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# A better schematic for regulating securitisation in Europe

In many political, regulatory, investor and even social circles, the word "securitisation" is associated with "US Sub-prime", "CDO squared" or "big problem": a large dustbin into which to throw the woes and excesses of the global financial crisis of 2007. However, there are many other financings or products labelled "securitisation" that have previously provided, and will need in the future to provide, funding for the real economy or to underpin financial stability. Current regulation has effectively treated them, good or bad, all the same while excluding other transactions that involve in substance essentially the same or very similar financial products on the basis of a technical, form-based definition.

The purpose of this article is first to highlight the conceptual difficulties covered by the current "one size fits all" regulatory definition of securitisation put forward by the Basel II Accord, secondly to highlight the key factors that should differentiate products for regulatory oversight and then thirdly to propose an alternative way of categorising transactions in Europe in the context of the Basel II/CRD definitions and their use in other regulations (for example relating to credit rating agencies). This new schematic is intended initially to supplement the Basel II/CRD definitions and should assist European regulators and governments in tailoring regulatory oversight and applying existing and new regulation to these transactions in a better focussed, more logical, manner. Eventually it is to be hoped that the development of regulation along these lines will supplant the need to use the current Basel II/CRD definitions entirely.

The root of this proposal is the assertion that securitisation is a set of skills rather than a single definable product. The widespread use of these skills has caused the range of financial products commonly "badged" as securitisation to stretch from forms of secured corporate debt to exotic derivative trades. However, even though there are common elements from the securitisation skills "tool box" in many of these product types there are many more areas of divergence in the nature of the products. Consequently it can be argued that it is preferable to have a closer alignment of regulatory engagement with the product types rather than a "one size fits all" approach emphasising some abstract perceived "unifying" concept. In other words different products that may be considered as securitisation should have different analyses.

The schematic put forward in this article would undoubtedly create some "hard cases" and require some fine judgments. In our view this is both inevitable in an area that will continue to innovate over time but more importantly such cases would be considered in a more logical and appropriate manner than the many "hard cases" that are currently under consideration.

## Conceptual difficulty within the definition of securitisation

The Basel II Accord included a regime for securitisation for the first time in a BIS Accord and attempted to encompass a broad range of transactions as securitisation by focussing on stratification of risk through credit tranching as the defining feature of securitisation. The Basel II definition, essentially adopted by the EC in the Capital Requirements Directive ("CRD"), has proved to be problematic: in part by being over and under inclusive in the types of transaction that are potentially included. For example layered corporate debt of an operating company in a leveraged financing can be caught whereas a single class of debt serviced by a ring-fenced portfolio of assets may not. Politicians and regulators have then exacerbated the impact of the Basel II/CRD definition by using it to underpin other regulatory initiatives ranging from rating agency supervision to risk retention where its shortcomings have caused unintended adverse consequences and often left those tasked with applying the relevant regulations, both regulators and supervised entities, confused and struggling to implement them sensibly.

Another problem with the potential breadth of the definition of securitisation lies in the overlap of political and regulatory concerns at the macro level. Put simply, it is a perceived fact that "bad" securitisations were a significant cause of the global credit crisis and should be restricted whereas it is also recognised that "good" securitisations are to be encouraged as an essential part of the solution for funding the recovery of the real economy in many jurisdictions. Until a richer appreciation is developed of how labelling something a securitisation actually relates to the nature of an individual type of financial product, this schizophrenia will persist.


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## Key factors in differentiating product types

How a securitisation is defined for regulatory purposes is very important to many market participants, for both legal and institutional reasons. In proposing the new schematic a number of key factors were considered to distinguish between product types. The following sets out the relevance and approach taken to these factors.

*(i) Regulatory capital relief vs securitisation positions for investors*

It is important to note that defining a transaction as a "securitisation" has an impact from two broad directions: first from the perspective of the originator of the transaction particularly where regulatory economic risk transfer is sought and secondly from the perspective of an investor in the securitisation (i.e. for these purposes a person holding a securitisation position). This distinction is recognised in Basel III/CRD, in particular the imposition of minimum requirements for significant credit risk transfer for originators to obtain capital relief and the prohibition on the originator providing implicit support to the securitisation neither of which affect the characterisation of the transaction as a securitisation for an investor. Consequently, at present, it is recognised and not uncommon for securitisation transactions to not obtain regulatory capital relief for the originator but be treated as securitisation exposures by investors and other transaction parties. The proposal set out below adapts this dual perspective and considers it a useful practical guide to regulatory treatment of certain product types.

*(ii) Ownership rights in securitised assets*

Another key consideration for securitisation, that has increasingly been marginalised in regulation, is the ownership rights to the underlying assets that are the subject of the transaction. At its inception the securitisation market was simply a technique to allow investors to own together, in the form of securities, pools of real economy assets. In other words the transaction structure, including the special purpose entity, was a convenient way for investors to hold the relevant assets: implicitly until such time as the assets performed or were disposed of. The evolution of the securitisation market has had two material developments that has diminished the extent of asset ownership – multi-layered structures and risk-transfer products. In multi-layered structures, such as typical master trusts, investors may have rights against an issuing vehicle that is a number of levels "removed" from the actual real economy assets and moreover their rights may only relate to a fraction, a proportion, of each individual asset (e.g. the "investor interest" concept common in most master trusts). In such structures actually obtaining or controlling the assets is in practice not possible. The development of structures where there is risk transfer but not ownership of the assets, for example synthetic securitisation structures, have sought to recast securitisation as a technique to transfer the risk in assets rather than their ownership and that therefore this risk can be transferred through financial products as well as by a legal sale of reference assets.

While the issue of legal ownership should not determine regulatory treatment for risk-based capital purposes, it has broader implications both for regulators in terms of issues such as managing securitisation programmes under bank resolution regimes and for investors in respect of their rights to deal with the relevant assets in default situations. Consequently there is a sound case to differentiate between structures where there are effective direct ownership rights in the assets transferred to investors and those where ownership rights are effectively retained by the originator or the securitisation scheme itself[1].

*(iii) Continual involvement of originator in generating assets*

Where a structure used in a securitisation either requires or is designed to add new assets on a continual basis over time then it is clear there will be an on-going involvement of the originator in generating assets[2]. In such circumstances it is almost invariably the case that the originator will feel compelled – either through contractual obligation or by reputational imperative – to keep generating and adding assets. The need to keep "feeding the beast" is a phrase often heard about such structures. This is true even if the rating agency analysis of the assets

[1] This would include a master trust structure where although the originator may be replaced as servicer, there will be a replacement servicer who will control the assets on behalf of the securitisation scheme, typically at a higher "tier" of the structure, rather than allowing investors to direct dealings with the assets.

[2] These are typically called "revolving" structures. The credit card and mortgage master trusts, in particular, are good examples of this type of structure. The ability to add some assets to a fundamentally amortising structure to replace fully performed or defaulted assets (i.e. broadly "substitution") does not make that structure a "revolving" structure.

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securitised within the structure is predominantly of a "static pool" amortising down from a fixed point of time (typically the end of the revolving/substitution period caused by the occurrence of a trigger event). Regulators and market commentators have expressed concerns in the past about the extent to which revolving structures are effective at transferring risk on assets away from originators and onto investors. Can there be said to be a "clean break" for the originator or indeed "significant risk transfer" if it retains responsibility for continuing to add assets? It is the contention of this article that the continued involvement of the originator in generating assets for the securitised asset pool is inconsistent with ownership rights to the assets being transferred to investors and should preclude regulatory and accounting "sale" treatment. However, investors are exposed to the assets with no direct undertaking from the originator to support losses or to make payments on the relevant securities. Consequently for investors in securitisations from such structures, their exposure is likely to be a securitisation exposure to the securitised assets. This "continuing involvement" definition has also been a key aspect in connection with accounting considerations about the nature of asset sales.

*(iv) Regulating transactions vs supervising originators*

There is a tendency for regulators considering a securitisation undertaken by a bank originator to focus mainly on the transaction itself. For transactions which essentially aim to transfer ownership and control of the assets to investors, this may well be appropriate as the regulators should be concerned with the nature and extent of the continued involvement of the originator in the assets and the proceeds from the assets. However, this is likely to not be the best area of oversight when the securitisation is part of a securitisation scheme where the assets are essentially collateral for an on-going funding platform. In respect of such transactions it is the operation of the funding platform, in particular its range of maturities and ability to refinance maturing liabilities, that is the key function that should be considered by regulators. In other words when the securitisation scheme is essentially part of the on-going funding operations of the bank originator there is a strong argument it should be regulated as part of the treasury function of that bank. This difference of emphasis between when to focus on regulating transactions and when to focus on supervising originators is also a key factor used to differentiate product types in this proposed schematic.

*(v) Alignment of interests: application of retention requirements*

A particular, and topical, area where the inadequacies of the definition of securitisation has caused difficulties is the area of alignment of interest between originators/arrangers of securitisations and investors: in other words the need for "skin in the game". Article 122a of the CRD introduced for European credit institutions a restriction on acquiring exposure to the credit risk of a securitisation exposure unless the originator, sponsor or original lender explicitly disclosed that it would retain on an on-going basis a material net economic interest of not less than 5%. Recital 24 of the CRD states that the rationale for this is as follows:

"It is important that the mis-alignment between the interest of firms that "repackage" loans into tradable securities and other financial instruments (originators or sponsors) and firms that invest in these securities or instruments (investors) be removed. It is also important that the interests of the originator or sponsor and the interest of investors be aligned."

These are understandable concerns given the difficulties caused by the originate-to-distribute model in the United States sub-prime market. However, it is far less clear to see how those concerns apply to many products currently defined as securitisations. As a consequent the application of Article 122a, in effect from 1 January 2011, to many transactions has been muddled and often counter-intuitive. For example, in those secured corporate debt transactions which previously would have been known as "whole business securitisations", does the existence of tranched debt cause Article 122a to apply and if so how and why if the originator is simply a borrower under a loan for which it grants security over its assets? Alignment of interest between originator and investors here is complete and straightforward without seeking some approved mechanical form of material net economic interest.

A better approach, as put forward in this article, would be to consider how effectively alignment of interest works with regard to different types of product. So, for example, as indicated above, alignment of interest with secured corporate debt is always present and if secured treasury funding platforms are to be on-balance sheet treasury functions for bank originators with no capital reduction then again there is obvious alignment of interest between the bank originator and investors. Indeed, as an aside, a more radical but simpler regulatory approach to many of the issues around "skin-in-the-game" rules would be to say that the rules do not apply where the assets previously were held on-balance sheet of the bank

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originator in the banking book and the bank originator gets no reduction in regulatory capital as a result of the transaction[3].

## The proposed schematic

This article proposes that types of financial products currently labelled generically as securitisations under the Basel II/CRD definitions be further grouped in accordance with the following new schematic:

- asset portfolio ownership in securities form
- lending to corporates secured on assets in securities form
- secured treasury funding platforms
- diverse portfolio investment products
- synthetic risk acquisition products

The nature and detail of regulation can then be tailored to the type of financial product.

In other words, initially at least, there would be a determination whether the financial product/transaction in question fell within the Basel II/CRD definition of a securitisation followed by a second determination of what type of financial product it was to determine the appropriate regulatory treatment (which may be that the financial product should not be treated as a securitisation at all). Over time it could be envisaged that the regulation of the types of financial product on a holistic basis, rather than on a differentiated basis due to application of a technical definition that is not based on the financial product itself, could lead to the initial determination being made redundant.

Turning to each type of financial product in turn, this article will consider the nature and typical features of the financial product as well as the direction such features indicate regulation should take.

*(i) Asset portfolio ownership in securities form ("Asset Ownership")*

These are the types of financial product closest to the original structures and intent of securitisation. In essence they involve identified stand-alone portfolios of assets being transferred to a special purpose entity ("SPE") which holds the assets for investors who have funded the SPE to acquire them and who are paid interest and repaid principal from the cashflow generated by that identified portfolio as it amortises over time. For a transaction to fall within this category, the asset portfolio should be static with minimal rights of substitution. From the originator's perspective the securitisation is conceptually "issue and forget"[4] as it will have transferred ownership and control of the asset portfolio to investors and will have no obligation to continue "topping up" the asset portfolio.

From the investor's perspective they will have jointly acquired ownership of the asset portfolio and their rights to deal with the asset portfolio should be commensurate with ownership – including, in certain circumstances, having the ability to require the sale of the asset portfolio. It also follows that their exposure is to the assets of the transaction and their own regulatory treatment should reflect that.

Assuming the originator does not become an investor itself to a material extent, the lack of originator ownership and control (and also neither a legal or implicit commitment to continue providing assets to the securitisation) should mean regulatory and accounting "sale" treatment is permissible for the originator.

Overall, Asset Ownership should be considered as a securitisation for regulatory purposes. In addition, given the fact that Asset Ownership is

conceptually about passing ownership and the risk of ownership to investors, explicit "skin-in-the-game" requirements are justified.

*(ii) Lending to corporates secured on assets in securities form ("Secured Lending")*

These are types of financial product where their essence is lending to corporates secured against specified cash generative assets. Examples of such products would include structured financings of operating businesses, covered bonds and fully supported asset-backed commercial paper ("ABCP") programmes. The typical features of such financial products involve significant retention of ownership rights and continued control by the originator/conduit sponsor. This can include extensive rights to change the asset portfolio through additions and removals subject to complying with covenants (which covenants themselves may be capable of amendment and re-statement). The interests of the

[3] Other parts of Article 122a can apply even if there are no mechanical retention requirements. For example investor diligence requirements (currently set out in paragraphs 4 and 5 of Article 122a) could apply to investors in a transaction even if there is no mechanical retention in that transaction.

[4] Of course it is likely the originator will continue to service the assets under a separate contractual arrangement with the SPE.

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originator/conduit sponsor are always aligned with the investor for regulatory purposes as, essentially, they always "remain on the hook" for ultimately repaying investors.

From the perspective of investors, they are secured financiers of the originator and not owners of the assets and conceptually the key consideration is the originator/conduit sponsor's covenant to pay and the security provided for that covenant. From this perspective the use of SPEs is to simplify and improve the analysis of the quality and value of the collateral.

The above considerations lead to a number of conclusions. First, the on-going originator ownership and control should preclude regulatory and accounting sale treatment for the originator. Secondly, from an investor perspective this is corporate risk of the originator/conduit sponsor secured on assets and should be marked as such. This leads to a third, and important, conclusion: Secured Lending should not be treated as a securitisation for regulatory purposes. For the avoidance of doubt this also means that retention requirements of the type promulgated in Article 122a of the CRD should not apply to Secured Lending transactions.

*(iii) Secured treasury funding platforms ("Treasury Platforms")*

These are structures where asset portfolios are used as collateral to raise on-going finance for the treasury operations of the originator of the relevant asset portfolio. Examples of financing through such Treasury Platforms would include revolving master trust programmes, structured repo asset swap facilities and bank lending secured and repayable by reference to the asset portfolio. For the originator such structures are "mini-treasuries" tying finance to the on-going performance of the asset portfolio and the management of on-going funding needs along a liability maturity curve. From the perspective of investors in respect of such Treasury Platforms the asset portfolio is essentially pledged to investors who are exposed to the performance of that portfolio while also relying on the on-going support of the originator. The fact that such Treasury Platforms can be used to raise different types of finance against the same portfolio of assets makes them broader than traditional single portfolio "asset ownership transfer" structures of the type referenced in (i) above.

The nature of Treasury Platforms as an on-going funding platform for an originator typically means the originator retains significant on-going control over both assets, i.e. the need to continually replenish the portfolio, and also liabilities, i.e. periodic new issuance. Much of this control is constituted by enforceable obligations both against and for the originator (e.g. the obligation on the originator to add assets and the obligation of the structure to issue when directed by the originator). However, in addition there is a significant undocumented imperative on the originator to support the platform should difficulties arise and it is apparent that this imperative underpins the analysis and investment decision of many investors even if it is not directly enforceable[5]. These on-going direct obligations and the significant undocumented imperative to provide support (i.e. a form of moral hazard for regulators to consider) as well as significant on-going control should preclude regulatory and accounting "sale" treatment for the originator for financings using the Treasury Platform. In fact there is a strong argument that regulation should focus on regulating the "treasury function" explicit in the operation of the Treasury Platform as if it were part of the wider treasury operations of the originator. It is important to note that this also means that there is on-going alignment of interest between the originator of the Treasury Platform transactions and investors as the originator will not only have explicit obligations and undocumented imperatives to support but will also retain capital against the asset portfolio held by the Treasury Platform.

On the other hand investors are directly exposed to the performance of the asset portfolio and repayment of their securities is explicitly tied to monies generated by the asset portfolio. Moreover while they may consider the "moral imperative" of the originator to support the programme as part of their investment decision, this is unlikely to be enforceable at law and hence should be disregarded by regulators when considering the prudent regulatory treatment for investors. This leads to the conclusion that for investors, securities issued by a Treasury Platform structure should be considered as a securitisation position.

As a result of the above, issuance through Treasury Platforms should be considered as securitisations for regulatory purposes: albeit securitisations that are always "on-balance sheet" for the originator. However, the inherent alignment of interest between the originator of the Treasury Platform and investors should mean mechanical retention requirements of the type set out in Article 122a should not apply to transactions undertaken through the Treasury Platform.

*(iv) Diverse portfolio investment products ("Portfolio Investments")*

Another form of financial product that has become characterised as a securitisation are structures that package together various forms of debt obligations to generate yield for investors based on a diversified portfolio of risk. These products include collateralised debt obligations

[5] For example, it is widely acknowledged that originators of large "Treasury Platform" programmes took steps to support their programmes during the financial crisis in 2007-2010.

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("CDOs") and their many manifestations as well as structured investment vehicles ("SIVs") and funding arbitrage vehicles such as arbitrage CP conduits. In broad terms such financial products are essentially a form of investment vehicle for investors to acquire exposure to a diversified portfolio of financial assets rather than ownership of a portfolio of substantially similar assets generated by real economy financing activity. While this is, of course, a generalisation it does highlight the need to keep this category separate: a diversified investment product versus the types of corporate exposure products or asset ownership products mentioned previously.

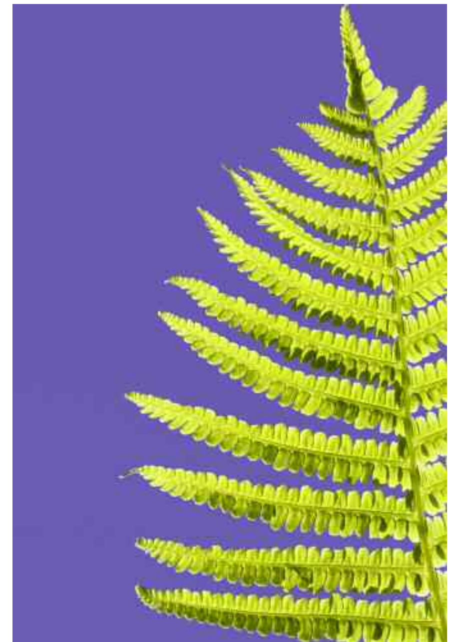
Investors in such Portfolio Investments in essence jointly own the assets making up the underlying portfolio(s). As the individual assets are typically acquired in the market and/or would be subject to a relatively liquid market, the logical ultimate remedy for investors in case of default should be to dispose of the portfolio assets in the market. In other words, investors' rights should be commensurate with ownership of their investment. As with all investment products, investors need to understand the investment and the assets backing their investments. To the extent the risk on the portfolio investments is tranched then under current regulation they should be, and currently are, securitisation exposures for investors. Going forward, they may also be "re-securitisation" exposures should an asset in the asset portfolio be a securitisation exposure itself.

Notwithstanding the foregoing, from an investor perspective Portfolio Investments should be regulated as a form of investment product rather than trying to squeeze them into securitisation regulation that focuses on, among other things, asset origination and servicing. Another reason to treat Portfolio Investments as a form of investor product is that it is often difficult to identify a real originator[6] as existing financial assets may be bought in the market by a portfolio manager who then packages them together. To the extent that the assets are sold by an actual "originator" (e.g. a bank selling leveraged loans into a CDO) then the likelihood of a lack of subsequent originator ownership and control should permit regulatory and accounting "sale" treatment. The corollary of this, however, is that explicit "skin-in-the-game" requirements are justified[7].

Taking the above into account, this leads to the conclusion that under current regulation, Portfolio Investments should be considered as a securitisation for regulatory purposes but going forward they would be better regulated through tailored regulation as a distinct form of investment product.

*(v) Synthetic risk acquisition products ("Synthetic Risk Acquisition")*

As part of the urge to create a unifying concept of securitisation (see above) regulators have been prepared to expand the scope of securitisation regulation from the traditional "ownership of assets" underpinning of securitisation into tranched risk, typically of identified assets, where no ownership rights to the assets are transferred. Hence Synthetic Risk Acquisition products are regulated currently as securitisations where there is tranching of risk, e.g. types of credit default swaps, credit linked notes and other forms of credit derivatives, but not otherwise. Part of the proposal put forward by this article is to re-establish the ownership rights associated with traditional securitisation as an important



de-limiter of the scope of regulation of securitisation. Consequently Synthetic Risk Acquisition products, where there is no asset ownership by investors and contractual rights only, should be regulated separately from other regulation of securitisation: in essence they are regulatory "risk mitigation" products and that is where their regulation should be based.

Of course there are some common features with "ownership" securitisation and investors need to understand underlying risk exposure. However, that is as true of "single name" exposure as much as "tranched exposure" to an asset portfolio and distinguishing between the two on the basis of a securitisation label is unnecessary and somewhat misleading. Another advantage of placing Synthetic Risk Acquisition products within risk mitigation is that it allows better, sharper regulation of "ownership" securitisation without overlaying complex and often contradictory requirements based around

[6] A problem highlighted in the CEBS Guidelines of 31/12/2010 on Article 122a of the CRD.
[7] This assertion does not mean that the objective tests for material net economic interest retention should not be better focussed for Portfolio Investment transactions.

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synthetic "risk" products[8]. This should allow the development of better, more focused regulation of securitisation going forward while allowing further development of risk mitigation for regulatory purposes.

Under current regulation Synthetic Risk Acquisition products should permit regulatory "risk mitigation" with similar capital effects for the originator to the regulatory "sale" of the relevant assets but should not allow "accounting sale" where such accounting treatment is based on the originator ceding control of the relevant assets. For investors there is risk exposure to the assets and where this risk is tranched then under current regulation this is a form of securitisation exposure. Going forward it would be preferable to develop the risk mitigation rules to reflect the risk acquired by the "protection buyer" and to take Synthetic Risk Acquisition products out of securitisation regulation entirely. These rules should also consider the extent to which explicit "skin-in-the-game" requirements apply to "protection sellers" and the precise form those requirements should take.

## Next steps and conclusion

The impact of the proposed schematic set out in this article is summarised in Table 1: Summary of proposed treatment of different financial products. As can be seen it would remove some types of corporate financial product from the purview of securitisation regulation (consistent with the treatment of covered bonds) and would prohibit regulatory capital relief for certain types of product with significant on-going control and implicit support from the originator.

The schematic outlined in this article is not intended to be the last word on how to regulate securitisation. On the contrary it is intended that by setting out a better, more coherent and logical route map for regulating financial products previously lumped together as securitisation, it will allow regulators to develop more appropriate regulatory approaches to, what are after all, diverse financial products. As politicians and regulators alike grapple with differentiating between "good" and "bad" securitisations perhaps a more rewarding exercise would be to consider how to regulate the key features of different products better.

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[8] For example, if securitisation is solely about tranched risk acquisition on assets why require in Basel II "true sale" for traditional securitisations at all?

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**Table 1: Summary of proposed treatment of different financial products**

| Type of Financial Product | Securitisation for Regulatory Purposes | Direct Ownership Rights | Regulatory "Sale" Possible | Accounting "Sale" Possible | Explicit Retention Requirement justified |
|---|---|---|---|---|---|
| Asset portfolio ownership in securities form ("**Asset Ownership**") | Yes | Yes | Yes | Yes | Yes |
| Corporate lending secured on assets in securities form ("**Secured Lending**") | No | No | No | No | No |
| Secured treasury funding platforms ("**Treasury Platforms**") | Yes | No | No | No | No |
| Diverse portfolio ownership in securities form ("**Portfolio Investments**") | Yes | Yes | Yes | Yes | Yes |
| Synthetic risk acquisition products ("**Synthetic Risk Acquisition**") | No[9] | No | Yes[10] | No | Possibly[11] |

[9] Should be treated as part of credit risk mitigation regulation.
[10] In form of reduction in risk weightings of exposures for regulatory capital purposes.
[11] Would be part of consideration of requirements for "protection sellers" in respect of credit risk mitigation.

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