-level disclosure for ABS backed by residential mortgages, commercial mortgages, auto loans, auto leases, debt securities, and resecuritisations of ABS that include these asset types; enhanced prospectus disclosure, including requirements that improve comparability of pool information; and earlier disclosure of transaction-specific information prior to an ABS “shelf” offering.

While we understand BCBS’ and IOSCO’s reasons for also including simplicity among the proposed STC criteria, we believe this standard should be utilized cautiously. Securitisations, by their nature, contain a measure of complexity, and it would be unfortunate if the STC criteria were applied in a manner that suggested that securitisations that do not meet the STC criteria

³ For purposes of this letter, the term “regulated fund” refers to any fund that is organized or formed under the laws of a nation, is authorized for public sale in the country in which it is organized or formed, and is regulated as a public investment company under the laws of that country. Generally, such funds are regulated to make them eligible for sale to the retail public, even if a particular fund may elect to limit its offering to institutional investors. Such funds typically are subject to substantive regulation in areas such as disclosure, form of organization, custody, minimum capital, valuation, investment restrictions (*e.g.*, leverage, types of investments or “eligible assets,” concentration limits and/or diversification standards). Examples of such funds include: US investment companies regulated under the Investment Company Act of 1940 (“Investment Company Act”); “Undertakings for Collective Investment in Transferable Securities,” or UCITS, in the European Union; Canadian mutual funds; and Japanese investment trusts.

⁴ See, *e.g.*, Letter to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, from Karrie McMillan, General Counsel, Investment Company Institute, dated Oct. 4, 2011; Letter to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, from Karrie McMillan, General Counsel, Investment Company Institute, dated August 2, 2010.

⁵ See *Asset-Backed Securities Disclosure and Registration*, 79 Fed.Reg. 57184 (Sept. 24, 2014).

should be avoided. Many investors, including Regulated Funds and their shareholders, may benefit from investing in such securitisations. Such investments may be appropriate as long as they are consistent with the investor's investment mandate and the investor has sufficient information to make an informed investment decision.

BCBS and IOSCO emphasize that the criteria are not intended to serve as a substitute for investor due diligence, and are intended to be non-exhaustive and non-binding. For these reasons, we believe it is critical that BCBS and IOSCO clarify in the final criteria that the failure of the STC criteria to capture any particular ABS offering is not in any way intended to reflect on the merits or appropriateness of that ABS offering as a potential investment for a particular investor.

BCBS and IOSCO Should Adopt Globally-Applicable Criteria

We are concerned that the STC criteria proposed in the Consultation are, in some cases, overly prescriptive, such that they may not apply on a sufficiently global basis, as intended. While we generally agree with the broad principles underlying the 14 criteria, the sometimes overly prescriptive nature or detailed descriptions of the criteria raise certain risks. First, the proposed STC criteria, in some instances, discuss requirements or practices that are not shared across all jurisdictions to which the criteria are intended to apply. Second, the proposed STC criteria include certain terms that may have different legal meanings in different jurisdictions. We recommend addressing these concerns by revising the proposed STC criteria to focus on the practices that are generally applicable across jurisdictions, and avoiding detailed descriptions that require jurisdiction-specific defined terms. These issues are discussed further below.

STC Criteria Should Avoid Jurisdiction-Specific Legal Requirements and Practices

We recommend that the STC criteria avoid the inclusion of jurisdiction-specific requirements or practices that may not apply globally. For example, proposed criteria 12 relates to alignment of interest and states that:

In order to align the interest of those responsible for the underwriting of the credit claims or receivables with those of investors, the originator or sponsor of the credit claims or receivables should retain a material net economic exposure and demonstrate a financial incentive in the performance of those assets following their securitization.

With regard to the U.S. market, ICI has generally supported credit risk retention requirements for ABS in the United States, as risk retention requirements can help align the interests of ABS sponsors and investors.⁶ While credit risk retention requirements relating to ABS have now been adopted by U.S. and European regulators,⁷ we question whether they have

⁶ See, e.g., Letter to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, et. al., from Karrie McMillan, General Counsel, Investment Company Institute, dated July 29, 2011.

⁷ As acknowledged by IOSCO, U.S. regulators impose a direct risk retention obligation on the originator or sponsor of an ABS equal to at least five percent of the credit risk of the assets collateralizing an issuance of the ABS, while EU regulations impose an indirect risk retention obligation on, among others, an Alternative Investment Fund Manager ("AIFM"), under which the manager shall assume exposure to the credit risk of a securitisation on behalf of one or more alternative investment funds it manages only if the originator, sponsor or original lender has explicitly disclosed to the

been adopted on a sufficiently global basis at this time to make this a workable criterion for all jurisdictions to which the STC criteria are intended to apply. IOSCO's recent report of findings on member progress relating to incentive alignment for securitisations suggests that a number of countries have a ways to go in this regard.⁸ We also recognize that this issue is complicated for EU investors which, as a result of the indirect effect of EU risk retention obligations, are effectively required to comply with such requirements regardless of where the transaction occurs.⁹ To address these concerns, IOSCO may wish to frame this criteria in more flexible terms, consistent with the incentive alignment recommendations in the Final Report.¹⁰

Furthermore, this criterion is expressed broadly and does not reflect, for example, that a jurisdiction may recognize differences among ABS asset classes and accordingly may have exemptions under its risk retention rules for certain asset classes.¹¹ IOSCO has recognized that exemptions from risk retention may be warranted, but that such exemptions may create inconsistent results across jurisdictions.¹² We recommend that the STC criteria recognize such exemptions.

AIFM that it retains on an ongoing basis a material net economic interest of not less than five percent. *See* Articles 51 and 52 of the AIFMD Level 2 Regulation. Commission Delegated Regulation (EU) No. 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council. The fourth Capital Requirements Directive 2013/36/EU (CRD IV) and the Capital Requirements Regulation (Regulation (EU) No. 575/2013) (CRR), collectively known as the CRD IV package, impose requirements similar to those in the AIFMD upon credit institutions and EU investment firms regulated under the Markets in Financial Instruments Directive (MiFID).

⁸ *See* The Board of the International Organization of Securities Commission, Peer Review of Implementation of Incentive Alignment Recommendations for Securitisation – Report of Key Preliminary Findings to the G20 Leaders' Summit (Nov. 2014), *available at* <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD464.pdf>.

⁹ IOSCO has acknowledged this challenge. *See* The Board of the International Organization of Securities Commissions, Global Developments in Securitisation Regulation, Final Report 23 (Nov. 16, 2012), *available at* <http://www.eifr.eu/files/file2248388.pdf> ("Final Report").

¹⁰ Recommendation 1 of the Final Report states, in relevant part, that:

All jurisdictions should evaluate, and formulate approaches to aligning incentives of investors and securitisers in the securitisation value chain, including where appropriate, through mandating retention of risk in securitisation products. Any exemptions to the risk retention requirements should be limited and warranted.

Recommendation 2 of the Final Report addresses the elements of the incentive alignment approach and risk retention requirements in more detail, and states that where risk retention is mandated the applicable legislation, regulation and/or policy guidance should address certain elements. Where a jurisdiction chooses not to mandate risk retention, national policy makers and regulators should provide an explanation to an IOSCO peer review committee.

Final Report, *supra* note 9, at 48.

¹¹ For example, the final risk retention rules adopted by U.S. federal regulators exempt from risk retention requirements, among other things, certain residential mortgage-backed securities where the underlying loans meet specified underwriting criteria, ABS guaranteed by the Federal National Mortgage Association ("Fannie Mae") or the Federal Home Loan Mortgage Corporation ("Freddie Mac") while they operate under the conservatorship or receivership of the Federal Housing Finance Agency with capital support from the United States, and securitisations of certain other residential mortgages, commercial loans, commercial mortgages, and auto loans that satisfy stringent underwriting criteria. *See Credit Risk Retention*, 79 Fed.Reg. 77602 (Dec. 24, 2014).

¹² *See* Final Report, *supra* note 9, at 23-24.

As a further example, the more detailed “additional consideration” included in the proposed criteria states that:

Parties with a fiduciary responsibility to investors should review and confirm the material economic exposure retained by the originator or sponsor and should confirm that the originator or sponsor demonstrates a financial incentive in the performance of these assets following their securitisation.

This consideration reflects requirements that do not apply in certain jurisdictions, such as the United States. While we recognize that, under EU regulations, an AIFM is subject to due diligence obligations prior to assuming exposure to the credit risk of a securitisation on behalf of alternative investment funds it manages,¹³ we do not believe it is appropriate to suggest this obligation should apply in those jurisdictions that have not explicitly adopted such a requirement.

STC Criteria Should Avoid Defined Terms That May Vary Across Jurisdictions

We also recommend that the STC criteria should avoid detailed descriptions that require defined terms that may vary across jurisdictions. It appears that BCBS and IOSCO already are struggling with this issue in the proposed STC criteria, as they note the possible need in several of the proposed criteria to define key terms.¹⁴ For example, in proposed criteria 3, which relates to payment status, BCBS and IOSCO note that the terms “default,” “delinquent” and “material increase” may need to be defined depending on the application of the criterion. Criteria 4, which relates to consistency of underwriting, refers to “. . . granular pools of obligors originated in the ordinary course of the originator’s business where expected cash flows have been modelled to meet stated obligations of the securitisation under *prudently stressed loan loss scenarios*.” (emphasis added). These terms and concepts are both highly technical and potentially subjective. We expect different jurisdictions have different meanings for these terms and concepts. We believe the fewer terms BCBS and IOSCO include in the STC criteria that need to be defined, the more readily the criteria may be applied across jurisdictions without ambiguity.

BCBS and IOSCO Should Not Adopt Separate STC Criteria for Short-Term Securitisations

BCBS and IOSCO explain that the proposed STC criteria are intended only to apply to term securitisations, and not to short-term securitisations, such as asset-backed commercial paper (“ABCP”). BCBS and IOSCO ask whether it would be useful to develop differentiating criteria for ABCP, in a manner similar to that of term securitisations. For the reasons discussed below, we do not believe development of additional criteria for ABCP and other short-term securitisations would be useful.

¹³ See Articles 51 and 52 of the AIFMD Level 2 Regulation, *supra* note 7.

¹⁴ IOSCO previously has acknowledged the challenge raised by definitions and terminology in the ABS area, noting that it is even a challenge to utilize a consistent definition of the term “securitisation” across jurisdictions. See Final Report, *supra* note 9, at 45-46.

Regulated Funds are important investors in ABCP, particularly in the United States where, as of October 2014, taxable U.S. money market mutual funds held \$88 billion, or approximately 40% of total ABCP outstanding.¹⁵ In the United States, ABCP typically is sold to investors in private offerings in reliance on Section 4(2) of the Securities Act of 1933 (“Securities Act”), and almost all ABCP programs provide for resales of ABCP in reliance upon Rule 144A under the Securities Act. ICI Global members are experienced investors in the ABCP markets, and are comfortable with the structure of ABCP programs, and the frequent, comprehensive disclosure that is provided in connection with these programs. We believe it would be confusing and would add unnecessary complexity to the STC criteria to attempt to tailor them to ABCP programs, which have unique characteristics.

Similarly, other short-term securitisations have distinct characteristics and creation of separate applicable criteria would create unnecessary complexity without a corresponding benefit. Instead, for the reasons discussed above, we believe a better approach is to revise the STC criteria so that they generally reflect the primary characteristics of common ABS offerings, rather than seeking to capture all ABS offerings, including short-term securitisations, or those that have more unusual features. In any event, BCBS and IOSCO should make clear that the failure of the STC criteria to capture any particular ABS offering is not in any way intended to reflect on the merits or appropriateness of that ABS offering as a potential investment for a particular investor.

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ICI Global appreciates the opportunity to comment on the Consultation. We recommend that BCBS and IOSCO modify the proposed STC criteria to make them more globally applicable in order to better reflect the differences in legal requirements and practices relating to ABS across, and within, jurisdictions, as well as allow for the diversity of ABS asset classes in the global markets. Please do not hesitate to contact me at 44-203-009-3101, Susan Olson at (202) 326-5813, Sarah Bessin at (202) 326-5835, or Matthew Thornton at (202) 371-5406 if you have any questions.

Sincerely,

/s/ Dan Waters

Dan Waters
Managing Director
ICI Global

¹⁵ Source: Investment Company Institute tabulations of SEC Form N-MFP data.