DC Circuit Court Newsflash: “Transfer” means “Transfer”

Authored by Dechert’s Global CLO Team: John M. Timperio, Mary Bear, Christopher P. Duerden, Sean M. Solis, James Waddington, Cynthia J. Williams and Christopher Desmond

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In an eagerly anticipated (and much speculated upon) decision, a three judge panel of the United States Court of Appeals for the District of Columbia Circuit (“DC Circuit Court”) issued a unanimous opinion on Friday, February 9, 2018 holding that the final rules (the “U.S. Risk Retention Rules” or the “Rules”) implementing the requirements of Section 941 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) do not apply to collateral managers (“CLO managers”) of open-market CLOs. In so ruling, the DC Circuit Court reached the remarkably unremarkable conclusion that the language chosen by Congress in Section 941 of the Dodd-Frank Act does indeed matter, and under any reasonable interpretation thereof by the rulemaking agencies the words “transfer” and “retain” could not be stretched to include managers of open-market CLOs. Accordingly, the DC Circuit Court of Appeals reversed and vacated the earlier decision of the United States District Court for the District of Columbia (“District Court”) that had initially upheld the Rules, and remanded the case to the District Court with instructions to, among other things, vacate the Rules insofar as they applied to managers of open-market CLOs.

Despite the past and ongoing success of CLO managers at educating new classes of CLO investors and raising money for their risk retention capital formation solutions, the decision was welcome news in the CLO market and will, once it becomes final, serve as a positive tailwind to primary and refi/reset issuance. The decision will eliminate the multi-layered “risk retention tax” on the CLO market that increased the cost of undertaking a CLO not just for CLO managers but for underwriters and investors alike, eliminating both the increased compliance burdens and the static of having to navigate through the numerous uncertainties and open questions embedded in the U.S. Risk Retention Rules. We note that, since the decision does not affect the EU retention requirements, we expect to see a significant drop off in dual compliant CLO structures.[1] Finally, the reasoning of the opinion has clarified our long-held view that externally-advised private funds and other balance sheet originators can indeed be sponsors of balance sheet CLOs that hold risk retention under the U.S. Risk Retention Rules.[2]

Read the DC Circuit Court’s full opinion »

What is the background of this lawsuit?

The lawsuit goes back some four years and had its foundation in the legal argument that the plain language of Section 941 of the Dodd-Frank Act does not encompass the activities of CLO Managers in a CLO. On November 10, 2014, shortly after the final Rules were approved, the Loan Syndications and Trading Association (the “LSTA”), on behalf of CLO managers and other market participants, filed suit against the Securities and Exchange Commission (the “SEC”)

1 It remains to be seen whether EU credit institutions and other regulated EU investors can and will, on a going forward basis, attempt to creatively restructure their investments using entities and employing pockets of unregulated capital such that they can continue to access the U.S. CLO investment opportunity without requiring U.S. CLO managers to have to comply with the EU retention requirements in doing so.

2 This viewpoint was explained in a comment letter submitted to the rulemaking agencies on October 30, 2013 on behalf of two of our clients.

and the Board of Governors of the Federal Reserve System (the "Federal Reserve Board" and, together with the SEC, the "Agencies") in the District Court, seeking relief for CLO managers from the application of the U.S. Risk Retention Rules. The District Court found in favor of the Agencies, and the LSTA appealed the decision to the DC Circuit Court, which reversed and vacated the District Court's decision.

What was the basis of the court's decision?

The DC Circuit Court reviewed the reasonableness of the Agencies' reading of the Dodd-Frank Act applying the U.S. Risk Retention Rules to CLO managers[3] and, in doing so, based its decision on the plain meaning of the language in the statute. In particular, the court focused its analysis of the words "transfer" and "retain" in the text of the statute. The court reasoned that the ordinary meaning of such terms required that the retention obligation only be imposed on an entity "that at some point possesses or owns the assets it is securitizing. . . ."[4] The court observed that CLOs can be either open-market (comprised of assets acquired on an arm's-length basis in the open-market) or balance sheet (comprised of assets transferred from one or more originators or original holders)[5] in form, and noted that its analysis was limited only to the former. The role and relationship of CLO managers in an open-market CLO is such that, "like mutual fund or other asset managers, [they] only give directions to an SPV and receive compensation and management fees contingent on the performance of the asset pool over time."[6] Accordingly, the court concluded that they were not "securitizers" under Section 941 of the Dodd-Frank Act and could not be required to hold risk retention under the U.S. Risk Retention Rules.

In so ruling, the court made a detailed response to the "special argument" by the Agencies that it was creating a "loophole" that would allow CLO managers and perhaps others to evade the statutory scheme stating: "Policy concerns cannot, to be sure, turn a textually unreasonable interpretation into a reasonable one."[7] The court acknowledged that there could be situations where the party transferring the assets into a securitization was different than the party organizing and initiating the transaction. According to the court, the "agencies overstate the supposed loophole" and, in any event, the supposed loophole was to a considerable extent due to the interpretations made by the Agencies themselves.[8] The court further explained that "to the extent that other asset-backed securitizations were to truly take the form of open-market CLOs, it is highly doubtful that their falling outside the reasonable coverage of the statute need be a cause for concern."[9]

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3 *Loan Syndication & Trading Ass'n v. SEC*, No. 17-5004, at *4 (D.C. Cir. Feb. 9, 2018) (stating: "We review the Credit Risk Retention Rule for reasonableness under the familiar standard of *Chevron, USA, Inc. v. NRDC, Inc*., 467 U.S. 837 (1984) 'which…means (within its domain) that a reasonable agency interpretation prevails.' *Northern Natural Gas Co. v. FERC,* 700 F.3d 11, 14 (D.C. Circ. 2012) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009)). Of course, 'if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.' *Entergy*, 556 U.S. at 218 n.4.")

4 *Id.* at *5.

5 *Id.* at *3 n.2. In drawing this distinction the court described balance sheet CLOs as ones in which the originators or original holders transfer the assets off their balance sheets. We note that while such balance sheet CLOs may involve a transfer of title to the assets, they are generally not off balance sheet for tax and accounting purposes.

6 *Id*. at *7.

7 *Id.* at *11.

8 *Id*. at *15.

9 *Id.* at *16.

When does the court's decision become effective?

The DC Circuit Court's decision will become effective upon entry of an order by the District Court in favor of the LSTA. At that time, the U.S. Risk Retention Rules will cease to apply to CLO managers of open-market CLOs. We anticipate that the court's decision will be applied retroactively to the date that the U.S. Risk Retention Rules became effective.[10] However, until the expiration of the Agencies' ability to challenge the DC Circuit Court's opinion, it is possible that the decision could still be overturned, and therefore the use of various structural mechanics and compliance options during this longer period would need to be considered based upon the advice of CLO counsel.

In the event they so choose, the Agencies have the following options to challenge the decision of the DC Circuit Court:

- Within 45 days of the date of the DC Circuit Court's decision,[11] the Agencies could petition for a rehearing *en banc* (i.e., in front of all of the judges on the DC Circuit Court). If the Agencies do not petition for rehearing or if their petition is denied,[12] the District Court would have seven days following the later of expiration of the 45-day period (i.e., April 2, 2108) or the denial of the petition to issue an order giving effect to the DC Circuit Court's decision.[13] In the event that the petition for rehearing is granted, the initial decision would be stayed pending a decision following the rehearing.[14]

- In addition, within 90 days from the later of the date of the DC Circuit Court's decision or the order denying a rehearing, the Agencies could petition the United States Supreme Court (the "Supreme Court") to hear an appeal by filing a petition for *certiorari*. The Agencies do not need to seek a rehearing in the DC Circuit Court first in order to petition the Supreme Court to take up the case. However, the Supreme Court grants very few petitions for *certiorari* and then only for compelling reasons.[15] Moreover, such a petition would not automatically stay the effectiveness of the DC Circuit Court's decision, and the requirements to obtain such a stay pending the Supreme Court's review of the petition for certiorari would be extremely high.

In our view, it is more likely than not that Agencies will not seek or receive any further review of the DC Circuit Court's decision. We say that for several reasons, including the fact that the DC Circuit Court issued a well-reasoned and

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10 As a general matter, judicial decisions as to the applicability of federal law are given retroactive effect; however, although this practice is in large part derived from precedent established by the Supreme Court, the federal appellate courts have not uniformly interpreted such precedent as having definitively concluded that retroactive effect should be provided in all circumstances. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), which promulgated a three-prong test to determine when a ruling should not be given retroactive effect; *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), which does not expressly overturn Chevron but sets forth directly the principle that a judicial decision as to federal law is the controlling interpretation of such law and must be given retroactive effect. As such, it is possible the Agencies could argue that the circumstances of the ruling and the U.S. Risk Retention Rules should not be given retroactive effect. However, our review of the case law where retroactive effect was not provided suggests that it would be very difficult for the Agencies to achieve such an outcome.

11 FED. R. APP. P. 40(a).

12 FED. R. APP. P. 35 ("An en banc hearing or rehearing is not favored and ordinarily will not be granted unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.").

13 FED. R. APP. P. 41(b).

14 FED. R. APP. P. 41(d)(1).

15 SUP. CT. R. 10.

supported decision, which presents none of the compelling reasons normally associated with a grant of *certiorari* by the Supreme Court. Moreover, we think it would be surprising if the Agencies seek this review given the Trump Administration has expressed its strong desire to roll back certain of the mandates in the U.S. Risk Retention Rules, including recommending a qualified exemption for open-market CLOs.[16]

Are compliant CLOs closed before the court's decision still required to the U.S. Risk Retention Rules?

Whether or not the DC Circuit Court ruling will allow managers of open-market CLOs that were structured to comply with the U.S. Risk Retention Rules to divest themselves of their retention interests, sell their interest below 5% or no longer hold the interest in a majority-owned affiliate will depend in large part on the specific contractual language governing each CLO and on the relevant disclosure that was provided to investors at the time of the initial risk retention-compliant issuance. A random sampling of offering circulars and engagement letters for open-market CLOs in which we were involved and that closed between the initial application date of the U.S. Risk Retention Rules and the date of the DC Circuit Court ruling showed a variety of approaches that contemplated a possible sunset of risk retention requirements in one way or another. A few represented that the retention party would hold the retention interest only as long as was required by the U.S. Risk Retention Rules, or, in the converse, prohibited divesting or hedging the retention interest only to the extent not permitted by the U.S. Risk Retention Rules. A majority—though not all—contained explicit risk factor language cautioning that, if the U.S. Risk Retention Rules were repealed or the CLO exempted from their application, the sponsor's obligation to hold the required retention interest would be of no further force and effect. None surveyed expressly required, or represented, that the relevant retention party hold the retention interest for the full period then contemplated by the U.S. Risk Retention Rules without leaving open the possibility that such requirements might be modified or repealed.

Do the U.S. Risk Retention Rules still apply to EU compliant Originator/Manager structures?

In order to establish dual-compliant structures over the past fourteen months, many U.S. CLO managers have employed the so-called "originator-manager approach" ("Originator Manager") to comply with the EU risk retention requirements, in which the CLO manager retains exposure to a portion of the loans that are acquired by the CLO issuer (usually around 5 to 10% of the target par) for a period of time prior to the closing date. Based on what is, in our view, a misreading of the court's decision, a question has been raised as to whether such an Originator Manager approach to compliance with the EU risk retention rules would preclude a CLO manager from relying on the court's opinion and avoiding compliance with the U.S. Risk Retention Rules.

Although it is difficult to predict what positions the Agencies may take in enforcing what is left of the U.S. Risk Retention Rules on the CLO market (especially with respect to topics not specifically addressed in the court's opinion), while perhaps not opinable we do not believe that Originator Manager activity alone would bring CLO managers into the ambit of the U.S. Risk Retention Rules for the following reasons:

- *The Originator Manager is not the original lender or engaged in any origination business.* In the ruling, the court distinguishes between "open-market CLOs" and "middle market" or "balance sheet" CLOs in which "originators or original holders" transfer loans to a securitization vehicle. The Originator Managers of the type described above typically are not in the business of originating loans; rather, they buy the loans (including the

16 U.S. DEP'T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS 95, 103 (2017).

small minority of loans they hold for their own account for a short period of time) in the open market, in arms-length negotiations, at the behest of investors. This fits squarely within the type of activity that the court determined does not fall under the scope of the statute.

- *The percent "originated" is an immaterial portion of the total portfolio.* It would be difficult to conclude that a holder transferring 5 to 10% of the assets to the portfolio has any meaningful impact on the overall credit risk of the CLO transaction, and thus it seems apparent that this is not the type of activity the Rules are intended to cover. In the event, however, that a CLO manager or other retention holding entity was acquiring and then transferring a significant portion of the assets to the CLO issuer, a different conclusion could be reached regarding the obligation to comply with the U.S. Risk Retention Rules, depending on the facts and circumstances of the transaction.

- *The purpose of the "purchasing" activity is to satisfy a regulatory mandate.* The Originator Managers are acquiring the credit risk to loans solely for the purpose of satisfying the EU risk retention rules, and not for any business purpose central to their management activities. The loans which the Originator Manager acquires are still purchased in the "open market"; indeed, the basic trappings of the "open market CLO" as described in the ruling—i.e., an asset manager causing an SPV to purchase loans from the open market at the behest of third-party investors—are not fundamentally altered simply because a small percentage of these loans passes through the Originator Manager prior to settling into the CLO issuer.

- *The loans never settle with the Originator Manager.* Typically, the loans passing through the Originator Manager will settle directly from the third party to the CLO issuer (unless there is a default during the seasoning period);[17] the Originator Manager typically enters into trade tickets or tripartite agreements reflecting its "purchase" of the loans from a third party and subsequent sale to the CLO issuer with a direction from the Originator Manager to the third-party seller to settle directly into the CLO issuer. Furthermore, there is little to no risk that the Originator Manager will "cherry pick" the loans it wishes to offload onto a CLO (thus alleviating the policy concern of entities dumping bad assets into a securitization); rather, the reverse is true: the Originator Manager is under contractual obligation to sell *all* of the loans subject to such trade tickets or tripartite agreement on to the CLO issuer *other than* loans that have defaulted during that seasoning period.

As has been observed throughout the risk retention compliance process, the CLO market is nothing if not creative and adaptive. Accordingly, structural fixes involving a "put option," rather than back-to-back trade tickets or tripartite agreements, have already been designed to eliminate any argument (even an erroneous one) that the Originator Manager approach can inadvertently cause a CLO manager to have to comply with the U.S. Risk Retention Rules. Furthermore, with the implementation of the new Securitisation Regulation, it is anticipated that most U.S.-based CLO managers may be able to hold risk retention as a "sponsor" rather than an "originator", given that the reference to "sponsor" in the new Securitisation Regulation refers to the MiFID II definition of "investment firm" (rather than the CRR definition), which includes investment firms outside the EU.

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[17] The "seasoning period" is the time during which the Originator Manager has exposure to the credit risk of the loans, usually around 15 days.

Would an existing CLO issuer be required to hold retention if it transfers its assets to a new CLO issuer?

Due to certain contractual or other practical considerations, in certain types of "refinancings" of open-market CLOs, it is necessary to effect such refinancing by causing an existing CLO issuer (the "Old CLO Issuer") to redeem its securities and transfer all of its loans to a new CLO issuer (the "New CLO Issuer"), with the New CLO Issuer undertaking a CLO transaction backed primarily by the loans it acquired from Old CLO Issuer. Typically, the New CLO Issuer is managed by the same CLO manager as the Old CLO Issuer. In such situations, given that the New CLO Issuer's assets were primarily acquired from the Old CLO Issuer, some market participants have asked whether the New CLO Issuer is still an "open-market CLO" of the type now exempt from the U.S. Risk Retention Rules, and whether the Old CLO Issuer may be required to hold retention interest in the securitization which New CLO Issuer undertakes. While as noted above it is difficult to predict what position the Agencies will take in situations which are not specifically discussed in the ruling, while perhaps not opinable we believe that this type of transaction should still fall within the scope of what is considered as an "open-market" CLO. Although the Old CLO Issuer is transferring assets to the New CLO Issuer, assuming the Old CLO Issuer acquired its loans primarily in the open market from third parties, this characterization should not change simply because the assets are passing from one special purpose vehicle ("SPV") to another. Furthermore, the U.S. Risk Retention Rules require the "sponsor" to "organize and initiate" a securitization transaction, and a limited-purpose SPV entity such as a CLO issuer would not have the capacity to "organize and initiate" such a transaction.[18]

Does the court's decision have any application beyond open-market CLOs to CLOs undertaken by externally advised private credit funds?

Prior to the DC Circuit Court's ruling, there was concern in the CLO market about whether or not an externally-advised private credit fund could be a sponsor and hold U.S. risk retention or whether only its external investment manager could do so.[19] While the DC Circuit Court limited its decision to open-market CLOs, that concern should now abate, as the ruling provides clear judicial support for a plain reading of Section 941 of the Dodd-Frank Act that will enable private credit funds to act as sponsors and permissible retention holders in CLOs undertaken by such funds.

By way of background, externally-advised private credit funds, which play a prominent role in the middle market and less liquid loan space, are not SPVs or pass-through conduits—far from it. Like their corporate and internally advised counterparts, they are ongoing businesses established and operated to invest in loans and to generate a profit for their investors. Moreover, the investors in such private credit funds are highly sophisticated institutional investors that actively negotiate and diligence their investment in such funds, including with respect to the level of ongoing monitoring and control they wish to exert. Such private credit funds frequently use portfolio leverage as part of their investment strategy, with the leverage provided on a non-recourse basis to wholly-owned subsidiaries of the funds through one or more financing facilities provided by banks and other institutional investors and by using CLOs as balance sheet financings of the fund's portfolio.

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18 The Agencies even note in the preamble that "another asset-backed security issuer would not meet the 'organization and initiation' criteria in the definition of 'sponsor' as such an entity could not be the party that actively makes decisions regarding asset selection or underwriting." *See* Credit Risk Retention, 79 Fed. Reg. 77,609 (Dec. 24, 2014).

19 This concern was based on the interpretation of the Agencies that word "transfer" meant that the investment manager, as agent of the CLO issuer, could "cause" a loan to be transferred to the CLO issuer (which the DC Circuit Court rejected in its ruling) and also based on a significant gloss added by the Agencies in the preamble to the adopting release regarding their interpretation of the phrase "organize and initiate."

In its decision, the DC Circuit Court recognized that Section 941 of the Dodd-Frank Act is "a statute that links the organization and initiation of a securitization to the transference of ownership interest in the assets that are securitized." In light of the reasoning of the court's decision, we believe that a private credit fund that organizes and initiates a CLO to finance its own portfolio[20] by selling or otherwise transferring assets, directly or indirectly, to the CLO issuer will be viewed as the sponsor of such CLO and as a permissible holder of risk retention.[21] Such a fund holds and retains the direct or indirect equity interests in such loans both prior to the transfer to a CLO issuer and afterwards; in fact, its primary purpose is to hold such loans. Moreover, under the court's analysis, it is clear in most cases that the external adviser to such funds could not be the sponsor as it did not transfer the assets to the issuer and therefore cannot "retain" the credit risk. [22]

What, then, is the implication of the statements made in the preamble to the Rules?

In our view, another of the key implications of the court's decision is that the CLO market may have been ascribing too much weight to statements made by the rulemaking agencies in the adopting release. This is understandable, given that there has been no other interpretive guidance regarding the U.S. Risk Retention Rules, and the adopting release was the only window into how the Agencies viewed the Rules and would go about enforcing them.

The Administrative Procedure Act[23] (the "APA") provides the basis for rulemaking by federal administrative agencies and among the requirements under the APA is a requirement that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."[24] This statement of "basis and purpose" comprising much of what is commonly referred to as a regulation's "preamble", are exempt under the APA from notice-and-consideration requirements[25] and, as a result, there are contrasting court decisions with respect to how much import to attach to such

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20 We expect that market standards will develop around how much of the portfolio must come from the private credit fund in order to make it a sponsor, and under what circumstances there may be CLOs undertaken by private credit funds where there is no sponsor. At this time, we suggest market participants consult with CLO counsel before making such determinations.

21 Once again, the reasoning used by the court in answering the feared hypothetical loophole cited by the Agencies which involved a balance sheet CLO undertaken by a bank or financial institution with a third party manager is instructive on this point: "[W]here the actual organizer is the institution that holds the assets and 'pre-approves[s]' the selections of a 'third-party' manager, then both the rule and the statute logically apply. 79 Fed. Reg. 77,655/1. The bank or financial institution that is actually calling the shots is organizing the securitization "by transferring" its assets and can be required to retain credit risks that it is already holding." *Loan Syndication & Trading Ass'n v. SEC*, No. 17-5004, at *15 (emphasis in original).

22 We assume in this analysis that the private credit fund's investment manager did not previously own and transfer loans to the private credit fund such that the private credit fund was merely the intermediate depositor of the investment manager acting as sponsor of the CLO.

23 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see also* 5 U.S.C. § 553(b)(3)(A) (2012).

24 *Id.* (citing 5 U.S.C. § 553(c)).

25 *Id.* (citing 5 U.S.C. § 553(b)(3)(A)).

statements.[26] Accordingly, care should be taken when referencing the adopting release to shed light upon the requirements of the U.S. Risk Retention Rules, especially where the statements therein extrapolate upon, or are not directly consistent with, the Rules and/or the Dodd-Frank Act. Moreover, going forward, any such statements will need to be read in light of the decision and reasoning of the DC Circuit Court.

What's next?

The DC Circuit Court decision has, if nothing else, shaken up the CLO market. Although the decision is, on balance, good news for the CLO managers and investors, it leaves many unanswered questions and considerations. In the short term, managers are eager to understand how this affects their CLOs, particularly those CLOs which are already in the pipeline or expected to commence prior to the DC Circuit Court decision becoming final. In the long term, many managers must grapple with the question of what to do with their capital formation strategies which were implemented to satisfy the U.S. Risk Retention Rules, as well as how this ruling may affect other asset classes outside of open-market CLOs. It is also possible that once bitten will not be twice shy and the Agencies will opt for further rulemaking. We recommend participants consult with counsel on all of the above, as due consideration must be given to the specific facts and circumstances at hand, as well as the risks and benefits associated with different approaches.

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26 Some courts have held that preamble language to a final statute or rule is not binding; rather, only the language of the statute or regulation itself will have a binding effect. *See* NRDC v. EPA, 559 F.3d 561 (D.C. Cir. 2009); Jurgensen v. Fairfax County, 745 F.2d 868 (4th Cir. 1984). However, in other instances, courts have found preamble language to a final regulation could have a binding effect on the agency or regulated parties. *See* Select Specialty Hospital Akron, LLC v. Sebelius, 820 F. Supp. 2d 13 (D.D.C. 2011) (holding that an agency could issue a correcting amendment to a rule without undertaking the full notice and comment process because the preamble to the amended rule "was an unequivocal expression of the agency's intended meaning of the [amended] rule" that there was no substantive change that would require notice and comment); Kennecott Utah Copper Corp. v. DOI, 88 F.3d 1191 (D.C. Cir. 1996) (determining that preamble language may be considered final agency action subject to judicial review if the agency intended the preamble language to bind itself or affected parties).

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