



# **POLICY GUIDANCE NOTE ON ISSUE OF ASSET BACKED SECURITIES**

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## **POLICY GUIDANCE NOTE ON ISSUE OF ASSET BACKED SECURITIES**

### **1. Context and Application of Guidance Note**

- 1.01 This Policy Guidance Note is issued under Section 12A and Section 30Z of the Capital Markets Act Chapter 485A (the Act) and is provided to assist applicants seeking to structure or issue Asset Backed Securities.
- 1.02 The intention of this Policy Guidance Note (PGN) is to assist in allowing asset backed securities transactions to be brought forward for approval during an interim stage until the Act is amended and new regulations are introduced.
- 1.03 This Guidance Note sets out guidance on the Authority's views, approach and intention as regards the application of the Act and the exercise of its powers under the Act and is intended to provide clarification of some areas where the Act or its application may be unclear.
- 1.04 Although reference is made to unrestricted issues, this Guidance Note shall at this stage, apply only to Restricted and Limited Restricted Offer classifications of Asset Backed Securities (ABS).
- 1.05 This Guidance Note provides explanation and background, and is intended for guidance only and does not bind the Capital Markets Authority (the Authority) in the application of the law to a particular application, the granting of any approval or the exercise of a discretion or take the place of legal advice.

### **2. Application of the Act and the Capital Markets Act (Asset Backed Securities) Regulations (2007)**

- 2.01 The Asset Backed Securities provisions of the Act, contained in Part IVB of the Act, and associated definitions contained in the Act were enacted in 2013.
- 2.02 The Act, as paramount legislation, in accordance with the general principles of statutory interpretation provides a specific scheme for regulation of asset backed securities and in the Authority's opinion overrides the existing Capital Markets Act (Asset Backed Securities) Regulations, 2007 ("the 2007 ABS Regulations") to the extent that there is any conflict.
- 2.03 There are fundamental differences in the structure proposed for the regulation of ABS as contained in the Act and that contained in the 2007 ABS Regulations. These differences result in there being significant conflicts between the provisions set out in the Act and those in the 2007 ABS Regulations. These conflicts make compliance with the Act and the 2007 ABS Regulations in any consistent manner impossible. The 2007 ABS Regulations looked at as a whole are in conflict with the Act's scheme of regulation.

- 2.04 As a consequence of the irreconcilable differences between the Act and the 2007 ABS Regulations and the paramountcy of the Act, it is the Authority's opinion that the 2007 ABS Regulations in their entirety have been superseded by the Act with the same effect as if the Regulations had been repealed. The Authority intends to apply the provisions of the Act on the assumption that the ABS 2007 Regulations do not apply.
- 2.05 Amendments to the Capital Markets Act as it applies to asset backed securities have been recommended to the National Treasury and new regulations will be proposed. In the interim period, the Authority is utilising its powers under the Act generally and specifically under Part IVB of the Act relating to Asset Backed Securities to issue this Guidance Note to clarify the requirements of the Act and how the Authority will approach applications and issues of ABS.
- 2.06 Although the Authority is seeking to facilitate and assist issuers by providing guidance as to how it proposes to apply the regulatory framework especially during this interim period, it is important that potential applicants when structuring ABS for issuance or offer in Kenya comply with the Act, as supplemented and interpreted by this Guidance Note, and that the structure for the ABS and, in particular that of, the special purpose vehicle proposed, comply with this Guidance Note.
- 2.07 Mere adoption of structures utilised in other jurisdictions will not necessarily comply with Kenyan laws due to the different legal basis (e.g. civil law, or hybrid arrangement of civil and common law compared with common law foundation applying in Kenya) or specific capital markets or securities laws applying in other countries. Whilst applicants may look to other countries for guidance, caution must be exercised in simply adopting what works elsewhere and there may be benefits in seeking at an early stage Kenyan legal, tax and accounting advice at an early stage of development of the structure. For example, caution should be exercised when considering structures and documents used in South Africa, the USA or the UK to ensure that the structure and documentation reflects the requirements of Kenyan law.
- 2.08 In addition to complying with the ABS provisions of the Act the attention of potential issuers is also drawn to the need to comply with the general law, provisions of the Companies Act, 2015 and to general provisions of the Act and other regulations issued under the Act which may apply to an issue or to the underlying transaction. Where the SPV is a trust then the general principles of the law of equity and trusts also apply. Potential issuers, irrespective of the structure of the SPV should also satisfy themselves as to the application of stamp duty and taxation laws to issues of ABS and ensure that these are adequately disclosed and factored into financial models and cash flow projections.

### **3. Interpretation**

3.01 In this Guidance Note, unless the context otherwise requires, or as set out below, the terms used herein will have the same meaning as in the Act.

3.02 In exercise of its powers under the Act and in particular under Section 30Z the Authority, , proposes pending the amendment of the Act, to clarify the interpretation and application of some of the definitions used in the Act as set out below.

Issuer or offeror Means for the purposes of Section 30E, 30F, 30G and 30O of the Act, the originator, any securitisation arranger and any person making available or offering for subscription or purchase or making an invitation to subscribe for or purchase the asset backed securities but shall not include in the case of a trust structured special purpose vehicle the trustee or where the special purpose vehicle is a company the company and for the other purposes of this Act means the trustee or the company depending on the structure of the special purpose vehicle.

Securitisation trustee has the same meaning as “trustee” in the Act, that is, the person appointed under the trust deed as a trustee of the securitization trust and any successor.

Servicer Means a person appointed by the special purpose vehicle under section 30P of the Act to be primarily responsible for-

- (a) the day to day administration functions of the cash flow of the securitised assets;
- (b) the ongoing relationship with any obligor;
- (c) the provision of service to obligors;
- (d) cash management;
- (e) collection and remission of funds to the trustee or the company special purpose vehicle;
- (f) to conduct such other activities as are specified in the transaction documents.

Substitute servicer Means a servicer appointed in substitution for the original or a preceding servicer.

Special Purpose Vehicle or SPV Means a securitisation trust established with a trust deed subject to the laws of Kenya or a company incorporated in Kenya whose memorandum and articles of association, shareholding and board structure complies with the Act and this Guidance Note and provided that-

- (a) where a reference is made in the Act to a special purpose vehicle and the special purpose vehicle in a particular case is a securitisation trust then the term special purpose vehicle shall be read as if it was a reference to the trustee and any power, right or obligation specified to be that of a special purpose vehicle shall be deemed to be rights or obligations of the trustee in its capacity as a trustee of the securitisation trust; and
- (b) where any reference is made in the Act to a special purpose vehicle or any obligation is imposed or power or right bestowed on a special purpose vehicle that is a company then the obligation shall apply to the board of the company and to any securitisation manager appointed by that special purpose vehicle and any power or right shall be exercisable on behalf of the company.

Note trustee	means a trustee, if any, appointed to act for and represent the interests of the holders of asset backed securities issued as debt securities and may where supported by a legal opinion be the same party as the security trustee.
Security trust	Means a trust established to hold a charge or other security interest over the assets of the special purpose vehicle for the benefit of the holders of the asset backed securities.
Security trustee	Means a person appointed to act as trustee of a security trust.

#### **4. Application of the Act and Classification of ABS Issues**

- 4.01 The Act applies to all issues of “securities” as defined in the Act. The provisions of Part IVB relate specifically to Asset Backed Securities. Section 30I provides that an offer of ABS cannot be made to the public or to a restricted investor unless the offer is made in accordance with the Act.
- 4.02 The Authority interprets the term “restricted investor” to include any investor to whom an offer of ABS can be made under the Act including a restricted offer or a limited restricted offer but does not include an offer to the seller or originator of the assets.
- 4.03 Under Section 30Q of the Act, issues or offers of ABS fall into three classifications based on the investors to whom they can be issued or offered. The classifications are:
  - (a) Limited Restricted that can be offered only to “limited investors” which are defined as qualified investors but excluding a:
    - (i) retirement benefit or pension fund formed or established under



- the laws of Kenya ;
- (ii) Insurance company formed or established under the laws of Kenya ;
- (iii) collective investment scheme formed or established under the laws of Kenya ;
- (iv) Any other investor as the Authority may prescribe

(b) Restricted that can be offered to any “qualified investor”, and

(c) Unrestricted which can be offered to any type of investor including, the public and retail investors but does not include a restricted offer or a limited restricted offer and include all issues or offers that do not fall into the classification of a limited restricted or restricted offer and are not made to the originator or seller of the assets.

4.04 The requirements of the Act generally apply to all issues of ABS, however, there are some differences based on the classification of the ABS issue. This Guidance Note is intended to apply generally to restricted and limited restricted issues. The Guidance Note does not, at this stage, apply to Unrestricted Offers. It is not the Authority’s intention at this stage to approve applications to issue unrestricted offers.

4.05 **Appendix A** to this Guidance Note is a summary of the requirements that the Authority will apply by offer classification. This summary is provided for assistance only and is not a substitute for reading the Act or other legislation or this Guidance Note.

## **5. Requirement for a Prospectus or Offering Memorandum**

5.01 An offer of ABS cannot be made unless:-

- (a) It is an unrestricted offer made in accordance with a prospectus approved by the Authority. The Authority has yet to develop regulatory requirements for the unrestricted offer of ABS. At this stage the Authority does not propose to approve applications for an unrestricted offer of ABS;
- (b) It is a restricted offer made in accordance with an offering memorandum, approved by the Authority before an offer is made; or
- (c) It is a limited restricted offer made in accordance with an offering memorandum that complies with the Act and this Guidance Note and is submitted to the Authority before the offer is made.

5.02 The Authority proposes at a subsequent time to prescribe the contents of the prospectus and offering memorandum. Until such are prescribed, the Authority intends to adopt the principles set out in **Appendix B** with respect to restricted offers and limited restricted offers.

- 5.03 In drafting the offering memorandum, care should be taken to differentiate and correctly describe the roles and obligations of the respective parties and to ensure that accounts provided relate to the correct party.
- 5.04 In drafting the offering memorandum and the transaction documents for the transaction, attention should in particular be paid to the provisions of this Guidance Note when applying the Act, and the **Appendices** to this Guidance Note in relation to:
- (a) definition of “Issuer” as clarified and set out in this Guidance Note;
  - (b) Form and content of offering memorandum- Minimum Content (Appendix “B”);
  - (c) requirements for the legal and expert opinions, (**Appendix “D”**);
  - (d) requirements for representations and warranties, (**Appendix “C”**) and
  - (e) requirements for trust deeds (**Appendix “G”**).

## **6. Structure of the Special Purpose Vehicle (SPV)**

- 6.01 Based on extensive consultations with stakeholders and Kenyan legal advisors conducted prior to the enactment of the 2013 amendments to the Act, the current provisions of the Act limited the SPV that could be for a securitisation transaction to a common law unincorporated trust.
- 6.02 Section 30Z (2)(d) of the Act empowers the Authority to issue guidelines for the better carrying out of the provisions of the ABS provisions of the Act which relate to “the form or structure of a special purpose vehicle and documentation requirements”.
- 6.03 Pursuant to those powers, the Authority now proposes to permit issuers to choose to utilise either a common law trust or a company structure for the SPV subject to the SPV and transaction documentation complying with this Guidance Note and the general laws of Kenya. It is, however, recommended that potential issuers and advisors consider carefully the practical and cost implications of the use of a company SPV, the application of the Companies Act and of reporting accounting and liquidation requirements under the Insolvency Act.

### **Company SPV**

- 6.04 A company SPV must-
- (a) be incorporated in Kenya;
  - (b) not be a subsidiary of the originator or of any seller of assets or of any party related to the originator or any seller;
  - (c) where the company SPV is a company limited by shares then not more than 20% in aggregate of the shares or voting rights of the SPV may be owned or controlled by the originator or a seller or by any party related to the originator or seller nor

may any such party have veto rights provided that this restriction shall not restrict the holding of shares by any independent director of the SPV;

- (d) where the company SPV is a company limited by guarantee then the independent directors may also be members of the company but not more than 20% in aggregate of members or the voting rights may be originators, sellers or any related party to the originator or seller nor may any such party have veto rights;
- (e) have a minimum of three directors the majority of which must be independent directors approved by the Authority and comply with paragraph 6.05. If the minimum number provided for under the Companies Act or any other law is greater than three then that number shall apply but the majority will still be required to be approved independent directors.
- (f) be a new company which has not carried on any other business or have any non-securitisation creditors and its memorandum and articles of association must comply with this Guidance Note.
- (g) have a security trustee who should hold a charge over the shares in the SPV; and
- (h) Obligations imposed in the Act on the securitisation trustee should, where the SPV is a company, be read as imposing an obligation on the company as SPV and on the board of the company SPV.

#### *Independent Directors*

6.05 The directors of an SPV structured as a company must:

- (a) have the majority as individuals and not corporate directors each of which must have sufficient experience, skills and understanding of the capital markets and of securitisation to enable them adequately fulfil their obligations;
- (b) have the Chair as a natural person;
- (c) not have a criminal record or be a person that the Authority considers not to be a fit or proper person;
- (d) be capable of being removed, without compensation, at the request of the security trustee, on reasonable grounds; and
- (e) the majority of directors including, the chairman, must be independent of the originator, seller, securitisation arranger, securitisation manager, servicer and any trustee.

6.06 For the purposes of this Guidance Note, a person may be considered as independent if the person-

- (a) is not an employee, executive director of any of the persons referred to in paragraph 6.05(e) .
- (b) has not in the preceding three years been a director or officer or member of the senior management group of any of the persons referred to in paragraph 6.05(e);
- (c) is and has not in the preceding three years been a shareholder in any of the persons referred to in paragraph 6.05(e);
- (d) is not and has not in the preceding three years been a professional advisor, consultant to or auditor either directly or indirectly of any person referred to paragraph 6.05(e);  
or
- (e) is not a relative of any person who would be excluded from being classified as independent under paragraphs “a” to “d” above, where relative for this purpose means spouse, parent, son or daughter, child, brother or sister and spouse of such brother or sister.

6.07 Where a person is appointed that is independent who subsequently ceases to be classified as being independent then that person should be replaced as a director within a period of three months of ceasing to be independent.

*Company Limited by Guarantee as SPV*

6.08 Where the SPV is structured as a company limited by guarantee then the provisions of this Guidance Note, amended as required to address the guarantee structure of the company, will apply. In addition, such an SPV must also comply with Section 31 of the Companies Act and must include an express prohibition in the articles of the company that prohibits any person other than a member of the company from participating in the divisible profits of the company.

6.09 Where the SPV is structured as a company limited by guarantee, then the members of the company may be directors of the company subject to the requirements to meet independence criteria.

6.10 The security trustee should hold security over the membership and any entitlements as a member.

*Bankruptcy Remoteness*

6.11 In determining whether the company SPV is considered to be bankruptcy remote the following must apply and be included:

- (a) The SPV company cannot include in its memorandum or articles of association or other document or instrument governing its establishment and operation any objectives or power to enter into or undertake any activities other than those required for or incidental to undertaking its sole purpose to act as an SPV for a securitisation transaction under the transaction documentation.

- (b) The SPV must be precluded from having any employees and must sub-contract to third parties all services that may be required to be undertaken by parties other than the board of the SPV in order to conduct the securitisation transaction.
- (c) The SPV must be precluded from entering into borrowings or the provision of guarantees or other forms of financial support or incurring liabilities or entering into fiduciary obligations except as provided for in the transaction documentation for the purposes of the securitisation transaction.
- (d) The SPV should be prohibited from issuing additional shares or options and cannot hold shares in any other company.
- (e) All assets acquired by the SPV should at the time of the securitisation be free from any encumbrance to a party external to the securitisation transaction. Where the SPV or any trustee takes security over assets as part of the securitisation transaction structure then the encumbrance should be a first ranking security.
- (f) Clear provisions in the documentation as to the priority of payment to the various parties to the securitisation transaction (or “waterfall”), subordination provisions including by ABS investors and providers of credit enhancements and the legal opinion supporting the operation and effectiveness of such provision.
- (g) Provisions (covenants) in documentation, enforceable by injunction, preventing ABS holders and other potential claimants from seeking to wind-up the SPV except in very limited circumstances and the legal opinion supporting the operation and effectiveness of such provision.
- (h) All liabilities of the SPV, present or future, must be quantifiable, including taxation, included in the financial model for the securitisation transaction and capable of being met out of the financial resources available to the SPV, including subordination and over-collateralisation, based on the assumptions included in the transaction documents.

#### *Responsibility for Delegations.*

- 6.12 The SPV and the board must be responsible for the acts and omissions of all persons to which it delegates any of its functions including parties to whom it sub-contracts so that the SPV and the board are responsible for ensuring that the assets are managed in the best interests of the ABS investors in accordance with the transaction documents and that the activities of parties appointed including, servicers, and the performance of the portfolio assets are monitored.

#### *Accounts and Reporting*

- 6.13 In addition to any provisions in the Companies Act or the Act the SPV must be obliged to maintain proper accounts and in the case of a restricted offer, an annual audit of accounts is required. Accounts requirements are more fully discussed in paragraph 25 and in **Appendix “F”**. For a limited restricted offer the requirement for an audit is dependent on whether or not

an audit is required under the transaction documents for the specific transaction. The SPV is also required to fulfil continuous disclosure obligations as required by the Authority and to provide periodic reports as detailed below, in paragraph 26.

- 6.14 The SPV must in all cases prepare and publish an interim report within sixty days of the respective interim reporting date. An interim financial report shall include at a minimum the following components: condensed Statement of Financial Position, condensed income statement; condensed statement of changes in equities and applicable notes to the accounts.
- 6.15 The SPV must also prepare an annual report containing audited annual financial statements within four months of the close of its financial year. A complete set of financial statements includes the following components: statement of financial position; income statement; a statement of changes in equities, cash flow statement and notes to the accounts.
- 6.16 These requirements are in addition to the periodic reports required and any additional requirements under the transaction documents or under the Companies Act or other applicable law. The requirements for periodic accounts are more fully addressed in paragraph 26 and in **Appendix “E”**.
- 6.17 It is not intended that anything in this Guidance Note will prevent the inclusion of a call or “mop up” provisions in the securitisation documentation which permit the seller or other person to acquire the outstanding ABS under clearly specified circumstances.

#### **Trust SPV**

- 6.18 Where the SPV is structured as a trust then, as provided for in the Act, a common law unincorporated trust must be used. The trust deed and transaction documents must include similar bankruptcy, accounts and reporting restrictions or any other restrictions to those that apply for a company SPV adjusted for a trust. The trustee’s obligations should impose fiduciary obligations to the ABS investors such that the trustee, including any security trustee, is not a mere custodian. In addition, the requirements for a trust deed set out in **Appendix “G”** must be met. In the case of a trust SPV the accounts should be for the trust and reflect accounting standards for reporting to creditors and beneficiaries on an annual and interim basis as well as complying with the Act and the provisions of this Guidance Note.
- 6.19 Care should be taken to ensure that the roles of the respective parties are clearly delineated, do not overlap and are allocated to the correct party. Particular care should be taken in the case of a trust SPV to reflect the fact that a trust is not a legal person and ensure that the rights and obligations are correctly allocated as between the trustee/s, the trust assets, the beneficiaries of the trust and the ABS investors and other parties. The nature of a common law trust is further discussed in Paragraph 8 of this Guidance Note.

#### **7. Type of Security that can be issued as an ABS**

##### **Company SPV**

7.01 Where the SPV is structured as a company then the ABS:

- (a) must be issued in the form of debt securities. The actual type of debt security will depend on the structure of the transaction and the cash flows (e.g. commercial paper, floating rate notes, medium term notes, fixed interest notes or bonds, amortizing or balloon repayment, callable etc.),
- (b) must be secured debt. In this regard, attention should be had to the debenture provisions of the Companies Act, 2015 and whether or not such provisions need to be complied with in addition to the ABS provisions of the Act and this Guidance Note.
- (c) The actual type security will depend on the nature of the assets securitised and the assets of the company, including any credit enhancements or liquidity facility, but should include a registered charge over the assets of the company which complies with the requirements of the Companies Act and may include ancillary security e.g. assignment of proceeds under insurance policies, security over leased equipment and the proceeds of sale of any such equipment.
- (d) A security trustee must be appointed to hold security over the assets of the SPV for the benefit of the ABS holders. The security trustee may be the same party as the note trustee where appropriate and where this dual appointment is supported by legal opinion. For further discussion see the Box in Paragraph 18 of this Guidance Note.
- (e) The trustee must be appointed to act for and represent the interests of the ABS holders and in most instances, subject to legal confirmation that there is no conflict, this requirement would usually be addressed by appointing the security trustee as note trustee and incorporating into its role and obligations the role and obligations normally undertaken by a note trustee (see further discussion in Paragraphs 17 and 18 of this Guidance Note.)

### **Trust SPV**

7.02 Where the SPV is structured as a common law trust then ABS may be issued as either:

- (a) An equity (or beneficial) interest in the trust, or
- (b) Debt securities secured over the assets of the trust.

7.03 Where the ABS are issued as equity interest in the trust or as a debt security the trustee of the securitisation trust (the securitisation trustee, or the security trustee if a separate security trustee is appointed would also undertake the role and fulfil the obligations usually undertaken by a note trustee. .

7.04 The requirement, if any, for a security trustee in addition to, and independent of, the trustee for the securitisation trust should be addressed in the legal opinion as should the appropriateness of the combination of the role of note trustee with that of another trustee.

7.05 See further discussion in paragraphs 16 to 18 of this Guidance Note.

## 8. Overview: Key Elements - Form and Structure of the Special Purpose Vehicle & Insolvency or Bankruptcy Remoteness

8.01 Securitisation involves two key elements:

- i. The establishment of a bankruptcy or insolvency remote SPV, and
- ii. The origination of assets directly into the SPV or a true sale of assets to the SPV,

8.02 Both of these key elements operate to delink the assets from the claims of parties other than the ABS investors and parties to the securitisation transaction. These areas will be prime areas of focus by the Authority.

8.03 A “true sale” is not required where the assets are originated directly into the SPV. No sale is required because the assets are already the assets of the SPV and do not need to be transferred into the SPV.

### ***Direct Origination by SPV***

*Where assets are directly originated into the SPV then the actual lending; lease or sale of product or service (e.g. residential housing mortgage secured by a mortgage over the residence, personal loan, car loan, car or equipment lease or trade receivable) contract and security arrangement is entered into directly by the SPV (as lender) and the obligor (as borrower from the SPV) and the security is provided direct to the SPV as lender. There generally is no need in this case for a sale.*

*In such cases the SPV is established as a “shell” and the promoter usually puts in place a “warehouse loan” for the SPV on an interim basis until a pool of assets has been created and aggregated. When sufficient mortgages or loans have been created (i.e. entered into or the loans made etc. and in some cases have a sufficient track record to provide investors with confidence) then the asset backed securities are issued to ABS investors and the funds received are used to pay out the warehouse loan providers.*

*In the case of a company SPV it may be necessary to change the Articles and Memorandum of Association prior to the ABS issue and to change the board and shareholding of the SPV if this does not comply. Accounts included in the offering memorandum would reflect the period from the SPV’s establishment until the ABS issue.*

*Direct origination can only apply to new assets (i.e. those not already on the sponsor’s or an originator’s balance sheet. Direct origination can have several advantages including: - there is no need to transfer the asset as it is owned by the SPV this reduces due diligence required and legal and registration costs of transfer and possible need for notification to the borrower*



*or consents. It removes practical legal issues associated with transfer and, as there are no other creditors or shareholders, it removes issues related to clawback on insolvency and most issues relating to void and voidable transactions under the Companies Act. Similarly, privacy issues and access to borrower information do not arise as the SPV is the contractual party. What is important is to ensure that the SPV meets all legal requirements necessary for it to be able to e.g. lend or lease direct to the obligor. Ongoing contractual relationship with the sponsor, usually as the Servicer appointed for the transaction is also very important. It is that the documentation be prepared to reflect the intention to securitise at a future time to limit future complications and additional costs.*

*Where assets are originated directly into the SPV then any borrowing that had been entered into for the purpose of acquiring the assets or encumbrance provided to secure such a “warehouse borrowing” must be repaid and the security discharged at the same time as the securitisation transaction is entered into.*

- 8.04 The fundamental requirement of securitisation is the direct origination of assets into the SPV or transfer to the SPV by way of a sale of the assets to be securitised which “back” the securitisation transaction and the securities issued (ABS). This direct origination or transfer by way of sale is essential to delink the assets from potential claims by the seller’s (Originator’s) creditors and shareholders in the event of the seller’s insolvency or winding up.

**“Delinking”**

*“Delinking” in this context means that the assets have been transferred to the SPV in a manner that cannot be challenged by e.g. creditors or shareholders of the seller.*

*Such a challenge could be made, for example, if the assets were sold without the seller receiving reasonable consideration (e.g. payment, assumption of risk etc.), are in breach of existing charges or encumbrances, where required necessary consents were not obtained (e.g. shareholders, regulators), the seller becoming insolvent or winding up proceedings being commenced within the permitted period from the sale or claims by the holder of an unregistered security or mortgage over the assets or where the transaction is classified as a borrowing and not a sale of the asset.*

- 8.05 To be able to act effectively as an SPV the “vehicle” (i.e. trust or company) selected must have:-

- (a) The legal capacity to hold the assets (and in the case of direct origination to validly originate the assets), and
- (b) The ability to enforce the rights in respect of the assets (e.g. take action including if required in court to enforce a mortgage debt and/or realise the security supporting the mortgage debt) in the name of the SPV without the need for the seller to be joined as a party.

8.06 The legal opinion issued as part of the securitisation transaction application should clearly confirm the true sale, the legal capacity of the SPV to acquire and hold the assets and the capacity to enforce. Further requirements as regards the legal opinion are set out in summary below and in detail in **Appendix “D”**.

8.07 It is essential that the SPV is established and operates in a manner so that it is, as far as possible, “bankruptcy remote” (meaning that it cannot be wound up, or in the case of a trust SPV dissolved or assets distributed by parties outside the specific terms of the securitisation transaction and will continue in existence until the assets have collected in full). The objectives in structuring the transaction, the SPV and the documentation is to minimise the risk of voluntary or involuntary insolvency or winding up prior to all ABS being paid out to the full extent of the assets which are realised over the projected life of the securitisation transaction.

8.08 To ensure that this issue is addressed, the Authority in reviewing applications (including, the trust deeds and Memorandum and Articles of Association and related transaction documentation) will pay particular regard to the matters set out in paragraph 6.11 above and that the legal opinion provided as part of the transaction specifically addresses the issue of bankruptcy remoteness and the recognition and enforcement by the courts in Kenya of:

- (a) Subordination provisions,
- (b) Limited recourse provisions,
- (c) Consents required, and
- (d) Non-enforcement (no winding up or other bankruptcy or insolvency application) provisions of the securitisation transaction documentation.

The application of The Insolvency Act, No 18 of 2015 to the SPV whether structured as a company or a trust should also be considered.

### ***Winding-up Rights***

*These provisions, and the covenant or agreement to forego, will vary from one transaction to another. Of particular importance is the need for the rights of the ABS holders to wind up the SPV (or in the case of a trust to dissolve the trust or distribute assets) to reflect the “waterfall” provisions of the transaction so that lower ranking investors who have agreed to be subordinated to the claims of higher ranking investors should not be entitled to in effect advance or negate these provisions by being able to wind-up the SPV in order to achieve payment outside the terms of the transaction or to disadvantage higher ranking*

*ABS investors which may still be receiving full or even part payment in respect of their higher ranking ABS investments.*

*The provisions do not operate to prevent e.g. a trustee, auditor or director from seeking to wind up (etc.) the SPV in the event that its fees or expenses are unpaid. It is up to the ABS investors to ensure that the trustee and others are paid contracted fees and expenses or if not paid to face the consequences of winding up.*

### **Trust as SPV**

- 8.09 A common law trust is not an incorporated entity and is not subject to the winding up provisions of the Companies Act. This is one of a number of benefits of the use of a trust as an SPV. As a strict matter of law a trust cannot be insolvent because common law trusts do not have legal capacity and cannot sue or be sued or have a liquidator or administrator appointed. In the case of a trust, the so called “insolvency” arises if the trustee has insufficient funds available under its indemnity from the assets of the trust to pay all obligations incurred by the trustee pursuant to the terms of the trust deed. In this case the waterfall and priority provisions apply according to the terms of the trust deed and the securitisation transaction documentation and it is important that these are clearly set out in the documentation and the offering memorandum. The legal opinion should specifically address the operation of these provisions and enforceability.
- 8.10 In a situation, if the trust’s (SPV) assets are insufficient to pay obligations to parties other than the ABS investors e.g. Trustee’s Fees, Audit Fees, Credit Enhancer’s Fees, Servicer’s fees then this could lead to acceleration of payment obligations, enforcement of security and the dissolution of the trust with the sale of assets and the payment out of obligations according to the trust deed and transaction documentation. In the case of a trust SPV there is the potential for the Trustee to become insolvent. So that the assets of the trust are not potentially subject to claims by creditors or shareholders of the Trustee, it is important that the trust assets are clearly identified in the trust deed and the transaction documentation and any bank accounts are clearly designated as trust accounts and assets are segregated. Section 30 M (4) and of the Act is specifically intended to provide additional protection to ABS investors by limiting claims by the trustee or its creditors against the SPV assets. At present this provision only applies where the SPV is a trust.

### **Company SPV**

- 8.11 In the case of a company SPV the situation is more complex and additional safeguards need to be put in place. In the case of a company SPV, the securitisation transaction documentation and offering memorandum should clearly set out and the legal opinion should address:

- (a) The payment priority schedule set out in the transaction documentation in the event of a winding up of the company SPV,
- (b) The ability of creditors and shareholders and members, if the company is limited by guarantee, to bring winding-up actions notwithstanding the transaction documentation,
- (c) The likelihood of the court recognising and giving effect to prohibitions on seeking to wind-up the SPV by ABS investors and other creditors.
- (d) The likelihood of the court granting an injunction to a trustee, ABS investor or other party seeking to enforce an application to wind-up clause in ABS transaction documentation.
- (e) The residual power of the courts to commence a winding-up action and whether in such an event the court would follow the payment waterfall and priority arrangements in the ABS transaction documentation or would follow the statutory provisions relating to priorities of creditors e.g. under the Companies Act if the SPV were a company. In this regard it is important to distinguish a securitisation SPV from a standard trading company with outside creditors and staff with entitlements and where all shareholders rank equally – In the case of a securitisation transaction where there are various tranches of ABS issued with different priority ranking and subordination arrangements it is to be expected that some investors may not receive all payments on their securities on the scheduled date or at all. ABS investors have the greatest potential to be paid in full only if the transaction remains in place for the full life of the assets so that the maximum collections are received. If lower ranking ABS investors are able to seek to windup the SPV prior to this then it is highly likely that other ABS investors with higher priority may also incur losses, and the payment waterfall will not be given full effect.

8.12 If the SPV is structured as a company, then the documentation and legal opinion as part of the insolvency remoteness aspect should also address:

- (a) Prohibitions on mergers, reorganisations and changes in ownership;
- (b) Appointment and independence of directors;
- (c) Separateness of the SPV from the seller to overcome the potential for the assets of the SPV company to be aggregated with a parent or associated company; and
- (d) The shareholding (or membership) structure and security over the shares.

### **Common Law Trust's Characteristics**

8.13 In Kenya, the trust envisaged will be a common law unincorporated trust. This is in contrast to the position in the United States where a trust may be incorporated, and in some civil law countries where special “trust like” vehicles have been specifically created to facilitate securitisation, or countries, such as South Africa, which have specific securitisation laws and different trust laws.

8.14 Common law trusts, unless established under a specific statute, are not incorporated and as a consequence are not “persons” or legal entities.

- 8.15 Consequently, it is not the trust but the trustee, in its capacity as trustee, of the trust that enters into transactions and documentation for the purpose of fulfilling the objectives of the Trust.
- 8.16 The trustee is entitled to be indemnified out of the assets of the trust for any obligations it incurs within its authority under the trust deed and authorised transactions.
- 8.17 In addition, to protect the trustee from personal liability, except for fraud, negligence or breach of terms of the trust deed or its fiduciary duties, it is usual for those contracting with the trustee and ABS investors, to acknowledge that they are dealing with the trustee in its capacity as trustee of the trust and not in its personal capacity and for the transaction documentation and contractual arrangements to include a “limited recourse” provision. Under the limited recourse provision, creditors, which may include the ABS investors, if the transaction is structured such that the ABS investors hold debt and not equity instruments, contract not to seek to recover any debt from the trustee except out of the assets of the trust (except in cases of fraud etc.).
- 8.18 In the case of actions being taken to enforce the rights of ABS investors or to take the assets, these are undertaken by the trustee on behalf of the ABS investors and the trustee has a fiduciary obligation to protect both the assets and the interests of ABS investors according to the terms of the transaction documentation.
- 8.19 Whilst the Trustee Act, Chapter 167, provides certain powers and obligations on a trustee which operate if no alternative is provided these are usually not appropriate to a commercial trust or ABS transaction and will need to be supplemented or overridden. Whilst certain powers and obligations are set out in that Act, a trustee is also subject to the additional obligations imposed by the principles of equity.
- 8.20 It is important that the securitisation transaction documentation clearly differentiate between the trustee, the trust and other parties and set out the rights of ABS investors relative to the trustee, the SPV and other parties e.g. Servicer, Manager, Credit and Liquidity Providers, etc.. This distinction should be clear in the offering memorandum, the accounts and ensure that ABS investors clearly understand that their claims are limited to the cash flows of the assets acquired and the credit and liquidity enhancements, if any, and that potential investors are not misled into believing that the transaction has the financial support of either the assets of the sponsor or originator (seller), the arranger or the Trustee.
- 8.21 The terms of the trust deed and other transaction documentation need to clearly set out, the objectives of the trust, the powers and obligation of the trustee, the powers of other parties and critically the priority and subordination provisions. Requirements as to the trust deed are more fully set out in **Appendix “G”**.
- 8.22 Section 30 M of the Act specifically requires that the Trustee of the securitisation trust shall:
- a. be the custodian of the assets of the securitisation trust,
  - b. manage the operation of the securitisation trust and securitisation transaction in a fiduciary capacity.

8.23 The transaction documentation should make clear that the assets of the securitisation trust are held on trust for the investors in the ABS and are not the personal assets of the trustee in the event of a claim against the trustee or in the event of the trustee's insolvency or winding up. To provide additional protection to the ABS investors and other creditors under the securitisation transaction, the Act specifically provides in Section 30M(5) that:

*“The assets of a securitisation trust shall not be included in the assets of the trustee in the event that the trustee is declared insolvent, wound up, placed under administration, dissolved, amalgamated or restructured.”*

### **Charge over Assets - Company or Trust SPV**

- 8.24 Where the ABS are debt securities then a charge (or mortgage) over the assets in favour of a security trustee in its capacity as trustee for the ABS holders, must be incorporated as part of the structure where the SPV is a company and may, where the SPV is a trust. The purpose of this charge is both to deter insolvency actions by others and to ensure that, subject to the provisions of the transaction documents and the waterfall for payments set out in that documentation the ABS holders rank ahead of unsecured creditors. In addition it allows ABS investors to maintain a measure of control in an insolvency situation. In the case of a company SPV it also provides some level of protection against directors acting outside authority. A charge over the shares of the SPV in favour of the ABS investors also assists in supporting bankruptcy remoteness.
- 8.25 In the case of the trust the legal opinion should address the issue of whether under Kenyan law a separate security trustee is required and the need for a separate Note Trustee. See further discussion in Paragraphs 16 to 18 of this Guidance Note.

## **9. Name of SPV and ABS**

- 9.01 Neither the SPV or the ABS may include their name or title in the name of any originator, seller, trustee of any description, manager, arranger or servicer or a symbol or wording which associates the issue of the ABS with that party or the credit of that party.
- 9.02 The reason for this is twofold:
- (a) Not to mislead investors or suggest that the ABS are guaranteed by or have recourse to the assets of those parties in the event of the assets of the SPV being inadequate to meet in full all payments due to the holders of the ABS, and
  - (b) From a prudential or risk perspective of regulated financial institutions to clearly segregate the seller of the assets from the moral hazard associated with the issue of securities that carry the name of the seller or originator even in situations where there is no legal obligation to support the payments due to ABS holders. Similar restrictions are usually included in prudential guidelines issued by central banks and other regulators of financial institutions.

## **10. Issuer or Offeror of ABS & Requirements for Due Diligence**

- 10.01 The offering memorandum and the transaction documents must include appropriate disclosures, covenants, representations and warranties (Appendix “C”) to reflect the requirements of Section 30V of the Act which imposes specific obligations to conduct due diligence.
- 10.02 No waiver or exclusion which purports to exclude the liability imposed by the Act should be included.
- 10.03 Attention is drawn to the definition of “issuer” set out in this Guidance Note.

## **11. Requirements for Assets that may be Securitised.**

- 11.01 The assets that are the subject matter of a securitisation transaction must:
- (a) Be directly originated into or sold, transferred or assigned into the SPV,
  - (b) Generate or result in a cash flow,
  - (c) Not be encumbered (mortgaged, charged etc.) to a third party at the time that the issue of ABS is made,
  - (d) Be capable of being legally originated, sold transferred or assigned, and comply with any requirements under the Act including those imposed by the Authority, and
  - (e) Where not originated directly into the SPV the assets must be validly transferred by way of a true sale as discussed more fully below.
- 11.02 In order for the assets to be legally sold etc. there must be no impediment to the transfer which has not been satisfied. An impediment would exist, for example:
- (a) If a consent of a borrower or another party including regulatory authority approval is required and has not been obtained,
  - (b) Shareholder consent is required,
  - (c) The assets are subject to a trust in favour of another party,
  - (d) There is a prohibition on foreign ownership of the asset which could be triggered, or
  - (e) If the originator has established by omission or action a right to set-off or counter claim against the assets, and

- (f) Where the interest of the originator is as a charge under e.g. a company charge then the charge must have been registered and existed for a period of at least six months before the transfer to the ABS (the objective of the provision is to limit claims that the charge is void or voidable in the event of the seller's insolvency and to guard against claw back.

11.03 The due diligence investigation, representations by the originator/seller and the legal opinion should specifically address and confirm that each of the criteria have been met.

## **12. True Sale Criteria and Requirements for Sale**

- 12.01 Asset backed true sale securitisation is not a loan or a borrowing by the originator or seller but is at law a sale of the assets backing the ABS (e.g. mortgages, receivables, lease contracts etc.) and the rights that are associated with such assets (e.g. to payments, to rights in the event of a default including the right to enforce security and recover damages) and with the securitisation transaction (e.g. recover under warranties). This distinction is very important and goes to the core of true sale securitisation. The definition of "true sale" from a legal perspective may differ from that applied by accounting standards or prudential regulations which have a greater focus on the transfer of risk and economic substance of the transaction. By comparison the legal definition is more focused on form and on compliance with statutory requirements to effect the transfer or those of the general law.
- 12.02 The assets backing the ABS must meet the requirements for a true sale so that they are so far as is legally possible isolated from potential claims from creditors or shareholders of the seller/originator even in the event of receivership, winding up or bankruptcy and are protected against clawback actions.
- 12.03 Fair consideration will usually be required to be paid to meet this requirement. What constitutes fair consideration will vary with the securitisation transaction and the quality of the assets transferred, for example, if the assets are of a high quality then the price paid would normally reflect the full value of the assets less a risk margin. In contrast if the assets were distressed or non-performing loans or otherwise represented a high collection or payment timing risk then the assets might be purchased at a significant discount to their face value or the principal amount outstanding. The rationale for the purchase price should be addressed in the prospectus or offering memorandum.
- 12.04 So as to prevent the potential for re-characterisation as a financing (or borrowing) transaction and not a sale or transfer of the assets a number of requirements must be met these include:
- (a) The originator/seller must effectively transfer all rights and obligations in the assets to the SPV.
  - (b) The Act requires under Section 30L, that the sale and transfer, must, subject to conditions that the Authority may impose, be by way of a legal sale and not an equitable



sale. Depending on the legal nature of the asset (e.g. loan, real estate mortgage, lease payments, trade receivable etc.) and the terms of the underlying contractual documentation (e.g. mortgage, lease, goods purchase contract etc.) effecting a legal sale may require:

- (i) the obtaining of the consent of each obligor (party who has an obligation to make a payment to the seller),
- (ii) provision of notice to the obligor to make payment not to the seller but to a nominated SPV account,
- (iii) registration of the transfer.

(c) Failure to meet with these requirements may :

- (i) At worst, invalidate the transaction leaving the ABS investors with no ownership and possibly no recourse to the assets supporting the payments (or backing ) on the ABS or
- (ii) Alternatively, it may limit the ability of the SPV to enforce its rights directly without commencing actions in the name of the seller (which can be problematic in the event that the seller is uncooperative or is insolvent) and leaves the ABS investors exposed to claims by third parties as to ownership of the assets or to a security interest.

(d) The originator/seller must not hold any equity stake (including options or voting rights) beyond 20% (e.g. shareholding in the SPV structured as a company) directly or indirectly in the SPV or be in a position to exercise actual or effective control over the operation of the SPV provided that this restriction shall not prevent the originator from:

- (i) having a residual interest as a beneficiary in a trust where it is a holder of a subordinated issue of ABS,
- (ii) prevent it from being a holder of subordinated ABS structured as debt securities,
- (iii) exercising a clean-up or mop-up option where the percentage of value of senior ABS outstanding falls below a specified level and the continuation of the transaction is consequently uneconomic.

(e) The SPV may have no recourse to the seller/originator for losses arising from the performance of the assets except for:

- (i) credit enhancement provided by the originator/seller on the establishment of the securitisation transaction (credit enhancement may be provided via one or more of a number of mechanisms including, guarantees, reserves, purchase at a discount, letter of credit etc.;
- (ii) a buy-back or make good obligation resulting from a breach of a representation or warranty made in respect of the performance or to the title etc. of the assets, or
- (iii) where there is fraud, misrepresentation or misconduct or breach of contract.

(f) Where the originator/seller is also the servicer or provides other services to the SPV then:

- (i) such services must be provided on an arms' length basis at market terms, and

- (ii) there should be no obligation imposed on the servicer to remit funds to the SPV unless they are received from the obligor/debtor.

12.05 The Authority proposes to apply the requirement for a legal sale, transfer or assignment of the assets to the SPV in all cases except in transactions which involve revolving short term receivables (e.g. under 365 days) where it is not practical to repeatedly go through the process of a legal assignment or future debts or where a legal assignment may not be legally possible because the debt is not yet in existence. In such cases, compliance with Section 30Y to file a summary of the assets sold with the Authority within seven days will be required on an ongoing revolving basis. Such summaries should be made available by the Authority for public inspection. The reason for this requirement is to assist to guard against the deliberate or inadvertent duplication of the sale of the same asset to more than one party and to provide potential for purchasers or lenders to check if there are competing or prior claims in respect of the assets and to establish a basis for constructive notice. Undertaking a search of filings with the Authority should form part of the due diligence and be specifically addressed in the legal opinion.

12.06 The requirements to effect a sale will vary from asset to asset and must comply with the requirements of Kenyan law or the law of the jurisdiction governing the sale of or location of the assets (e.g. the assets may be a combination of equipment lease receivables located in Kenya, Uganda and Tanzania) which should be addressed specifically in the legal opinion and may require opinions from lawyers in more than one jurisdiction.

### 13. Rating of ABS Issues

13.01 All issues of ABS except those made as a limited restricted offer are required to be rated by a rating agency licensed or approved by the Authority. In the case of a limited restricted offer the obtaining of a rating is optional and is dependent on the terms of the specific transaction documentation.

13.02 Where a rating is obtained it must be maintained and obligations imposed on the relevant parties to maintain and provide information required. The exception to this requirement is where the Servicer or residual investor owns all of the ABS issued in respect of the transaction e.g. during the clean-up period.

#### ***Meaning of Rating being “Maintained”***

*“Maintained” in this context means that the ABS must continue to be rated and that the parties must provide such information as is required to the rating agency(ies) so as to permit the rating to be undertaken together with reviews from time to time.*

*“Maintain” does **not mean** that the rating level or levels of the ABS (e.g. “AA” or “BBB”) has to continue to be the same from the time of issue throughout the life of the transaction. The actual rating of the ABS may vary from time to time during the life of the transaction based on*

*the performance, etc., of the assets backing the issue. The ABS issuers carry the risk of the stability of the rating.*

- 13.03 Where a rating is required or to be obtained then discussion with the rating agency should be at an advanced stage prior to an application being lodged with the Authority so that the applicant has a high degree of confidence that a rating at the required level for the transaction to be economic and acceptable in the market will be likely to become available to support the issue.
- 13.04 Many of the requirements of this Guidance Note as regards compliance with the Act, transfer of the assets, the SPV, trustee, note trustee and security trustee and provision of security as well as the legal opinion will also be required be addressed in order to meet rating agency requirements.
- 13.05 An obligation should be imposed on the rating agency to provide a copy of any rating report, review or notification of a rating watch should be made available for the Authority and any listing exchange in a timely manner and should be published on the rating agency's website. The SPV should be obliged to provide details to the ABS investors no later than the time at which it provides the next periodic report. Compliance with this provision is in addition to any continuous obligation required by the Authority.

#### **14. Clarity of the Structure, Nature of the ABS and Relationship between the Parties**

- 14.01 It is essential that any application and the offering memorandum clearly and succinctly describe the structure of the ABS transaction, the parties and their relationships and the nature of the ABS being offered to investors (e.g. debt or equity instruments). It is of particular importance that the parties and their roles are differentiated, correct from a legal and accounting perspective and are clearly and accurately described. In particular the following should be addressed:
- (a) If the SPV is structured as a common law trust the differences between the trust (an unincorporated structure in which the "trust" is the relationship between the parties i.e. the ABS investors and the trustee and the "trust" is not a legal entity or person) and the trustee, and
  - (b) The limited recourse of ABS investors to the assets of the SPV, including credit enhancements and that there is no recourse to the assets of the originator, trustee, note trustee or security trustee.
  - (c) The Authority's decision to permit the use of a company SPV in addition to a trust SPV means that additional care needs to be taken to ensure that rights are provided to the correct party and that obligations, roles and duties are imposed on the correct party. The Act, currently in the case of a trust SPV, imposes many obligations on the trustee (securitisation trustee) because in the case of a trust it is the trustee that enters into obligations and holds rights on behalf of the ABS holders, as beneficiaries of the trust

because the “trust” is not a legal person. Where a company is used as the SPV these obligations, etc., will in some instances be the responsibility of the company SPV in which case the obligation should be imposed on the company SPV and on the board of the SPV. In other cases the rights will be those of and obligation should be imposed on e.g. the security or note trustee is a separate note trustee is appointed. The Authority proposes that this issue will be addressed through amendments to the Act.

- 14.02 Detailed requirements for the offering memorandum are set out in **Appendix “B”**
- 14.03 A structure diagram which identifies all key parties should be included.
- 14.04 A cash flow diagram should also form part of the offering memorandum or prospectus.
- 14.05 A detailed legal opinion will be required as part of the application and it is assumed that there will be early consultation with legal advisers in the course of the structuring of a transaction by the applicant so that the applicant can ensure that the structure proposed complies with the Act.
- 14.06 The critical test of the documentation and in particular of the offering memorandum or prospectus is to answer the questions:
- (a) Could a member of the class of investor to whom the document is addressed reasonably read the offering memorandum understand the structure, the nature of the instrument being offered for sale and assess the key risks?
  - (b) Is the information appropriate to this type of Asset Backed Security?
  - (c) Have the priority of payments to the various classes of ABS investors (i.e. the “waterfall”) been clearly described together with disclosure of assumptions underlying the ability to meet scheduled payments and the various sensitivities that have been run to test the assumptions?
  - (d) Has all the information reasonably required been provided to enable a potential investor to assess the risk of investment in this Asset Backed Security?

## **15. Description of the Asset and Sale or Origination into the SPV**

### **15.01 The Assets**

- (a) The documentation should clearly set out the precise legal nature of the assets to be securitised and how the origination or sale is to be effected to the SPV (in the case of a trust SPV then the sale is to the Trustee who holds the assets on trust). The requirements for the type of sale required in Kenya to meet the requirements of the Act are described in the section “*Perfection of Title*”. The obligation of the trustee or, in the case of a company SPV, the SPV under Section 30 Y of the Act irrespective of the classification of the asset to file a summary of the assets transferred with the Authority within seven days of an offer of ABS to an investor other than the seller or originator should be noted.

- (b) The offering memorandum should include details on the historic performance of similar assets or pools of assets including, payment delays (delinquencies), defaults (delinquencies beyond an agreed time in arrears) and ultimate losses. The offering memorandum should also include a range of scenarios and sensitivities appropriate to the assets and the structure of the transaction (e.g. interest rate movements, property price declines etc.).
- (c) To be the subject of a securitisation transaction in Kenya, the asset must fall under the definition of “asset” in Section 30 H of the Act. There is authority to prescribe additional assets.
- (d) The description of the asset is fundamental to determining:
  - i. What is being transferred?
  - ii. Can it be transferred?
  - iii. How is it to be transferred?
  - iv. Who is entitled to the cash flows?
  - v. Can there be any other claimants against the cash flows?
  - vi. What can be enforced to recover cash flows to support the ABS?
  - vii. Has “all” the asset been transferred? For example, if the transaction involves the securitisation of cash flows due on motor vehicle lease payments then the resale value of the motor vehicle should only be included if the vehicles have been transferred or security provided to support payment. If not then the SPV has no entitlement to these if the lessee defaults in making lease payments as the vehicles are still the property of the lease company (the seller in this case).
  - viii. Have any prior or competing charges/mortgages or claims to ownership been released.
  - ix. What registration or recording is required, who is to undertake, what assurances can be given that this will be done?

All of these should be addressed in the legal opinion.

15.02 In securitisation, as discussed above except in the case where assets are originated directly by the SPV, the most critical element is ensuring a true sale has been effected to the SPV. If this does not occur then, at best, the ABS investors will be unsecured creditors of the seller and at worse may have no claim against the seller or may be subject to claw back or claims of other creditors.

### **15.03 True Sale**

- (a) A true sale is a sale, transfer or assignment of the asset which makes it legally independent from the Seller or previous owner so that in the event of the winding up or insolvency of the Seller the asset
  - i. will not be considered to be part of the assets of the Seller and available to its creditors’ claims, and
  - ii. the transaction cannot be re-characterised as a loan.
- (b) A second aspect of true sale is to ensure as far as is possible that the asset is sold in a manner and for consideration that does not make it subject to claw back or avoidance as a preferential sale in the event of the Seller’s insolvency or an action by shareholders.

- (c) Several tests must be met and should be addressed in the legal opinion as well as the offering memorandum. These include meeting tests of substance, commerciality and fairness of the transaction and compliance with form and registration procedures and answering the questions-
- i. Are the assets transferable to the SPV? Particular care needs to be taken if the assets are the assets of government or a government related entity to ensure that the necessary legal and probity requirements are met.
  - ii. Have the necessary regulatory requirements been met? (notice, consents, forms, signatures, approvals, payment of stamp duty, registration etc.)
  - iii. Is the transfer free from potential set-off claims by e.g. a borrower? In this regard the terms of any underlying finance or sale or supply agreement (in the case of receivables) as well as the principles of common law and equity need to be considered.
  - iv. Has any security been released (e.g. company charge, mortgage) and has this been registered?
  - v. Can the asset going forward be managed and enforced by the SPV without impediment (e.g. can action to enforce the debt or the security supporting the debt be exercised by the SPV or Trustee independent of the participation of the seller)?
  - vi. Where the assets are located in or transferred in multiple jurisdictions then each jurisdiction should be addressed.
- (d) Each of these aspects should be addressed in the offering memorandum and the legal opinion.

#### **15.04 Perfection of Title**

- (a) In many common law based jurisdictions it is possible to sell or transfer the equitable title to property or a right separate from the legal title and the two titles or estates will be recognised by the law and courts. This is not the case in civil law jurisdictions where the concept of a dual title or “estate” (i.e. legal title and equitable title) is not recognised by the civil law and trust has a far more limited application.

The benefit of an equitable assignment is often the convenience of creation process and the avoidance of the need to give notice, obtain consent or register a transfer. Provided the full requirements for a valid equitable assignment have been met then the courts in many common law jurisdictions have in the event of the insolvency of the Seller upheld the rights of the purchaser. Utilising an equitable assignment requires considerable discipline to ensure that all the necessary steps and requirements are met. Failure to do so can result in the equitable title not being recognised or being postponed to another party with a superior claim. Even when all the required steps have been undertaken an equitable assignment still, even in jurisdictions where the process and legal concept have been in use for many years and are well understood still involves the ABS investor assuming additional risks when compared with a legal assignment.

Legal assignments generally cannot be effected for future assets which are not yet in existence. This could apply, for example, in the case of a revolving securitisation

programme involving the ongoing purchase of receivables. In this case the seller at law enters into an agreement to sell those receivables in existence at the time and as these are collected to sell a new collection of receivables that arise in the future. As these latter obligations are not in existence at the time of the initial securitisation they cannot be legally sold, transferred or assigned at that time and can only be sold by way of a legal sale at the time that they come into existence. At the time of the original securitisation, the seller enters into a contract to sell future receivables and agrees to assign these to the SPV. On creation, the receivable is then assigned to the SPV. If future receivables are not created, then the ABS structure provides for the ABS to be repaid out of the collections and the transaction no longer revolves.

- (b) The disadvantages of an equitable versus a legal assignment or sale include
- i. That unless some form of registration or notice is available and registration or notice occurs or a detailed process of marking each transaction document removing the title documentation from the physical control of the seller is adopted then in the event that the seller engages in a second sale of the same asset or charges or mortgages the asset, the interest of the first purchaser (in this case the SPV and the interests of the ABS holders) will be deferred to that of the second innocent purchaser without notice of the prior transaction.
  - ii. The mixing of assets with those of the seller which can occur when it is not possible to clearly delineate those assets which have been assigned from the assets of the seller means that in the event of the insolvency of the seller creditors and shareholders of the seller are likely to be able to mount a successful claim that the assets subject to the securitisation are in law still the assets of the seller and available to satisfy the claims of the seller's creditors and those of its shareholders.
  - iii. A purchaser who is only an equitable owner cannot take independent action to enforce but must take action through the legal owner which can be a source of problems and open the transaction up to additional risks in the event that the seller is insolvent or simply uncooperative. Any action to enforce would in this case be required to be taken in the name of the seller and not in the name of the SPV.
- (c) In the case of an equitable assignment or sale having the ability to "perfect title" is essential to address the situation of either declining credit quality of the seller that might lead to the seller's insolvency and/or the need to take enforcement actions in respect of the assets independent of the seller. Perfection of title is the process of combining the legal and equitable ownership (title or estate) of an asset so that the SPV has the full legal and beneficial title to the assets. Perfection often involves, notice, consent and/or registration.
- (d) Equitable assignments can be undertaken under the general law in Kenya, however, under Section 30 L (3) of the Act equitable assignments do not generally qualify as a sale for the purposes of securitisation.

- (e) One reason for the strong preference for a full legal assignment to be undertaken to effect the sale from the commencement of the transaction is due to the potential for fraud (e.g. multiple sale of the same assets), competing ownership claims arising, and for inadvertent breach leading to ABS investors being placed at considerable risk. These risks are not totally removed by requiring a legal assignment but are considerably reduced. Section 30Y which requires the Trustee or SPV to file a summary of the transferred assets with the Authority assists in reinforcing the position of ABS investors by providing potential notice of assets that have been transferred.
- (f) A second reason to prefer a full legal assignment is that this to the maximum extent possible delinks the assets from claims by creditors and other claimants of the seller or originator in the event of their insolvency as the legal title and ownership of the assets has vested in the SPV.
- (g) Equitable assignments will not generally be considered for approval by the Authority. The Authority proposes to apply the requirement for a legal sale, transfer or assignment of the assets to the SPV in all cases except in transactions which involve revolving short term receivables (e.g. under 365 days) where:
  - i. It is not practical to repeatedly go through the process of a legal assignment or future debts, or
  - ii. where a legal assignment may not be legally possible because the debt is not yet in existence, but
  - iii. In all cases compliance with Section 30Y (i.e. SPV ,securitisation trustee or company, to file a summary of the assets sold with the Authority within seven days will be required on a revolving basis and should be part of due diligence for each acquisition and addressed in legal opinions.
- (h) The nature of the sale or assignment, the risks associated with the manner selected, the requirements for registration and the steps to be taken and who is responsible for effecting should all be fully addressed in the offering memorandum and the legal opinion.

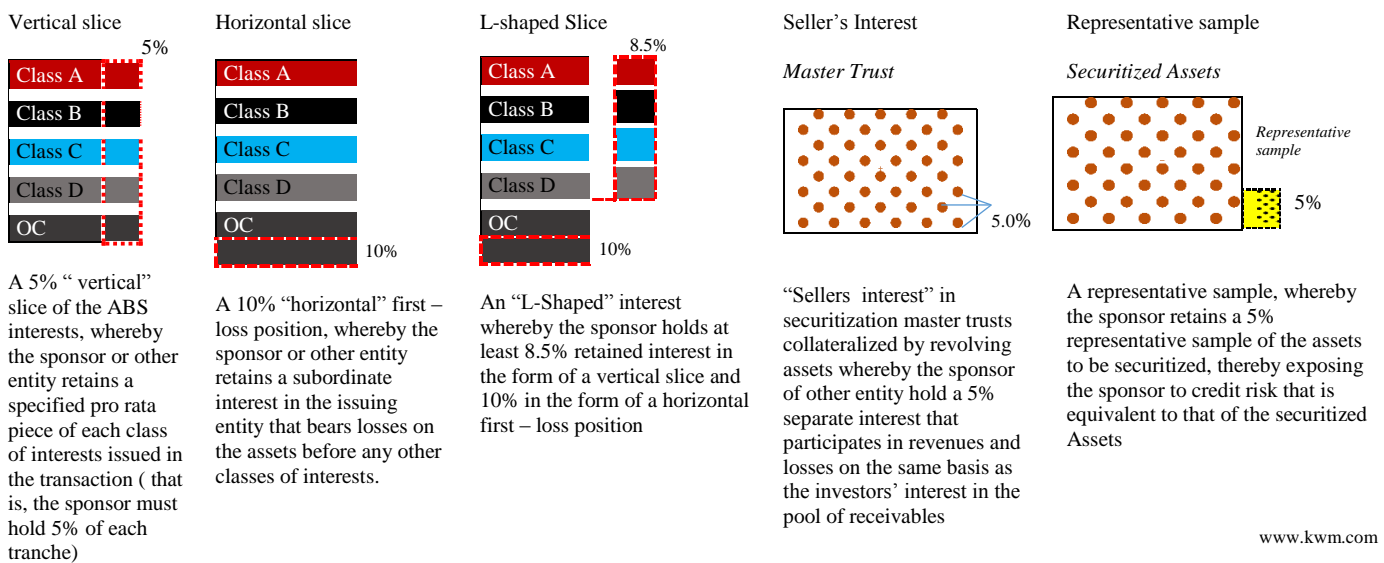
### **Retention of an Interest or “Skin in the Game” by Seller or Sponsor**

- 15.05 “Skin in the Game” refers to the seller or sponsor having an ongoing interest in the success of the transaction and the performance of the assets by continuing to carry some level of risk. The requirement for the retention of skin in the game which may take a variety of forms e.g. equity in the SPV or the acquisition of a minimum value amount or percentage of the ABS issued in each transaction arose out of “originate to securitise” transactions of sub-prime loans principally in the United States and which were seen as a substantial component in the cause of the Global Financial Crises.
- 15.06 The skin in the game requirements proposed in many jurisdictions and adopted in some are intended to address the misalignment of incentives of originators and ABS investors by motivating originators to continue to originate and underwrite high quality loans because it



would also share in the pain of losses if such loans failed to perform as projected. A variety of different models have emerged in different countries and methods of application (e.g. via securities law regulation or via central bank prudential regulations).

15.07 At this stage the Authority does not propose to apply a minimum skin in the game requirement but will require each transaction to disclose what level will be applied and provide an explanation for the percentage retention set and its implication to investors. Other regulators may require the inclusion of such a requirement. An example of some of the approaches to requiring skin in the game that have been proposed or adopted in other jurisdictions is illustrated in the figure below.



## 16. Trustee of Securitisation Trust

16.01 Where the SPV is structured as a trust, then a securitisation trustee must be appointed. Minimum requirements for inclusion in the trust deed are set out in **Appendix "G"**.

16.02 The securitisation trustee must be:

- A company incorporated or a corporation established under the laws of Kenya (individuals are not acceptable),
- Demonstrate capacity to act as a securitisation trustee for a securitisation transaction, and
- Have fiduciary obligations to the ABS investors.

## 17. Requirement for a Separate Note Trustee

17.01 A separate note trustee need not be appointed to represent the interests of asset backed securities. Some of the rationale for this requirement is set out below in Paragraph 18. Where a separate

note trustee is not appointed then the role, fiduciary duties and obligations normally undertaken by the note trustee should be included as a requirement for:

- (a) The securitisation trustee, in the case of a trustee SPV where the ABS are issued as equitable interests; or
- (b) The security trustee in the case where the ABS are issued as debt securities and a security trustee is required to be appointed,

Minimum requirements for inclusion in the trust deed are set out in **Appendix “G”**.

17.02 The note trustee, or any person undertaking the role of a note trustee, must be:

- a. A company incorporated in, or a corporation established, under the laws of Kenya,
- b. Demonstrate capacity to act as a note trustee for a securitisation transaction.

## **18. Security Trustee & Aggregation of Trustees’ Roles**

18.01 A security trustee must be appointed to represent the interests of asset backed securities where the securities are issued as debt securities by an SPV structured as a company and may be appointed in other cases. In the case of debt securities issued by an SPV structured as a trust, if a different legal person to the securitisation trustee is not appointed as security trustee then the appropriateness and legal implications of the two roles (i.e. as securitisation trustee and security trustee) being fulfilled by the one legal person under Kenyan law should be specifically addressed in the legal opinion.

18.02 In order to approve structures where it is proposed that the securitisation trustee is also the security trustee, the Authority will require that there is a clean legal opinion provided that specifically addresses this issue and confirms that there is no legal issue with this dual appointment that could adversely impact on the rights of ABS investors.

18.03 Minimum requirements for inclusion in the trust deed are set out in **Appendix “G”**.

### ***Requirement for Note Trustee, Aggregation of the Role of Note Trustee with Security Trustee & Possible Legal Arguments for Separation of the Roles of Securitisation Trustee and Security Trustee***

*In a trust SPV arrangement, from a legal perspective, the actual issuer of the ABS which has payment obligations to the ABS investors is the trustee acting in its personal capacity and not the trust, because the trust is not a legal person. However, the trustee is not required to carry the liability itself and is entitled to be indemnified (that is to pay or to recover any payment obligation) out of the assets of the trust. In addition, to cover the situation where the assets of the trust are insufficient to pay out the obligation, the claimants under the securitisation transaction, including the ABS investors, agree via a limited recourse clauses in the*

*securitisation transaction documentation to limit their claims to payment in cases other than fraud, negligence, breach of fiduciary duty or misconduct by the trustee to recovery only against the securitisation assets and not against the trustee personally.*

*To protect investors it is important that the securitisation trust assets, whether the ABS is issued as a debt instrument or a beneficial interest in the trust, are not mixed with and are clearly segregated from the general assets of the trustee and are identifiable as trust assets. The reason that this is important is that if the assets are mixed with the trustee's own assets (personal assets) and are not clearly identifiable as trust assets then the ABS investors will be exposed to claims by the general creditors of the trustee in the event of insolvency of the trustee. Section 30M(5) of the Act seeks to provide a measure of protection for ABS investors in the event of the insolvency of a trustee by providing that the securitised assets do not form part of the assets of a trustee in the event of the trustee's insolvency etc. This is reinforced by the requirements of Section 30 Y which requires the filing of a summary of the securitised assets with the Authority.*

#### **Requirement for a Note Trustee**

*Whilst it is not clear that the legal position has been considered or resolved in Kenya there are several legal arguments that have been raised in different jurisdictions with a similar common law foundation as to why a note trustee's role needs to be provided for and why a separate security trustee may be necessary in the case where a securitisation SPV is structured as a trust and the ABS is issued as a debt. These include:*

- (a) **Registered securities and Note Trustee:** *Where the ABS are issued as registered debt securities then the actual debt obligation of the issuer is usually established via a separate instrument from the actual ABS. In this arrangement the issuer (the securitisation trustee) promises to pay from time to time the persons who are on the register as holders of the ABS. The ABS investor then receives a written acknowledgement from the person maintaining the register confirming that the ABS investor is registered. From a legal perspective there is no "privity of contract" (link) between the issuer and the ABS investor which generally at law means that the contract to make payment by the issuer to the ABS investor cannot be enforced by the investor.*

*Where the SPV is a company this problem with registered securities is usually resolved by the use of a note trust, or a deed poll, under which the issuer enters into a covenant in favour of the note trustee to pay the principal and interest on the ABS and this covenant is held on trust by the note trustee for the benefit of the holders of the registered securities (ABS) from time to time. As beneficiaries of the note trust the ABS investors, as holders, can require the note trustee to enforce. Under a deed poll (i.e. where there is no note trustee) the covenants are made in favour of the ABS registered holders from time to time but there is some lack of legal clarity as to whether the covenant can or must be enforced individually or by all ABS investors leading to practical issues of enforcement. Under this Guidance Note, where debt securities are issued, then the ABS must be secured instruments.*

*In the case of a company SPV or a trust SPV issuing debt ABS then the security trustee may also be appointed to also undertake the role of the note trustee subject to confirmation*

*being included in the legal opinion for the specific securitisation transaction that a single person undertaking the dual roles is not precluded by Kenyan law and identifying any legal risks, if any, resulting from the dual appointment.*

- (b) Registered securities and Securitisation Trustee also undertaking the roles of Note Trustee and Security Trustee:** - *In addition the need for a note trustee role to be provided for in the case of registered debt securities as described in (a) above, where the SPV is a trust and the issuer of the registered debt securities is a securitisation trustee there is an additional legal issue to be considered. In such structures it is usual for the securitisation trustee's promise to pay to be included in the trust deed governing the trust. In such situations the trustee's obligations can only be enforced by a beneficiary of the trust.*

*At a practical level this problem is addressed by appointing a separate security trustee under a security trust deed. The security trustee is the beneficiary and holds the benefit of the covenant to pay by the securitisation trustee on trust and on behalf of the ABS investors as the beneficiaries of the security trust. The security trustee enforces the securitisation trustee's obligation to pay and as beneficiaries of the security trust ABS investors can enforce the security trustee's obligation to enforce against the securitisation trustee.*

*A problem arises, however, in the event that the securitisation trustee and the security trustee are the same entity (or legal person) then applying, the general legal principle, that a person cannot hold something on trust for itself, that is, the same person cannot be both the trustee and the beneficiary would result in the ABS investors being at risk of not being able to enforce rights to payment.*

*For this reason there strong legal arguments that the securitisation trustee and the security trustee should not be the same person. This issue can be resolved by separate companies from the same group undertaking the separate roles. A second reason relates to "indemnification" and is discussed below. The position under Kenyan law needs to be addressed in the legal opinion.*

**Trustee's Right to Indemnification & Risk to ABS Investors:**

*A second argument as to why the securitisation trustee and the security trustee cannot be the same legal person or entity arises out of the application of the principles of the trustee's right to indemnification. As outlined earlier, because a trust is not a legal person in the case of borrowings or the entering into of contracts or issue of ABS structured as debt securities, it is the trustee that enters into obligations in its role as trustee of the trust with the proviso that the trustee's liability is limited to the amount available from the assets of the trust. ABS investors in debt securities are dependent upon the trustee having access to the assets of the trust (via its rights to indemnification) in order for the trustee to be able to meet its payment obligations to the ABS investors.*

*The trustee is entitled to recover from the assets of the trusts expenses and liabilities properly incurred in its role as a trustee. This right of recovery (indemnification) should be provided for in the trust deed but in addition arises out of the principles of the trust law.*

*The trustee's right to indemnification out of the assets of the trust is, however, limited by the principle of law that in determining a trustee's right to recovery it is necessary to consider the amounts claimed from the trust's assets and then to offset against such indemnified amount any liabilities that the trustee may have to the trust.*

*A potential problem arises if the trustee has committed a breach of trust which results in the trustee having a personal liability to the trust then the trustee will not be entitled to indemnification or access to the trust's assets to the extent that it has a breach liability (i.e. the payment amount to the ABS holders could be reduced by the set off obligation) to allow it to meet the payment obligations in respect of properly incurred trust debts, (e.g. including liabilities to ABS investors on debt securities).*

*This problem, which has been of concern to some rating agencies, is usually addressed by two mechanisms:*

- i. Through enhancement of the trustee's right to indemnification by making clear that the right to indemnification is not reduced or impacted by the trustee being in breach. This requires careful drafting in the transaction documentation to ensure that the protection of ABS investors is not reduced in cases of breach by the trustee but that the trustee can access (and be indemnified from) trust assets where the purpose of access and indemnification is to enable the trustee to make payments to ABS investors and to others under the terms of the transaction documents, and at the same time ensuring that this provision does not erode the ABS investors' rights to recover from the trustee for the breach and/or:-*
- ii. To remove the need for ABS investors to have to rely on the securitisation trustee's right of indemnity in order to have access to the trust's assets. This can be achieved by ensuring that the ABS investors are secured creditors of the trust. The mechanism to achieve this outcome is for the securitisation trustee to "charge" (or mortgages) the trust assets as security for the ABS debt securities. This charge is held by a security trustee for the ABS investors. ABS investors have recourse to the trust assets via the charge and do not have to rely on the securitisation trustee's right to indemnity.*

*For this mechanism to be effective the security trustee must be a different legal entity to the securitisation trustee.*

*These issues need to be considered in the context of the structure and practices of the Kenyan capital markets; the structure of the specific securitisation transaction and Kenyan law. The issue should be addressed in the legal opinion if a separate security trustee is not used.*

#### 18.04 The security trustee must:

- (a) Be a company incorporated, or a corporation established, under the laws of Kenya,
- (b) Demonstrate capacity to act as a security trustee in a securitisation transaction, and
- (c) Have fiduciary obligations to the ABS investors.

## **19. Servicer and Substitute Servicer**

- 19.01 An originator or seller may appointed as the Servicer. The Authority must be satisfied that the servicer has adequate operational systems and resources to administer the assets.
- 19.02 Provision should be incorporated in the documentation for the appointment of a substitute servicer.
- 19.03 A Servicer must be appointed in the transaction documentations which should include:
- (a) An ability by the SPV to change the servicer (without any requirement to pay compensation or a fee) for breach of the transaction documents or in the event that winding-up or insolvency proceedings are commenced against the servicer or the SPV or any securitisation manager is in its absolute discretion of the opinion that it is advisable to change the servicer in order to protect the interests of any holder of ABS.
  - (b) An obligation on the servicer to provide all necessary information, access to documentation records and data and to necessary systems and software and hardware to access to records in order to facilitate a change of servicer, enable the assets' performance to be monitored, cash flows collected and rights enforced.
- 19.04 Depending on the rating, experience and substance of the originator/seller of the assets the Authority may require that an alternate or substitute servicer is identified and provided for in the original transaction documentation.
- 19.05 Where a servicer including an originator acting as a servicer retires or is removed then the transaction documents should make provision for the securitisation trustee or the securitisation manager (depending on the structure of the SPV) to carry out the functions of the servicer until another servicer is appointed.

## **20. Collections of Cash Flow**

- 20.01 Where possible notification should be given to the obligor to make payments from the date of commencement of the securitisation direct to an account in the name of the SPV, which account should be subject in the case where the ABS are debt securities to a charge. The reason for this is twofold to:
- (a) Ensure that monies paid become the asset of and under the control of the SPV as soon as possible and are not mixed with the assets of the seller, and
  - (b) So that the obligor (party making the payment) is not legally discharged of the obligation to make payment where it pays as previously directed.
- 20.02 In the event that it is demonstrated to the Authority that the provision of notification and direction of payment direct to the SPV's account is not possible then the transaction documentation should require that:

(a) The servicer (and where the servicer is not the originator then the originator) has in place adequate systems and controls to “ring fence” and segregate the cash flows relating to the securitisation assets, and

(b) Funds collected by the servicer etc. are remitted to an account in the name of the SPV within three business days of collection of the funds from the obligor.

## **21. Cash Flow Modelling – Scenarios and Sensitivities- Disclosure**

21.01 Any prospectus or offering memorandum should include details of cash flow profile, aging of cash flows and historic data (including arrears, default and loss rates and timing of such), of the performance of the portfolio of assets securitised and where possible of the performance of similar portfolios originated or managed by the originator.

21.02 An explanation of the cash flow modelling and how it is expected that the cash flows, including accessing any credit enhancements or liquidity facilities or reserves are anticipated to enable the SPV to meet payment obligations to ABS holders.

21.03 Details of scenarios and key sensitivities and assumptions should be included.

## **22. Static Pool Analysis & Historical Disclosure**

22.02 Where the assets consist of a pool of assets then a static pool analysis should be undertaken and the results disclosed in the prospectus or offering memorandum and form the basis for comparison in ongoing reporting.

## **23. Securitisation Arranger**

23.01 The SPV (trustee or company) may appoint a securitisation arranger. The securitisation arranger should be a transaction advisor (e.g. investment bank or other person approved by the Authority). The role of the securitisation arranger is as provided for in Section 300 of the Act. Where a securitisation arranger is not appointed then the issuer shall be liable to investors for the matters specified in the provision.

## **24. Securitisation Manager**

24.01 A Securitisation Manager may be appointed by the securitisation trustee where the SPV is structured as a trust and must be appointed where the SPV is a company. The Securitisation Manager should be able to demonstrate that it has the experience, capacity and resources to undertake the role. Where a Securitisation Manager is not appointed then the role normally undertaken by a securitisation manager will be required to be undertaken by the securitisation trustee.

## 25. Accounts and Auditor

- 25.01 Accounting records must be maintained in accordance with the Companies Act and where this Guidance Note provide for preparation of accounts and additional reporting the transaction documents shall require the inclusion of additional information. The accounts of the SPV for the securitisation transaction shall comply with **Appendix “F”**.
- 25.02 For an SPV structured as a trust then accounts shall be produced for the trust which comply with accounting standards and include any information provided for in this Guidance Note. The trust deed and transaction documents must include obligations to prepare the required accounts and for additional reporting.
- 25.03 For a Restricted Offer of ABS an independent auditor of the SPV (company or trust) and the securitisation transaction must be appointed. For a Limited Restricted Offer an auditor may be appointed as required by the transaction documentation.

Copies of accounts should be filed with the Authority.

## 26. Periodic Reports

### Periodic Servicer Reports

- 26.01 Irrespective of the classification of the issue, in addition to annual reports and any continuous disclosure reports, the transaction documents must include an obligation on the servicer to prepare and circulate to ABS investors, the Authority, any listing exchange, any credit rating agency, the SPV and any trustee, note trustee or security trustee periodic servicer reports which comply with **Appendix “E”**. These obligations are in addition to any obligations that an SPV structured as a company may have under the Companies Act.
- 26.02 Periodic servicer report should be required to be sent to ABS investors, and any and each trustee, on the date that payments are scheduled to be made irrespective of whether a payment is made. Provided that if payments are not scheduled to be made at least once a quarter, then reports should be prepared and circulated within seven days of the end of each calendar quarter and include information on the performance of the portfolio as at the end of the particular quarter. A copy of each periodic report should also be provided to the Authority.
- 26.03 Each periodic report shall be certified as correct by two officers of the Servicer one of which shall be the senior officer of the Servicer who is in charge of the securitisation transaction and if there is more than one Servicer then the certification shall be provided by at least two officers of each servicer.
- 26.04 Where the Servicer fails to prepare such reports and deliver by the required date then the securitisation trustee or the securitisation manager depending on the structure of the SPV shall be obligated to the best of its ability from the information reasonably available to it, or reasonably obtainable by it, to prepare a substitute pro forma report within fourteen business



days of the date on which the reports should have been prepared by the servicer and to distribute a copy of such report.

### **Periodic Trustee and Securitisation Manager, SPV Reports**

- 26.05 The securitisation trustee and any securitisation manager and the board of a company SPV must be required by the transaction documents to prepare and circulate to ABS investors, the Authority, any listing exchange, any credit rating agency, the SPV and any trustee, note trustee or security trustee a report within fourteen business days of the due date for receipt of the servicer's periodic report a report which meets the requirements of **Appendix "E"**.
- 26.06 In the event that a Servicer's report is not prepared or received then the trustee is not relieved of its obligation to submit the trustee's report by the specified date. each trustee shall also be under an obligation, irrespective of other actions that it may be required to undertake, to advise the Authority of the Servicer's failure to prepare the report and circulate by the due date.
- 26.07 Reporting requirements by the note trustee, if any, and security trustee which meet the requirements of **Appendix "E"** should also be included.

### **Periodic Auditor's Reports**

- 26.08 A periodic audit report containing the information set out in **Appendix "E"** shall be prepared by the auditor appointed within sixty days of the end of the financial year and financial half year for all securitisation transactions for a restricted offer.
- 26.09 The periodic audit report is in addition to any audit of the accounts that may be required by the Companies Act, this Guidance Note or the transaction documents. The trust deed of an SPV structured as a trust must include obligations on the trustee to appoint an auditor and to prepare accounts.
- 26.10 The report shall be addressed to the SPV and stated to be for the benefit of the asset backed securities investors and shall be filed by the SPV or, if applicable by the Securitisation Manager, with the Authority and any listing exchange and distributed to any credit rating agency and to the investors in the asset backed securities as soon as reasonably practicable but in no event no later than the end of the next working day after the date of preparation.

**APPENDIX “A” – Summary or Requirements by Classification of Offer**

<b>ISSUE</b>	<b>Limited Restricted Offer</b>	<b>Restricted Offer</b>	<b>***Unrestricted “public” Offer</b>  <b>*** These provisions are indicative only as the Authority does not propose at this stage to Approve any applications in respect of Unrestricted public Offers.</b>
<p><b>Permitted Investors</b></p> <p><b>Excludes</b> in all cases offers to the originator or seller of the assets in exchange for the assets for the purpose of establishing</p>	<p>Offer made <b>only to a “limited investor”</b> which is a “qualified investor” <b>but not</b></p> <ul style="list-style-type: none"> <li>(i) Kenyan retirement benefit or pension fund</li> <li>(ii) Kenyan Insurance company</li> <li>(iii) Kenyan collective investment scheme</li> <li>(iv) any other investor as the Authority may prescribe</li> </ul> <p>May be made in conjunction with an Unrestricted Offer S30Q(4)</p> <p>General provisions of CMA to offers of securities apply to extent not specifically covered in ABS provisions.</p>	<p>Made only to a “qualified investor”</p> <p>May be made in conjunction with an Unrestricted Offer S30Q(4)</p> <p>General provisions of CMA to offers of securities apply to extent not specifically covered in ABS provisions</p>	<p>No restrictions on investors for primary or secondary offers or trading</p> <p>General provisions of CMA to offers of securities apply to extent not specifically covered in ABS provisions</p> <p>CMA may impose requirements for secondary sales S30T</p>

ISSUE	Limited Restricted Offer	Restricted Offer	***Unrestricted “public” Offer  *** These provisions are indicative only as the Authority does not propose at this stage to Approve any applications in respect of Unrestricted public Offers.
	<p>Conversion to another classification possible S30R.</p> <p>CMA may impose requirements for secondary sales S30T</p>	<p>Conversion to another classification possible S30R</p> <p>CMA may impose requirements for secondary sales S30T</p>	
<b>The “Issuer” &amp; Liability</b>	<p>For purposes of Sections 30E, 30F, 30G and 30O means the Originator and any Securitisation Arranger but shall not include the trustee or where the SPV is a company the company</p> <p>For other purposes means the trustee or the company depending on structure of SPV.</p>	Same	Same

ISSUE	Limited Restricted Offer	Restricted Offer	***Unrestricted “public” Offer  *** These provisions are indicative only as the Authority does not propose at this stage to Approve any applications in respect of Unrestricted public Offers.
<b>Due Diligence Obligations</b>	Obligations are imposed on various parties to conduct independent verification & due diligence S30V  Party not liable if made reasonable enquiries etc.	Same	Same
<b>Structure of the SPV</b>	Common law unincorporated trust <u>or</u> company incorporated in Kenya (subject to compliance with structure requirements for a company) e.g. shareholding, directors, contents of memorandum and articles as required by CMA.	Same	Same
<b>Types of ABS that can be issued</b>	Company SPV, ABS only debt securities which are secured over the assets of the SPV. S30J(1) as proposed to be amended  If Trust SPV then may be equity (beneficial) interests in the trust or debt securities secured over assets of the SPV	Same	Same

ISSUE	Limited Restricted Offer	Restricted Offer	***Unrestricted “public” Offer
<b>Prospectus, Offering Memorandum or Information Note required</b>	Offering Memorandum required S30I(6) and definition of offering memorandum: S30H  Must comply with S30S	Offering Memorandum required S30I(6) and definition of offering memorandum: S30H  Must comply with S30S	Prospectus required S30I(5)  Must comply with S30S
<b>CMA’s Role</b>	Offering Memorandum that complies with Act to be <b>submitted to CMA</b> before offer made S30Q(6)  If in conjunction with Unrestricted Issue then offer in entirety must be approved by CMA S30Q(5)	Offering Memorandum that complies with Act to be submitted to CMA before offer made S30Q(6)  Offering memorandum <b>must be approved</b> by CMA – Proposed amendment to S30Q(6)	Prospectus to be submitted to & <b>must be approved</b> by CMA S.30Q(3)  However, the disclosure standards for prospectus to be issued for an unrestricted offer have yet to be finally formulated

ISSUE	Limited Restricted Offer	Restricted Offer	***Unrestricted “public” Offer  *** These provisions are indicative only as the Authority does not propose at this stage to Approve any applications in respect of Unrestricted public Offers.
		If in conjunction with Unrestricted Issue then offer in entirety must be approved by CMA S30Q(5)	
<b>Assets and Type of True Sale Required</b>	<p>Assets may be anything generating a cash flow, not encumbered &amp; capable of being legally originated and sold S30K</p> <p>May be originated direct into SPV S30L in which case a sale is not required as assets are already owned by the SPV.</p> <p>If sold or transferred to SPV must be a true sale that is a <b>legal sale</b> and <u>not</u> an equitable sale. S30L(1) &amp; S30L(3) except subject to conditions imposed by the CMA. Only exceptions are in the case of revolving transactions involving the sale of</p>	Same	Same

ISSUE	Limited Restricted Offer	Restricted Offer	***Unrestricted “public” Offer
	<p>future receivables where the collection term for the receivable is greater than 365 days.</p> <p>Other than when the exception applies legal opinion must clearly state that the sale is a legal true sale and in all cases the nature of the sale.</p> <p>Summary of assets transferred must be filed with CMA within 7 days of issue or offer S30Y</p>		
<b>Listing</b>	Optional subject to CMA prescribing	Optional subject to CMA prescribing	Must be listed S.30Q(4)
<b>Rating Requirement</b>	<p>Optional subject to CMA prescribing</p> <p>If obtained must be maintained S30W</p>	CMA will require a rating	CMA will require a rating

ISSUE	Limited Restricted Offer	Restricted Offer	***Unrestricted “public” Offer  *** These provisions are indicative only as the Authority does not propose at this stage to Approve any applications in respect of Unrestricted public Offers.
		If obtained must be maintained S30W	Must be maintained – to be redone every 2 years?
<b>Initial Disclosure &amp; Ongoing Disclosure</b>	S30X Must comply with Act including S30F  Continuing disclosure obligations apply	S30X Must comply with Act including S30F  Continuing disclosure obligations apply	S30X Must comply with Act including S30F  Continuing disclosure obligations apply
<b>Audit Requirements</b>	Optional subject to provisions of the transaction documentation	Mandatory CMA requirement	Mandatory CMA requirement
<b>Requirement to appoint Securitisation</b>	May be appointed S30O	Same	Same



ISSUE	Limited Restricted Offer	Restricted Offer	***Unrestricted “public” Offer  *** These provisions are indicative only as the Authority does not propose at this stage to Approve any applications in respect of Unrestricted public Offers.
<b>Arranger</b>	If not appointed then the issuer liable for structure etc.		
<b>Requirement to appoint Securitisation Manager</b>	If SPV is a trust <b>may</b> be appointed  <b>Must</b> be appointed if SPV is a company	Same	Same
<b>Requirements for Trustee</b>	If SPV is a trust <b>must</b> be appointed  <b>Must</b> be a corporate trustee not one or more individuals	Same	Same
<b>Note Trustee Requirements</b>  <b>Subject to the</b>	<b>A party to undertake the role and obligations of a note trustee must</b> be appointed where ABS is in the form of a debt security & SPV is structured as a company	Same	Same

ISSUE	Limited Restricted Offer	Restricted Offer	***Unrestricted “public” Offer  *** These provisions are indicative only as the Authority does not propose at this stage to Approve any applications in respect of Unrestricted public Offers.
	<p><b>May</b> be appointed where SPV a trust.</p> <p><b>Must</b> be a corporate not one or more individuals</p> <p><b>Either a separate note trustee may be appointed or, subject to legal opinion the party appointed to undertake the role, may</b> be same entity as security trustee.</p>		
<b>Security Trustee Requirements</b>	<p><b>Must</b> be appointed where ABS is in the form of a debt security &amp; SPV is structured as a company or a trust</p> <p><b>May</b> be appointed where SPV a trust.</p> <p><b>Must</b> be a corporate not one or more individuals</p>	Same	Same

ISSUE	Limited Restricted Offer	Restricted Offer	***Unrestricted “public” Offer  *** These provisions are indicative only as the Authority does not propose at this stage to Approve any applications in respect of Unrestricted public Offers.
	<p>May be same entity as note trustee</p> <p>Should be supported by legal opinion.</p>		
<p><b>Servicer</b></p>	<p>CMA may impose eligibility requirement for Servicer, Alternative Servicers &amp; Successor Servicers s.30P</p> <p>Generally, Seller or Originator may act as Servicer</p> <p>Under proposed amendments to S.30P(3) where no Servicer then the securitisation trustee or securitisation manager appointed by SPV to carry out functions until new Servicer appointed.</p> <p>Servicer is to have obligation to provide any trustee, note trustee, security trustee or auditor with information required to enable them to fulfil obligations &amp; comply with S30E.</p>	<p>Same</p>	<p>Same</p>

## Appendix “B” - Form and Content of Offering Memorandum – Minimum Content

1. The disclosure requirements are principles based. ABS can involve a large range of different asset types. Consequently the disclosure requirements will vary significantly based on the nature of the asset backing the transaction and some disclosures will be inappropriate or irrelevant for some classes of assets.
2. It is envisaged that similar requirements will apply to prospectus for unrestricted offers but the Authority has yet to finalise the requirements for unrestricted offers.
3. This Schedule addresses a range of asset classes and recognises that there is a need for flexibility to achieve appropriate disclosure.
4. In some markets historic information may not be available – that fact should be disclosed. It is **not the intention of the Act or this Guidance Note** to prevent issuance until historic data becomes available.

### PART 1

#### **GENERAL REQUIREMENTS, ISSUER & PARTIES RESPONSIBLE FOR THE PROSPECTUS OR OFFERING MEMORANDUM**

5. Shall include a glossary of defined terms, a table of contents and a summary at the beginning of the document with a cross reference to the pages of the offering memorandum.
6. The names and addresses of the issuer, of each other person and the functions of the other persons responsible for the offering memorandum or any part thereof, specifying such part.
7. If the issuer and the offeror are different, the name and address of the person offering the securities.
8. In all cases the offering memorandum should contain on the cover and in a prominent position in the document the following words: – **“In making your investment decision to invest in asset backed securities you should be aware that there is very limited, if any, recourse to the assets of the issuer, the seller or originator or to those of the trustee”**.
9. **Recourse and rights of action in most cases will be limited entirely to the assets of the securitisation trust which may be insufficient to pay the claims of all, or any, investors”** or words to the like effect.
10. The date of publication of the offering memorandum and the period for which the offer is open.
11. A statement that the offering memorandum has been approved by the Authority.

12. A statement that the offering memorandum has been drawn up in accordance with the Act and any regulations.
13. A statement as appropriate to the classification of the issue or offer that the Authority takes no responsibility for the contents of the offering memorandum and shall not be liable to any action in damages suffered as a result of any document having been approved by the Authority or in respect of any offering memorandum, including, where relevant, the Authority's issue of a stop order or failure to issue a stop order.
14. Where the offering memorandum contains any statement by an expert, or any statement is said in the offering memorandum to be based on a statement made by an expert, the offering memorandum shall state that the expert has given his consent, and that the expert has not withdrawn his consent before the date the offering memorandum is filed with the Authority for approval or issued. The final document shall include a statement that updates such statements to the date of issue.
15. Include a statement in the following words: – "**If you are in any doubt about the contents of this document you should consult a person licensed under the Act who specialises in advising on the acquisition of shares and other securities**", or words to the like effect.
16. Include a list of the transaction documents and details of where they can be inspected or how and where copies may be obtained and by whom.

## PART II

### **SUMMARY OF THE ASSET BACKED SECURITIES TO WHICH THE OFFERING MEMORANDUM RELATES AND THE OFFER**

17. A brief description of the number, type and nature of the asset backed securities being offered or issued. The classification of the offer should be clearly stated together with a clear statement as to who can be an investor in the securities and restrictions on transfer.
18. Contain a summary of investor entitlements to payments, the nature of the payments and the relative priority or order of payment where more than one class or tranche is being issued or offered, including any subordinated classes or tranches or residual interests.
19. Summary details of how payments on each class or tranche are calculated and payable, a schedule of the payment dates and the circumstances in which payments may not be able to be made or made in full on scheduled dates to investors.
20. If a credit rating is being sought and the issue or offer is conditional on the assignment of a particular rating details of: –
  - a The name or names of credit rating agencies from whom a rating has been sought.
  - b The rating level the attainment of which is a condition of the issue or offer of a class or tranche.

- c The name or names of any other credit rating agency with whom rating discussions were held and whether any other credit rating agency declined to rate the transaction.
- 21. Where any class or tranche is to be rated include a statement to the effect that **“The inclusion of a rating is not a recommendation to buy or sell the securities, ratings may be subject to revision or withdrawal at any time by the credit rating agency and securities may be subject to other risks not covered by the rating (including market and liquidity risks). Any prospective investor should make its own evaluation independent of the credit rating agency’s opinion.”**
- 22. Include a statement detailing any restriction on the free transferability of the securities being issued or offered.
- 23. Include:-
  - a a statement as to whether-
    - i. the securities are eligible for listing on a securities exchange;
    - ii. if any of the securities being offered have been listed on a securities exchange; or
    - iii. an application for listing has been made, and
  - b where no such application for listing has been made, or such an application has been made and refused, a statement as to whether or not there are, or are intended to be, any other arrangements for there to be dealings in the securities and, if there are, a brief description of such arrangements.
- 24. The total proceeds that will be raised from the issue or offer to which the offering memorandum relates and from the other issues or offers being made in conjunction with the issue or offer.
- 25. Details of the fees or estimated expenses payable in connection with the issue or offer of these or other asset backed securities in the securitisation transaction , the amounts and to whom the fees or estimated expenses are payable.
- 26. The names of any persons underwriting the offer and details of the fees and expenses payable.
- 27. The name and address of any paying, transfer or registration agent.
- 28. Arrangements for payment for the securities, their form and the arrangement and timetable for their delivery.
- 29. The arrangements during the period prior to the delivery of the securities being offered relating to the moneys received from applicants including the arrangements for the return of moneys to applicants where their applications are not accepted in whole or in part and the timetable for the return of such moneys.

### **PART III**

#### **DIAGRAM/S SETTING OUT STRUCTURE OF THE SECURITISATION TRANSACTION, THE PARTIES & CASH FLOWS**

30. Include a diagram which illustrates the: –

- a. Structure of the transaction;
- b. All relevant parties and to whom they owe responsibilities;
- c. Cash flows both in and out of the securitisation trust;
- d. Order of payments and priority in the event of a shortfall;
- e. Internal and external credit enhancements, liquidity facilities and risk management facilities.

### **PART IV**

#### **PARTIES RESPONSIBLE FOR THE OFFERING MEMORANDUM, AND IDENTITY OF PARTIES INVOLVED IN THE TRANSACTION & RESPECTIVE ROLES & OBLIGATIONS**

31. The objective of this Part is to provide disclosure on all parties to the securitisation transaction so as to provide investors in the asset backed securities with the context of the transaction and the ability to analyse the role of the parties and the interrelationship between the parties and their responsibilities and liabilities and should address the following as is relevant to the type of asset, the manner in which the asset is generated and the structure of the particular securitisation transaction.

#### **Securitisation Arranger:**

32. Clearly identify the arranger, if any, its role responsibilities, including if a sponsor of the transaction, and its experience.

- a. Where there is no securitisation arranger has been appointed then explain who has undertaken the function and provide relevant details of that party and of how the securitisation transaction has been initiated and by whom.
- b. Where there is a securitisation arranger detail the:
  - i role of the arranger,
  - ii functions it has undertaken ,
  - iii its role in the initiation or generation of the securitisation transaction,
  - iv the experience of the arranger in carrying out such roles or functions,
  - v its capacity and operations in Kenya;
  - vi its relationship or affiliations with any other party to the securitisation transaction, and
  - vii its obligations and liabilities to investors in the asset backed securities.

**Seller/s or Originator/s;**

33. Clearly identify the seller/s or originator/s of the assets, provide names and addresses and provide details: –

- a. On the history of the seller or originator.
- b. The performance of any other securitisation transaction that it has been involved in as a seller or an originator, irrespective of the nature of the asset; and
- c. Include details of the following:
  - i. the extent to which the transaction is reliant on the seller or originator’s ongoing capacity to sell or originate additional assets.
  - ii. comment on the seller or originator’s capacity to originate assets, including threats or challenges.
  - iii. the processes and procedures utilised to originate or generate assets of the type included in the securitisation transaction and underwriting standards, and
  - iv. the size, type and growth of the seller or originator’s portfolio of similar assets and the performance of its portfolio of assets over time.

34. The description must conclude with a clear statement which draws attention to the limited recourse, if any, that the investor in asset backed securities has to the seller or originator or to its assets in the event that the assets of the securitisation trust generate insufficient funds to meet all the payment obligations of the securitisation trust. The limitations of the recourse, if any, should be detailed.

35. The level of retention of an interest in the assets or “skin in the game” of an Originator or Seller and the nature of the retention (e.g. investor in ABS, provision of reserve or other enhancement by the Originator or Seller) and quantum of such retention should be clearly described together with the priority of payment relative to other claimants under the ABS transaction.

**Securitisation trustee and securitisation manager: Adapted based on the Structure of the SPV**

36. Where the SPV is structured as a common law trust then clearly identify the trustee and/or securitisation manager;- the role that each is to undertake and obligations, its place of incorporation, involvement in and performance in other securitisation transactions and its experience, resources, financial standing and capacity to undertake the role as trustee.

37. The description should include clear statements on and details of:

- a. The trustee’s and/or securitisation manager’s role and its relationship with other parties and in particular the differentiation between the role



of the trustee and/or securitisation manager and the servicer and any note trustee or security trustee.

- b In the case of a trust SPV, whether, the securitisation trustee proposes to appoint a securitisation manager to assist the trustee.
- c In all cases where a securitisation manager is appointed details of the manager, its experience and capacity and the relationship between the trustee or company SPV and its manager.
- d A description of the:
  - i. any trustee's (including note trustee or security trustee) and the company SPV's and in the case of a company the board's or directors' duties and responsibilities under the transaction documents and the law, including its liability in respect of the actions or omissions of any securitisation manager or other party describe actions required by any trustees, SPV and/or securitisation manager and whether any notice is required to be given to the Authority, investors, rating agencies or third parties in the event of a default, or other breach or a transaction representation and warranty or covenant and the required percentage of vote of the investors in any class or classes or tranche needed for the trustee to take action;
  - ii. limitations on any trustee's, SPV's and/or securitisation manager's liability;
  - iii. any indemnification that entitles any trustee, SPV and/or securitisation manager or other person to be indemnified from the assets of the securitisation trust; and
  - iv. provisions in any of the transaction documents or understandings regarding the removal, resignation or replacement of any trustee, SPV and/or securitisation manager and how the associated costs or expenses of moving from one trustee to another will be paid and any fees or payments to be made to any outgoing trustee and in what circumstances.
- e Detail any trustee's, director of SPV and/or securitisation manager entitlement to receive fees and for the payment of the expenses of the securitisation transaction in priority to the making of payments to the investors in asset backed securities.
- f The limited recourse, if any, that the investor in asset backed securities has to any trustee and that the obligation to make payment is not supported by the assets of the trustee, and
- g State whether or not any trustee or securitisation manager is authorised or approved by the Authority.

- h The circumstances and procedures for the resignation or removal of any trustee or securitisation manager and the appointment of a new trustee or securitisation manager and any payments due on removal.
- i List material contracts entered into or proposed to be entered into by the trustee, SPV and/or securitisation manager in respect of the securitisation trust and the securitisation transaction.
- j That a full copy of any trust deed and transaction documentation is available from the trustee and/or securitisation manager or on request a copy will be made available without the payment of a fee by the issuer or offeror.

### **The SPV**

38. Provide a clear description of: –

- a. The nature of and the form of the SPV (common law trust or company).
- b. The relationships of the investors in the asset backed securities with:
  - i. Where the SPV is a trust:- the trust, the trustee, any securitisation manager, the assets, any note or security trustee, other investors in the asset backed securities and with other parties to the securitisation transaction, and
  - ii. Where the SPV is a company: the company, the board of the company, any securitisation manager, the assets, any note or security trustee, other investors in the asset backed securities and with other parties to the securitisation transaction
- c. Where the SPV is a trust:- the objectives of the trust, authorized activities and powers of the trustee and set out the limitations and restrictions on the activities of the trust.
- d. Where the SPV is a company:- The mechanisms in place to segregate and safeguard the assets of the trust and the rights and entitlements of the investors in the asset backed securities as beneficiaries of the trust.

### **Note trustee and Security trustee**

39. Details should be provided of:

- a. The role and responsibilities of any note or security trustee
- b. Whether the assets of the SPV are subject to a charge in favour of the ABS,
- c. The priority of the various parties to payment under the charge, and
- d. Limitations on recovery under the charge.

### **Servicer and Alternative Servicer:**

40. Provide details of:

- a The servicer, or servicers, including name, address, details of business, prior experience and capacity (including resources, staff, systems and financial) to perform the role as a servicer.
- b The rating of the servicer's borrowings, if any, and any other rating and by whom each credit rating has been provided.
- c Whether the servicer has any other interest or role in the securitisation transaction, including as residual beneficiary and the extent to which its rights (including voting rights) rank with or are subrogated to those of other investors in the asset backed securities.
- d The roles, responsibility and oversight of the servicer and a clear description of the servicing function and the parties involved together with details of its obligations and liabilities, limitations on its liabilities and the relationship between the servicer and other parties to the securitisation transaction.
- e The servicer's association or relationship with any seller or originator to the SPV.
- f Contain a clear statement of the limited recourse to the servicer and its assets.
- g Comment on the possible adverse impact on the securitisation transaction of deterioration in the servicer's financial position.
- h If the servicer has previously acted as a servicer its performance and any prohibition orders made in respect of its activities.
- i Any special or unique factors relating to the servicing of the specific transaction or the assets.
- j A summary of the material terms of the servicing agreement and other transaction documents as regards the servicer, including:
  - i. servicer's responsibility for calculating or making distributions to investors in the asset backed securities and to other parties and the division of such functions between any trustee, any securitisation manager and the servicer or servicers,
  - ii. obligations of the servicer to segregate and remit funds collected and the mechanisms in place to prevent or minimize the potential for commingling of funds with the assets of the servicer or any other party,
  - iii. ability of the servicer to waive or modify any terms, fees, payments or penalties in respect of the assets and the potential impact of such authority on the cash flows from the assets,

- iv. The terms relating to cash advances and recoveries, if applicable,
  - v. The fees payable to the servicer and comment on whether the fees payable are market fees, and
  - vi. Any trigger clauses which could result in a change in the removal of the servicer or a change in servicer.
- k Details of the alternative servicer, its role and obligations, resources and capacity to fulfil the role as a servicer if required to do so (including, resources, capacity and systems and prior experience and performance record), fees payable and the arrangements that have been put in place to ensure that the alternative servicer is readily able to assume the role as the servicer with the minimum of interruption.
  - l Process and procedures and terms under which the alternative servicer may become the servicer or on which any servicer may be removed or resign and the process for transferring the servicing of the assets.
  - m The material terms of the contract with the alternative servicer and details of the fees payable to any alternative servicer.
  - n Where no alternative servicer is identified in and provided for in the transaction documents how a requirement for a change of servicer would be addressed.
  - o That a full copy of the agreement with the servicer, and alternative servicer (if any) is available from the Authority or on request will be made available without the payment of a fee by the issuer or offeror.

**Credit Enhancers, Liquidity Providers and Other Transaction Parties:**

41. Where other parties are included in a specific securitisation transaction (such parties may include, by way of example only and not limited to, providers or guarantees, credit enhancements, liquidity facilities, interest rate or currency management products, collection or paying agents, custodians, concession holders or operators of assets, special servicers or managers, intermediate transferors) then details should be provided on:
- a. The name and address of the party and its role, responsibilities and liabilities and any limitation on such liabilities.
  - b. Ratings of the party.
  - c. Relevant experience, resources and financial capacity of the party and past involvement in securitisation transactions or in undertaking similar roles.

- d. The relevance of the person and the role it plays to the securitisation transaction, the ability to replace such person and the implications of doing so.
- e. Material provisions of any transaction document to which the person is a party including, fees payable.
- f. Where a transaction involves infrastructure assets or cash flows generated from infrastructure assets then the government and or any authority or government related body with authority in relation to the project, infrastructure assets or cash flows, permitting or limiting operations or the setting of tariffs, fees or charges or the provision of the licenses or approvals or who otherwise has a regulatory power in respect of the asset, the cash flows of the transaction shall be deemed to be a party and relevant particulars and information should be included.

## **PART V**

### **ASSETS OF THE SPV AND THE NATURE OF THE ORIGINATION OF THE ASSETS INTO THE SPV OR OF THE SALE, ASSIGNMENT OR TRANSFER OF THE ASSETS**

#### **Overview of the Assets.**

**42.** The nature of the assets should be explained.

43. Details should be included on:

- a The eligibility and criteria necessary to be able to be included as an asset in the securitisation trust.
- b Description of the assets and of their legal characteristics.
- c Confirmation of the legal capacity of the originator or seller to originate, sell transfer or assign the assets to the special purpose vehicle.
- d Details of any potential for a third party to claim an interest in the assets, including by way of operation of law.

#### **Transfer or vesting of assets in the Special Purpose Vehicle:**

44. Details should be confirmed in the legal opinion and include:

- a The method of origination, sale, assignment or transfer of the assets to the special purpose vehicle and the trustee's and beneficiaries' interests in the assets.
- b The method of transfer or vesting, process and risks associated with the transfer or vesting should also be addressed in the legal opinion and that opinion and any material issues or risks raised in it should be referred to in this section together with a reference to the full opinion and where it can be found.
- c Approvals, consents or licences required and obtained and registrations effected or to be effected and implications of any transitional or intervening period, in particular for the validity of the transaction and the ability of third parties to raise claims.

- d The circumstances in which the seller or originator is required to repurchase the assets or to substitute assets.

### **Other assets supporting cash flows, including credit enhancements**

45. Describe: –

- a Any form of internal structural credit enhancement, assumptions, triggers and sensitivities.
- b Any form of external credit enhancement. Provide details of provider, amount, term and circumstance of use and rating of provider.
- c Any mechanism to ensure that payments to investors are timely, e.g. liquidity line, reserves, letters of credit etc. Provide details of provider, amount, term and circumstance of use or cross reference with the details required to be provided under PART X.
- d Provide details of any derivatives to provide credit enhancement of the assets or the asset backed securities or to support timely payments or minimise other structural risks, e.g. currency or interest rate swaps, options, forward sales or guaranteed investment contracts etc;.
- e Detail authorised investments for cash.
- f Provide example of the order in which facilities can be drawn on and the limitations on drawings including any conditions.
- g Detail the effect of the package of credit and other enhancements.
- h Clearly differentiate between classes of investors and tranche and the likelihood of different classes or tranches to receive reduced payments. The impact of subordination on the holder of any subordinated calls should be clearly addressed.

## **PART VI**

### **STATIC POOL INFORMATION**

46. Where the securitisation transaction involves a pool of assets then the offering memorandum should include static data on how different pools of similar assets have performed over time and include details which assist in the identification of patterns of performance of the assets over periods of time. Data should be included for as long a period as is reasonably available or can reasonably be constructed from secondary sources relating to other or hypothetical pools so that the performance of the assets in different economic cycles is illustrated.
47. Where only short series of data or limited components can be tracked then this fact and the potential implications should be commented on.
- a. General information regarding pool asset types and selection criteria:
    - i. Location of assets and distribution.
    - ii. Description of sourcing of assets and underwriting criteria and override policies,
    - iii. Method and criteria for selection of assets for the transaction, including summary of eligibility criteria and eligibility of pool mix,

- iv. Identify any legal or regulatory provisions such as bankruptcy, consumer credit, predatory pricing, moratorium, foreclosure or other laws that could materially impact on asset performance or expected payments and briefly identify provisions.
- b. Pool characteristics
- i. Number and type of each asset, by ranges.
  - ii. Weighted average loan size.
  - iii. Weighted average loan term,
  - iv. Asset size such as original balance, outstanding as of cut-off date,
  - v. Interest rate or rate of return, including type.
  - vi. Capitalised or uncapitalised interest,
  - vii. Age, maturity (seasoning) remaining average life (based on different prepayment assumptions) current payment/prepayment speeds and pool factors as applicable,
  - viii. Concentrations and significant obligors including groups of related obligors, where there is a high level of concentration then consider if it is appropriate to include financial or industry data on the significant obligors,
  - ix. Servicer distribution and link with pool if more than one servicer,
  - x. Billing information and collection procedures and any changes as a consequence of entering into the securitisation transaction,
  - xi. If loan or similar receivable
    - (1) Amortization period,
    - (2) Loan purpose, new purchase, refinance, expansion etc.,
    - (3) Loan to valuation ratio (LVR) or to purchase price (e.g. new auto)
    - (4) Debt service cover ratio (DSCR) or monthly debt payment obligations to monthly income or other appropriate factor
    - (5) Type and use of underlying property, e.g. rental, residence, commercial vehicle, private car, taxi, truck,
    - (6) If receivable or other financial asset that arises under a revolving account such as a credit card or trade credit limit
      - (I) Monthly payment rate
      - (II) Maximum credit line
      - (III) Average account balances
      - (IV) Seasonality if any of account balances
      - (V) Type of asset

- (VI) Finance charges, fees and other income earned
  - (VII) Terms of trade
  - (VIII) Percentage of full balance and minimum payments made.
- (7) If the asset pool includes commercial mortgages, to the extent material:
- (I) No and amount of each mortgage
  - (II) Location and current use of property
  - (III) Nature of title and if leasehold term, ground rent, expense obligations, renewal or extension terms and history,
  - (IV) Net operating income and net cash flow as well as components of each,
  - (V) Current occupancy rate, historic 5 year occupancy rate,
  - (VI) Lease expiry profile, rent review provisions, include here or elsewhere discussion on supply and demand for rental property and likely impact of changes in macro economy,
  - (VII) Identify of key tenants, concentrations, percentage of building leased, rental terms and how this reflects current market.
  - (VIII) Nature and term of any material liens or charges including statutory,
  - (IX) For any asset representing more than 10% of pool details of any planned refurbishment or scheduled capital works and how these are to be funded.
  - (X) How properties are managed and tenants sourced?
- (8) Include other pool criteria and concentration information relevant to asset type.

(c) Delinquency, default and loss information:-

- i. Include details of delinquencies, default and loss information including speed, and statistical data
- ii. Detail period and if possible align with economic cycle or other key determinants of performance,
- iii. Provide details of the impact of sensitivities of performance and impact on various investors in different classes of asset backed securities or tranches. A worked example should be provided and where appropriate graphs included.



- iv. Comments on the availability or otherwise of historic data should be provided and on any changes in law, underwriting etc. which might impact on performance.
- (d) Prepayments include information on
- i. Estimated prepayment speed and levels of prepayments and clearly state the potential impact of prepayments and whilst relevant,
  - ii. Illustrate impact of changed assumptions.
  - iii. State drivers, if any identified, of prepayments.
  - iv. Comment on the availability or otherwise of historic data.
- (e) Sources of pool cash flow and use:
- i. Identify sources of all cash flows available ,
  - ii. Identify all potential claimants on cash flows,
  - iii. Clearly identify the order or priority of payments to be made from available funds including expenses and if possible percentage available from each source,
  - iv. Illustrate the cash waterfall,
  - v. Conditions under which funds are available and triggers,
  - vi. The assumptions underlying the assumed and projected cash flows;
  - vii. The sensitivity analysis undertaken in relation to the impact of changes in levels of delinquencies, defaults, losses or prepayments on the ability of the securitisation trust to make scheduled distributions to different classes of investors.
- (f) Representations and warranties and repurchase obligations regarding pool assets, summarise and provide details of implications and rights.
- (g) Revolving asset pools, prefunding accounts and other changes to asset pools, provide details of term, cost, arrangements, and percentage of pool that can be prefunded, triggers and implications.
- (h) Process and ability to remove assets from pool which do not comply.
- (i) Circumstances in which monies in prefunding accounts or revolving account can be returned to investors or otherwise used.
- (j) Amortizing asset pools provide details of assumptions, historic information and sensitivities.
- (k) Revolving master trusts, clear description and implications of the structure should be provided. Data should be provided in periodic increments to provide meaningful information.
- (l) Residual value information where there is an assumption of access to residual values as a source of funds provide details of

- i. How residual values may arise,
- ii. Assumptions on quantity and timing,
- iii. How residual values are used in the structure and access,
- iv. Procedures for realizing,
- v. Statistical or other information on residual values, and
- vi. Sensitivity and impact on various classes of investors if not enough cash flow is realised from residual values.

## **PART VII**

### **INFRASTRUCTURE & OTHER NON-POOL TYPE ASSETS – PROVISION OF TARGETED INFORMATION APPROPRIATE TO THE NATURE OF THE ASSETS AND CASH FLOWS.**

48. Infrastructure assets and a range of non-traditional asset backed securities of their nature are not homogenous. Some infrastructure transactions may involve pools of assets whilst others will require a different approach and information to the more traditional pool analysis. What is required is an adaption of the principles set out in PART VI so as to provide in the case of each particular infrastructure backed security issue relevant disclosure of sources and uses of cash flows and the structure of the transaction to permit an understanding of the assumptions behind the level of cash flows projected and the risks. Disclosure should include:

- a Assumed source of cash flows from the infrastructure related cash flows,
- b Assumptions on which the cash flows are based,
- c The drivers of each assumption, e.g. for a toll bridge
  - i. Number and type of vehicle per day over the course of a week;
  - ii. Seasonal differences,
  - iii. Historical data if any,
  - iv. Capacity limits including, limits on feeder roads to deliver assumed bridge capacity,
  - v. Leakage to alternative toll free routes,
  - vi. Potential interruptions or reasons for decline in usage (fuel prices deters use of private vehicles, mine closure, major factory closure, high wind closes bridge on regular basis, inadequate maintenance limits loads or road works limit capacity etc.)
  - vii. Level of toll and form of tolling (electronic, cash, voucher, fixed toll, peak and off peak pricing, concessions etc.)
  - viii. Toll fixing and adjustment mechanism, regulatory framework, approvals required, linked to inflation indicator, percentage rise, linked to bond rate, increases until usage level reached then reduced increases of sharing of income with government,
  - ix. Technology risk on electronic tolling and collection mechanisms, lead to interruption to cash flows,
  - x. Reduction in cash flows due to other claims on cash flow (e.g. increased capital or operational and maintenance costs or higher collections costs or fraud in collections.

- xi. Sensitivity analysis should be included of exposure to key shortfalls and the implications for various classes of investors,
- d Life of Concession and the make good or handover obligations need to be considered and factored into cash flows,
- e Internal and external credit enhancement, liquidity lines and risk management products should be detailed, and
  - i. a worked example should be provided which links the cash flow waterfall with a shortfall in revenues and the drawing on various facilities to maintain scheduled payments to some or all classes of investors,
  - ii. A sensitivity analysis should be included.
  - iii. Role of the servicer and any operator, trustee and any securitisation manager should be detailed in the collection of tolls, remitting of funds to the trustee should be detailed together with the process for auditing and dealing with shortfalls arising from operational issues, technology failure or misappropriation etc.,
- f Detail of representations and warranties of the concessionaire or originator or seller and implications of failure to comply.

## **PART VIII**

### **DESCRIPTION OF THE ASSET BACKED SECURITIES**

#### **General Information –**

49. Details should be provided of:

- a Types or categories of securities that will be issued or offered, numbers, entitlements to participate and priority as to payments,
- b Coupon rates and basis for setting or resetting,
- c Legal and if different expected maturity of securities,
- d Any prior issues or offerings of securities with claims over the cash flows.
- e Full details of any associated issues and of residual or subordinated interests.
- f Relevant information on how the principal or interest or other distributions on each class of security or tranche is calculated and payable, amortization, performance or similar triggers and their effects on the transaction if triggered.
- g Details of calculation process and timing and process for payment.
- h Optional or mandatory redemption or termination, ability to redeem, call, pay or distribute on other dates.
- i Process if shortfalls,
- j Provisions for step up rates.
- k Prepayment, maturity and yield considerations and effect of prepayments on yield and weighted average yield.
- l Details of cross collateralisation or cross default provisions,
- m Detail of voting rights and entitlements of each class of investor in relation to amendment of documentation, waivers, change of trustee etc.

## **Credit rating**

50. Provide details of:-

- a. Is rating required for various class or classes or tranches,
- b. Is minimum acceptable rating condition of issue and offer and if so the minimum rating for specific classes and/or tranches,
- c. Acceptable rating agency,
- d. Arrangements for ongoing monitoring of securities by rating agency and obligations of parties to provide information, submit reports and pay rating fees,
- e. Rating report should clearly specify what if any due diligence or verification the rating agency has undertaken of the data or information provided to it.
- f. Any party to the transaction should disclose if
  - i. it has obtained a preliminary rating from another rating agency, or
  - ii. an agency has declined to rate the transaction or any class or tranche of the issue,
- g. Specific statement should be included in the document explaining that the rating is not a recommendation to buy, or sell, or hold securities; that the rating might be subject to revision or withdrawal at any time by the assigning rating agency and that each offer should be evaluated independently of any rating.

## **PART IX**

### **STRUCTURE OF THE TRANSACTION**

#### **Objective of this Part –**

51. This section should draw together in a concise narrative the key elements of the structure of the transaction and incorporate key disclosures on

- a. Flow of funds,
- b. Distribution frequency and cash management,
- c. Fees and expenses and deductions payable to any party,
- d. Excess cash flow,
- e. Prepayment, maturity and yield considerations,
- f. Ability to draw on credit enhancements and/or liquidity lines, and
- g. Optional of mandatory redemption or termination.

#### **Master trust or similar structures**

52. Where the structure utilises a master trust or similar structure then there should be included a clear disclosure of the fact that additional securities can be issued backed by a common pool of assets. Disclosure should be sufficient to permit the potential investor to understand:

- a. Potential impact of the new issuance on existing investors,
- b. Any cross collateralisation,
- c. Priority as between different issues,
- d. Method of allocation of cash flows, expenses and losses,

- e. Consent required to additional issuance,
- f. Conditions, if any, required to be met prior to additional issuance, and
- g. Independent verification, if any, required that conditions met prior to new issuance.

## **PART X**

### **CREDIT ENHANCEMENT AND OTHER SUPPORT, INCLUDING CERTAIN DERIVATIVE INSTRUMENTS**

#### **Objective of this part:**

53. The objective of this part is to provide a narrative description of the credit enhancements and other supporting elements forming part of the transaction. The objective is to explain the manner in which the various enhancements and supports operate in order to support the overall transaction. The linkages between the various types of credit enhancement and other structural supports should be explained as should the circumstances in which facilities can be accessed and how they operate to assist in ensuring that timely payments are made.

#### **Financial information on provider**

54. Where the enhancement or support is provided by an external third party then adequate information on the third party should be disclosed to permit a view to be formed on the financial standing of the provider. It should be clear for whose benefit a facility can be drawn and the implications for each class of investor. Where applicable details should be included of the credit rating of any provider of credit enhancements as well as any conditions on the ability to draw on any credit enhancement

#### **Derivative instruments**

55. There should be provided:

- a. A narrative description of the instruments,
- b. A description of how the derivative would operate in the structure of the transaction and detail the circumstances in which it can be utilised.
- c. Provide financial data and details of any credit rating of the provider of the derivative sufficient for the party to make an assessment of the providers' capacity to make a payment if required to do so.
- d. Details of any potential liability for the SPV arising out of the derivative transaction.
- e. Details of the impact, if any, of the derivative on the cash flows of the transaction e.g. where earnings are brought forward or deferred.

## **PART XI**

### **RISK FACTORS KEY ASSUMPTIONS UNDERLYING THE ASSUMED CASH FLOWS AND SENSITIVITY ANALYSIS**

#### **Objective of this part:**

56. Objective is to identify the key risk factors that are material to the transaction, the particular assets and the structure of the particular transaction.
57. It should be made clear that the only recourse that investors have for payment is to the assets of the SPV including any credit enhancement and that there is no recourse to the seller or any other party except for breach of fiduciary or contractual duties, fraud, misconduct or breach of representation, covenant or warranty.

**Particular structure, assets and issue**

58. There should be disclosed in a concise manner the key material risks.
- a. Focus should be, as well as on generic and common risks, on the risks of the specific transaction,
  - b. The disclosure should clearly set out all relevant credit, legal, structural, regulatory and documentation risks faced by investors in various classes of securities,
  - c. The document should be structured to divide up risks into different categories and where possible the potential impact of the risks should be quantified,
  - d. Where appropriate sensitivity analysis should be included and the use of graphs to illustrate should be considered,
  - e. Emphasis should be on illustrating the risks of the particular transaction and the type of assets backing the securities rather than extensive discussion of generic risks and
  - f. Where the transfer of the assets has not been via a legal assignment the risks associated with an equitable assignment should be clearly set out together with what searches have been conducted and/or other actions taken to mitigate these risks both initially and on an ongoing basis as the assets the subject of the securitisation revolve.

**PART XII**

**MARKETS AND LIQUIDITY FACTORS & RESTRICTIONS IF ANY ON  
THE SALE OR TRANSFER OF THE ASSET BACKED SECURITIES**

59. Specific attention should be drawn to the restrictions, if any, on the sale or transfer of the ABS securities. Requirements as to listing, if an unrestricted offer, should be included including, dates for listing and the exchange for listing.
60. For a restricted offer details should be included of any entitles providing liquidity or on OTC trading a potential.
61. Specific reference should be made to the market and liquidity risks which are not addressed by credit or structural enhancements or the quality of the underlying assets.

**PART XIII**

**SECURITY OVER ASSET's of SPV**

62. Where security (e.g. by a charge or mortgage) is provided over the assets of the SPV to support payments due to asset backed security investors or any class or group of investors then details of the nature of the security, registration, who is entitled under the security, the priority and ranking of parties and risks associated with the security (e.g. avoidance, preference, priority, being set aside etc.) should be set out. The role of the various parties in enforcing or calling on the security should be described.
63. The security should also be addressed in the legal opinion and any material issues raised in that opinion including risks should be set out in the Offering Memorandum. A cross reference to the legal opinion should also be included.

#### **PART XIV**

### **TAXATION, IMPOSTS, WITHHOLDINGS AND CHARGES**

#### **Taxation treatment of the transaction, and the securitisation trust**

64. If not fully addressed in PART XI, (Risk Factors) this section should discuss the taxation treatment of the transaction as a whole and of the income and expenses of the trust and attributable to the transaction and potentially impacting on available cash flows available to investors. The discussions should:
- a. Address all relevant taxes, stamp duty, VAT and other imposts on the transactions, cash flows and documentation anticipated to be entered into or given effect to as part of the establishing, implementing and maintaining the operation of a securitisation transaction.
  - b. State where any regulations have been specifically enacted or rulings obtained,
  - c. Refer to the expert report attached to the offering document, and
  - d. Provide an estimate of the impact of changes on the cash flows and the ability of the trust to make scheduled and timely payments. Where appropriate a sensitivity table might be included.

#### **Taxation of investors in the ABS**

65. Separate from the taxation of the trust or the company SPV there should be discussion of the taxation treatment of cash flows and capital gains, or losses if any, in the hands of each class or type of investor.
66. These issues should also be addressed in one of the legal, accounting or taxation opinions forming part of the offer document.

#### **PART XV**

### **LEGAL PROCEEDINGS**

Include details of any legal proceeding involving the trust or the trustee in its capacity as trustee and of their possible impact on the transaction. Where appropriate, statements from the legal representatives conducting such proceedings or defence of such proceedings should be

requested to provide an opinion for inclusion. Legal proceedings involving any party to the securitisation transaction should be addressed.

## **PART XVI**

### **REPORTING TO INVESTORS AND MEETINGS**

Include details of:

- a. Annual and half-yearly reporting and accounts obligations,
- b. Periodic reports required and distribution timing and of who is responsible for the preparation and circulation,
- c. Continuous disclosure obligations under the Act, the regulations, the listing rules of the exchange and the transaction documentation.

Include details of meeting provisions for ABS holders which comply with this Guidance Note.

## **PART XVII**

### **LEGAL OPINION/S**

Provide a legal opinion in accordance with **Appendix “D”** of this Guidance Note.

## **PART XVIII**

### **OTHER EXPERT OPINIONS**

Include such other experts' reports as have been prepared for the purpose of the securitisation transaction and the preparation of this offering document.

Taxation of the SPV should be addressed including access to deductions together with the accounting treatment of cash flows in the SPV.

## **PART XIX**

### **AFFILIATIONS AND CERTAIN RELATIONSHIPS AND RELATED PARTY TRANSACTIONS**

Detail and affiliations, relationships and related party transactions and include details of the process set up to address such conflicting roles.

## **PART XX**

### **INTERESTS OF EXPERTS AND LEGAL ADVISORS**

Include details of experts and legal advisors, the fees payable to these parties and the relationships, if any, with any originator, seller, transferor or assignor of assets, any securitisation arranger or securitisation manager, any trustee, any servicer or alternative servicer, credit enhancers or providers of liquidity facilities, or underwriter.



**PART XXI**  
**MATERIAL OR RELEVANT CONTRACTS**

Include details of such material or contracts and if document is not annexed provide details of where inspection is available free of charge.

## **APPENDIX “C” - Representations, Warranties and Covenants**

### **For Mortgaged Backed Securities**

As a minimum there should be included in the transaction documents related to an issue of offer of mortgage backed securities representations, warranties of covenants or specific exclusions in relation to:

- a. Undertaking of reasonable due diligence relative to role in the transaction *(by all parties in relation to the role that they have in respect of the transaction)*,
- b. Compliance with eligibility for the origination, sale, transfer or assignment of assets *(by the Seller/Originator and the securitisation arranger, if any, and securitisation manager based on the due diligence conducted by them as disclosed)*
- c. Absence of fraud *(by the Seller/Originator)*;
- d. Income, employment and asset verification in relation to the obligor and any guarantor *(by the Seller/Originator)*;
- e. Property valuation and verification of title *(by the Seller/Originator)*;;
- f. Use of property including occupancy by obligor or rental to a related or unrelated third party *(by the Seller/Originator)*;
- g. Reliability of pool data and any model including in relation to pool and historic rates of voluntary prepayment, delinquencies, default and losses *(by the Seller/Originator and the securitisation arranger, if any, and securitisation manager based on the due diligence conducted by them as disclosed)*;;
- h. Underwriting process in relation to the origination of assets and collection process *(by the Seller/Originator)*;;
- i. Enforceability of any mortgage or other security *(by the Seller/Originator and addressed in the legal opinion)*;
- j. Non-existence of third party liens, charges or claims in respect of the assets *(by the Seller/Originator and addressed in the legal opinion)*,
- k. All required consents have been obtained *(by the Seller/Originator and addressed in the legal opinion)*, and
- l. Where the asset pool is a revolving pool the representations, covenants and warranties should be continuing and applicable to each new acquisition or transfer of assets.

### **For Asset backed securities backed by other consumer or commercial receivables of a pool nature**

As a minimum there should be included in the transaction documents related to an issue of offer of asset backed securities representations, warranties of covenants or specific exclusions in relation to:

- a. Undertaking of reasonable due diligence relative to role in the transaction *(by all parties in relation to the role that they have in respect of the transaction)*,
- b. Compliance with eligibility for the origination, sale, transfer or assignment of assets *(by the Seller/Originator and the securitisation*

*arranger, if any, and securitisation manager based on the due diligence conducted by them as disclosed).*

- c. *Absence of fraud (by the Seller/Originator);*
- d. *Income, employment, where relevant, and asset verification in relation to the obligor and any guarantor (by the Seller/Originator);*
- e. *Where the obligor is a business or a company the profitability of the obligor (by the Seller/Originator);;*
- f. *Valuation of asset, nature and verification of title (by the Seller/Originator);;*
- g. *Use of property by obligor (by the Seller/Originator);*
- h. *Reliability of pool data and any model including in relation to pool and historic rates of voluntary prepayment, charge offs, delinquencies, default and losses as appropriate to the nature of the asset (by the Seller/Originator and the securitisation arranger, if any, and securitisation manager based on the due diligence conducted by them as disclosed);;*
- i. *Underwriting process in relation to the origination of assets and collection process ((by the Seller/Originator);*
- j. *Enforceability of any right and security or collateral (by the Seller/Originator);*
- k. *Non-existence of third party liens, charges or claims in respect of the assets;*
- l. *All required consents have been obtained (by the Seller/Originator, supported by the legal opinion)., and*
- m. *Where the asset pool is a revolving pool the representations, covenants and warranties should be continuing and applicable to each new acquisition or transfer of assets.*

#### **For Infrastructure backed assets**

- a. *Undertaking of reasonable due diligence relative to role in the transaction (by all parties in relation to the role that they have in respect of the transaction),*
- b. *Validity of and compliance with licenses or concessions or other rights to operate the infrastructure asset or deliver the service (by the Seller/Originator supported by the legal opinion),*
- c. *Absence of fraud (by the Seller/Originator);,*
- d. *No material breach of any concession agreement or other agreement, licence or right relating to the generation of the securitised cash flows or the infrastructure assets other than that which has been disclosed in writing (by the Seller/Originator supported by the legal opinion);*
- e. *Where the infrastructure has a history of operation:*
  - i. *reliability of historic data provided and of any model (by the Seller/Originator and the securitisation arranger, if any, and securitisation manager based on the due diligence conducted by them as disclosed);;*
  - ii. *where a pool of assets is involved, reliability of pool data and any model including in relation to pool and charge offs, delinquencies, default and losses as appropriate to the nature of the asset (by the*

- Seller/Originator and the securitisation arranger, if any, and securitisation manager based on the due diligence conducted by them as disclosed);;*
- iii. reliability of any expenses or charges or other information in relation to the assets provided in relation to the infrastructure assets transferred which could result in reduced cash flows from the assets *(by the Seller/Originator)*;
  - iv. non-existence of third party liens, charges or claims in respect of the assets *(by the Seller/Originator)*, and
  - v. all required consents have been obtained *(by the Seller/Originator, supported by the legal opinion)*.

### **General Representations, Warranties and Covenants**

Each party should provide initial and continuing representations, warranties and covenants as to:

- i. The correctness of the information disclosed in respect of the particular party or which has been attributed to it;
- ii. Status, solvency, no litigation, capacity to enter into the transaction including the obtaining of all necessary consents and approvals, and
- iii. Compliance with the transaction documents and the law.

## APPENDIX “D” - Minimum Contents of Legal Opinion

Where more than one legal jurisdiction is involved (e.g. origination of assets, jurisdiction of originator or sellers establishment or regulation of any parties with roles in the transaction) then an opinion will be required in respect of each jurisdiction.

The legal opinion contained in the offering memorandum shall be addressed to the trustee/s or the SPV (as appropriate to the structure) for the benefit of the trustee/s, the SPV if a company, and the investors in the asset backed securities and contain as appropriate to the nature of the assets backing the securities –

- a. Details of the formation of the trust or company and express an opinion on the validity of the appointment of the trustee and the trust or the formation of the company SPV;
- b. Confirmation that the terms of any trust deed and any trust and/or the memorandum and articles of association, shareholding and board comply with the requirements of the Act and this Guidance Note;
- c. Details the legal nature of the sale, transfer or assignment of the assets or the origination of the assets to the trustee of the securitisation trust or to the company SPV, compliance with the requirements of the Act and Guidelines and outline what steps, if any, are still required in order to perfect the legal sale, transfer or assignment of the assets;
- d. Opinion as to whether the sale, transfer or assignment to the trustee of the securitisation trust or the company SPV, constitutes a true sale which complies with the requirements of the Act and this Guidance Note and detail the grounds, if any, on which the sale, transfer or assignment could potentially be challenged by creditors or shareholders of the originator, seller, assignor or transferor;
- e. Opinion on the validity of the origination of assets into the securitisation trust or the company SPV and in respect of any sale, transfer or assignment of the assets and the potential claims against the assets by parties other than the trustee or the investors in the asset backed securities as beneficiaries or creditors of the SPV trust;
- f. Opinion on the validity of the registration (if required) and enforceability any charge given over the assets of the SPV to the security trustee;
- g. Details of any notices, consents or approvals required by any regulator or other third party to the establishment of the trust or company SPV, the sale, transfer or assignment of the assets and any charge over the assets and confirm that such consents have been obtained and, if subject to conditions, that such conditions have been met;
- h. State what:
  - i. provision of notices, consents, approvals, licences or registrations or filings or other like actions, if any, is required in respect of the various actions anticipated by the securitisation transaction or to give effect to the sale, transfer or assignment of assets or the provision of any credit enhancement, structural or liquidity support or risk management mechanism in relation to the securitisation transaction,

- ii. whether these have been given, obtained, filed or undertaken,
  - iii. if any matters or actions are outstanding the impact of there not having been obtained or undertaken, the timescale for obtaining or completing all such actions and whether there are any impediments to obtaining consents or completing such actions, and
  - iv. the legal implications for investors in the asset backed securities of such consents not having been obtained or actions not having been completed.
- i. Details of provisions in the memorandum and articles of association of a company SPV and the potential for parties (e.g. shareholders, non-securitisation creditors) to claim against the assets;
  - j. Details of the due diligence which the party providing the opinion has conducted including searches of registers of e.g. title, mortgages, charges, bills of sale and the register maintained by the Authority in respect of filings made of summaries of assets securitised as required by Section 30Y;
  - k. Detail the legal risks associated with the transaction and circumstances in which the validity of the sale, transfer or assignment of the assets, the establishment of the trust and SPV and the securitisation transaction when looked at in its entirety could be challenged or rendered void or invalid;
  - l. Detail the security, if any, provided over the assets of the SPV, the legal nature of such security, in whose favour the security is held and by whom, whether registration, consent or approval is required and if so has this been obtained or how is it to be effected, any risks to investors associated with the granting of security including:- avoidance, invalidity, priority, claw-back, set-off etc.;
  - m. Comment on the implications of the securitisation transaction's documentation and the procedures provided for in relation to commingling, segregation of funds, charging of assets and the potential for setoffs or other third party claims and of the legal risks of such for investors in the asset backed securities;
  - n. An opinion on the validity and the trustee's, or company SPV or note or security trustee's (and any successor), ability to enforce in its own name and without the need to either take action in the name of the originator, seller, transferor or assignor or to join any such person as a party to the action:
    - (i) rights in respect of the assets sold, transferred or assigned (e.g. where the assets are mortgages the ability to enforce the mortgage against the borrower or, if a lease receivable against the lessee); or
    - (ii) under any guarantees, charges, security or other credit, structural or liquidity support, licence or concession agreement, forming part of the securitisation transaction or the transaction documentation;
  - o. Comment from a legal perspective the potential for third party claims against the assets and the implications of bankruptcy or insolvency of a seller or originator, a servicer or the securitisation trustee, note trustee or

- security trustee or securitisation manager, including the potential for claw back or a transaction being voided or challenged by creditors or shareholders of any party,
- p. Comment on the likelihood of recognition by the courts of the subordination of the claims of one class of investor in asset backed securities relative to another and by any residual beneficiary and of a court giving effect to the priority of payments provisions in the transaction documents,
  - q. Comment on the likelihood of recognition by the courts of the non-petition (i.e. provision in transaction documents by parties agreeing not to seek winding up of a company SPV by creditors), limited-recourse provisions and waterfall payment schedules,
  - r. Details of any additional matter which the credit rating agency has required to be addressed in the opinion provided to it to support the rating of the transaction,
  - s. Where the transaction assumes that there will be cash flows from future receivables comment on the ability to sell, transfer or assign future receivable in the particular jurisdiction and the legal risks, if any, associated with such a transaction,
  - t. Where the transaction involves the issue of infrastructure backed securities detail which assets are assets of the trust and specifically comment on the:
    - i. enforceability of the concession agreement, stature or licence or other document or instrument supporting the right to conduct or to own, operate or undertake the service or the infrastructure related activity,
    - ii. nature of the assets from which it is assumed that the cash flows supporting the infrastructure backed securities arise and the trustee's and company SPV's rights and entitlements to receive such cash flows and to distribute the cash flows as provided for in the transaction documents,
    - iii. ability of the trustee to enforce its rights in respect of the assets of the securitisation trust,
    - iv. impact from a legal perspective on the cancellation of the concession agreement, licence or other right to operate the infrastructure; or of a breach of a law, material agreement or contract relating to the infrastructure supporting the cash flows of the securitisation transaction, or of the insolvency of a party to a material agreement or contract, and
    - v. the potential for claims by third parties,
  - u. Specifically address issues relevant to the legal status and legal risks associated with the specific transaction,
  - v. An opinion as to the stamp and other duty, charges or imposts applicable to the all aspects of the transaction and taxation implications (including, for investors, the SPV and the transfer of assets) except to the extent that the taxation aspects have been addressed in an opinion from a taxation law specialist,
  - w. Comment on any other law or legal issue of material relevance to the transaction, and

- x. Details of or comments on any other matter required to be addressed by the guidelines.



## APPENDIX “E” - Contents of Periodic Reports – Minimum Content

### Periodic Servicer Report

It is intended that the reports contain as a minimum the data specified. Industry standards may recommend additional data or higher standards of reporting as the market develops.

Reporting should be based on principles set out below and where necessary the form should be adapted to fit the particular asset and transaction. The Authority may approve an alternative form of report where warranted by the class of assets or particular circumstances.

All reports shall be certified as correct by the auditor or trustee or security trustee as appropriate to the particular transaction.

### Requirements for Mortgage Backed Securities (MBS)

<b>Name of the Securitisation Transaction</b>	
<b>Name of SPV</b>	
<b>Name of Servicer</b>	
<b>Name and address of Securitisation Trustee, if SPV is a Trust</b>	
<b>Name and address of Note Trustee</b>	
<b>Name and address of Security Trustee</b>	
<b>Name and address of Auditor</b>	
<b>Period to which the Periodic Servicer Report relates</b>	

<b>Original credit rating &amp; provider</b>		
<b>Current credit rating &amp; provider</b>		
<b>Note term “securities” means asset backed securities</b>		
<b>No.</b>	<b>Area</b>	<b>Required Information</b>
<b>Transaction Deal Summary ( Static Information)</b>		
<b>1</b>	<b>Information Supplier</b>	Name and address of the Servicer or other party who has prepared the report
<b>2</b>	<b>Contract Details</b>	Name of nominated key contact person within the party who prepared the report, position, mail address, email address. fax and telephone number
<b>3</b>	<b>Listing &amp; Reference Code, if any,</b>	Listing Code or Exchange reference, if any, or if not listed statement of such
<b>4</b>	<b>Securitisation Transaction Name</b>	Common name by which transaction is known in market
<b>5</b>	<b>For each ABS Class</b>	
(a) Issue date		
(b) Name		Designation, typically a letter and/or number given to a tranche of securities that exhibit the same rights, priorities and characteristics.
(c) Currency		
(d) Original Balance at Issue		Initial par, or notional balance of security
(e) Coupon Payment Details & Frequency		The base rate, margin & periodic frequency at which distributions of interest to holders of

		securities are scheduled to occur , e.g. base rate+ 50bp payable on 15 <sup>th</sup> day of each calendar month or the next working day.
(f) Interest calculation Methodology		Method for calculating interest for each security e.g. Actual/365
(g) Principal (capital repayment) payment dates & frequency		The methodology & periodic frequency for distributions of principal (return of capital) that are scheduled to occur
(h) Ex-Interest (principal) date / Record date		Number of days prior to interest payment date on which registered holders of securities are determined for purpose of making distributions
(i) Maturity date/		The ultimate/legal maturity date for each class and the issue
(j) Call date/s if any		If applicable
(k) Step-up dates & details		If applicable, step up details and rate applicable
<b>6</b>	<b>Working Day/Business Day</b>	State city/ies relevant for calculation
<b>7</b>	<b>Prepayment Assumption – at Issuance</b>	The rate (or range) of prepayments on the assets assumed at issuance for each class of securities
<b>8</b>	<b>Substitution Date</b>	Substitution period end date
<b>CASH FLOWS/ DISTRIBUTION DATA – UPDATED FOR EACH REPORTING PERIOD</b>		
<b>9</b>	<b>Report Date</b>	The date for which the calculations have been performed (i.e. current payment date)
<b>10</b>	<b>Interest Payments to Security Holders</b>	Amount per security by class for the current period rounded to 4 decimal places
<b>11</b>	<b>Principal Payments (capital distributions) to Security Holders</b>	Amount per security by class for the current period rounded to 4 decimal places

<b>12</b>	<b>Coupon Rate/s Applicable</b>	Including relevant benchmark and margin for current payment date per class for the reporting period
<b>13</b>	<b>Coupon Rate Reset date</b>	The date on which the reset becomes effective
<b>14</b>	<b>Bond Factor</b>	The factor (expressed as a % to [ ] decimal places) created by dividing the remaining balance of a security as of the end of the current period by the total original balance of the security.
<b>15</b>	<b>Invested Amounts</b>	Opening and closing par values
<b>16</b>	<b>Stated Amounts</b>	Opening and closing stated amounts
<b>17</b>	<b>Subordination level</b>	For any senior class of securities, the stated amount expressed as a percentage of the outstanding principal balance of the asset pool. This should indicate original and current levels.
<b>18</b>	<b>Redraws, if any</b>	Amount of principal advances (including redraws on loans) during the preceding collection period which remain in the loan pool as collateral for the securities, if any.
<b>19</b>	<b>Further Advances, if any</b>	Amount of further advances in this period
<b>20</b>	<b>Original Weighted Life</b>	
<b>21</b>	<b>Current Weighted Life</b>	
<b>22</b>	<b>Coupon Interest Distribution Shortfalls, if any.</b>	The excess of interest accrued on each security over the interest actually paid for the current coupon accrual period
<b>23</b>	<b>Cumulative Coupon Interest distribution shortfalls, if any</b>	The cumulative amount of interest shortfalls on each security over the interest actually paid for all prior coupon accrual period
<b>24</b>	<b>Current Principal Distribution/Chargeoffs or Shortfalls, if any</b>	Amount of principal losses during the current reporting period & how they were funded, if so, (e.g. excess collections, seller tranche, charge against a class of outstanding securities)

25	<b>Cumulative Principal Distribution/Chargeoffs or Shortfalls, if any</b>	Cumulative amount of principal that has been charged against outstanding securities and has not been reinstated from excess collections etc.
26	<b>Credit enhancement, reserves, liquidity &amp; risk management etc.</b>	The amounts available at end of period from e.g. <ul style="list-style-type: none"> <li>• Credit enhancements by category</li> <li>• Liquidity support</li> <li>• Redraw facility</li> <li>• Other</li> </ul> Amounts drawn and/or topped up, by type, in respect of any credit enhancement / liquidity / risk management product
<b>COLLATERAL DATA</b>		
27	<b>Original weighted average yield</b>	Weighted average rate of interest on the assets backing the security at the time of issue
28	<b>Current weighted average yield</b>	Weighted average rate of interest on the assets backing the security at reporting date
29	<b>Original weighted average maturity</b>	Average term to maturity backing a security, weighted for the (currency unit) amount of the assets as at the date of issuance.
30	<b>Current weighted average maturity</b>	Average term to maturity backing a security, weighted for the (currency unit) amount of the assets as at the date report or determination date as appropriate. .
31	<b>Original weighted average seasoning</b>	Average seasoning of the assets backing the securities, weighted for the (currency unit) amount of the assets, at the time of issuance expressed as a number of months.
32	<b>Current weighted average seasoning</b>	Average seasoning of the assets backing the securities, weighted for the (currency unit) amount of the assets, at the current reporting date expressed as a number of months

<b>33</b>	<b>Pool balance and no of loans</b>	Total current pool balance and total scheduled balance including <ul style="list-style-type: none"> <li>• Maximum loan balance</li> <li>• Average loan balance</li> <li>• No of loans corresponding to the pool balance</li> </ul>
<b>34</b>	<b>Percentage loan size distribution</b>	% of loans within predetermined ranges by no and (currency unit) as originally disclosed and current period
<b>35</b>	<b>Balance Split by Interest Rate Type</b>	Split by (currency unit) amount and number of loans with e.g. fixed interest, variable interest etc.
<b>36</b>	<b>Prepayment Assumptions</b>	Rate of prepayment assumed on pool at date of issuance Include graph as appropriate
<b>37</b>	<b>Constant Prepayment Rate</b>	Include calculated CPR for current period expressed as annualized % & include definition of method of calculation Include graph as appropriate
<b>38</b>	<b>Prepayment rate recent trends</b>	Prepayment rates for past 1, 3, 6, 12 months Include graphs as appropriate
<b>39</b>	<b>Life of Deal Prepayment Rate</b>	Provide life of deal prepayment details. Include graph as appropriate
<b>40</b>	<b>Weighted Average Loan to Valuation Ratio (LVR) – Initial &amp; Current</b>	Weighted LTC <ul style="list-style-type: none"> <li>• Initial at issuance</li> <li>• Current Outstanding</li> <li>• Scheduled current outstanding plus surplus buffer</li> </ul>
<b>41</b>	<b>Loan to Valuation Ratio Distribution</b>	Current % of loans with LVR in various (currency unit) by No bands as per original disclosure ranges
<b>42</b>	<b>Occupancy of Mortgage Property</b>	% e.g. investment, owner occupied, by (currency unit ) & No of loans in each category
<b>43</b>	<b>Geographic Spread</b>	Distribution by % and number of loans based on original disclosure division
<b>44</b>	<b>Property Types</b>	e.g. detached house, flat, apartment
<b>45</b>	<b>Loan Purpose</b>	e.g. construction, purchase, refinance

<b>46</b>	<b>Origination Year</b>	% Split by principal amount (current balance outstanding) by loan interest rate and % bands
<b>47</b>	<b>Collateral Loan Rate Distribution</b>	% Split by principal amount (current balance outstanding) by loan interest rate and % bands
<b>48</b>	<b>Mortgage Insurance</b>	If applicable insert details of % by (currency unit) and No subject to coverage & % of coverage on loans  Detail amount of timely payment coverage received from insurer
<b>49</b>	<b>Delinquencies</b>	Include graphs where appropriate  % split by 31-60, 61-90, 90+ days in arrears for current period
<b>50</b>	<b>Defaults, Losses Claims</b>	Report ( include graphic representation where appropriate) <ul style="list-style-type: none"> <li>• Cumulative defaults (no of loans and (currency unit amount)</li> <li>• Cumulative details of mortgages in possession, foreclosure etc.</li> <li>• Cumulative losses on sale (no &amp; currency unit) amount</li> <li>• Coverage on loss on sale from <ul style="list-style-type: none"> <li>o Mortgage insurance</li> <li>o Excess spread</li> <li>o Seller deposit,</li> <li>o Reserves</li> <li>o Charge off etc</li> </ul> </li> <li>• Cumulative amount of claims against mortgage insurer &amp; amount of claims reduced or denied including reason for reduction or denial</li> </ul>
<b>51</b>	<b>Trigger &amp; Measurement Ratios</b>	If applicable, the status of various delinquency dilution, default, loss or similar collateral measurements and ratios in relation to early amortization or other trigger levels, as at current report. Include tracking graph where appropriate

<b>SERVICER, OTHER PARTIES &amp; LITIGATION</b>		
<b>52</b>	<b>Rating of Servicer</b>	Corporate & servicer rating if any at issuance & current
<b>53</b>	<b>Alternative Servicer, if any, Type &amp; rating</b>	Name & Corporate & servicer rating if any at issuance & current. Whether alternative servicer is hot/warm/cold
<b>54</b>	<b>Servicer Experience</b>	Other Servicing Roles
<b>55</b>	<b>Supporting ratings of Other Parties</b>	Name, role and ratings – initial and current
<b>56</b>	<b>Breach of remission of funds requirement</b>	
<b>57</b>	<b>Details any material legal proceedings against</b>	Against servicer By servicer By trustee Against trustee Other
<b>58</b>	<b>Other information, if any, to explain the transaction and the performance of the assets</b>	

**For - Commercial Mortgaged Backed Securities (CMBS)**

Reporting should be as for MBS with the addition of the following fields:

<b>59</b>	<b>Tenant Profile</b>	Include details of key exposure to tenants as per original disclosure ranges but with details of concentrations by % and Currency amount
<b>60</b>	<b>Lease Term &amp; Vacancies</b>	Details of average lease maturity, excluding options, maturity profile over life of issue and vacancy factors
<b>61</b>	<b>Use distribution</b>	Include details of usage (e.g. office, retail, industrial) distribution & industry sectors



<b>62</b>	<b>Borrower REIT</b>	If mortgage backing security is to a REIT detail legislative restrictions, if any, on retention of funds in REIT to make principal repayments or to build up reserves or if captured as consequence of trigger, including taxation implications and impact on REIT available cash flow if minimum distributions to REIT investors not made.
<b>63</b>	<b>Other relevant ratios</b>	Where CMBS includes e.g. Debt Service Cover Ratios, Free Funds Flow etc initial and updated data should be provided

**For - Vehicle or Equipment (Lease, Hire Purchase, Loan Etc), Credit Card Receivables, Trade Receivables**

Reporting should be as for MBS with the addition and exclusion of the following fields:

<b>OMIT</b>		
Fields 42, 45 and 48		
<b>ADD OR ADJUST</b>		
<b>New field</b>	<b>Payment Rate</b>	Include total repayments for reporting period divided by number of opening receivables balance for such reporting period multiplied by 30 and divided by number of days in reporting period
<b>Adjust field</b>	<b>All fields which relate to MBS</b>	Should be adjusted to include similar data appropriate to the asset backing the transaction

**For - Infrastructure Backed Securities (IBS)**

In the case of infrastructure the periodic reporting will in many circumstances need to be adapted to fit with the nature and characteristics of the particular infrastructure asset. The disclosure should reflect the principles of disclosure outlined in the forms of disclosure illustrated above as adapted to fit with the particular asset or transaction.

The periodic disclosure should address the principles and disclosure requirements set out above for MBS.

The reports for IBS should cover the assumptions on which the key assumptions behind the cash flow and performance over time against such assumptions. Included should be the key assumptions considered by any credit rating agency and or disclosure in any offering memorandum,

For example, in relation to the securitisation of tolls from a bridge, the following would be relevant:

- a. Term of Concession to operate the infrastructure, if any
- b. Key provisions of Concession beach of which would impose penalties or potentially lead to cancellation of Concession.
- c. Patronage usage assumptions, no of vehicles, types of vehicles,
- d. Toll charges, rates, by sector etc.,
- e. Revision of toll formula and timing of toll adjustments,
- f. History of revision of tolls, intervention or refusal to permit scheduled changes,
- g. Potential deductions from total collections and basis of determination,
- h. End date, if any, for concession and maturity for issue with details updated in each reporting period which illustrate the potential if any under the structure of the transaction and the concession agreements for an extension of the collection period.
- i. Breaches of Concession agreements.
- j. Reporting on the progress of development or performance of ancillary infrastructure where cash flows are potentially dependent on the other infrastructure delivery.
- k. Include any other data required to be included in reports to a rating agency.

Reporting should set out initial information and update information each reporting period. Where appropriate graphs should be included with the report.

### **Periodic Securitisation Trustee Compliance Report for SPV Structured as a Trust**

Periodic trustee compliance report should:

- a. Certify whether funds received by the trustee and payments made accurately reflect the payments and other funds reported to have been received and remitted by the servicer as detailed in the periodic servicer report for the period;
- b. State whether there were any variations between the information in the periodic servicer report and the trustee's records, details of the discrepancies, and, if known, the reasons for such discrepancies and what action if any the trustee has taken or proposes to take;
- c. Detail whether remittances due from the servicer were made within the period provided for in the Act or the transaction documents and if not

when they were received and if known the reasons for the failure to receive within the specified dates and state what action the trustee has taken or proposes to take to rectify the situation;

- d. Detail any other variances in the operation of the transaction and the trust which fall outside the scheduled activities;
- e. State whether the trustee has administered the trust assets in accordance with the law; the terms of the trust deed and the transaction documents and containing such information as may be required by the regulations shall be prepared by the trustee, and
- f. Detail any material breach of the Act, regulations or transaction documents by any party of which it is aware or would have become aware if it had made reasonable enquiry and any action it has taken as trustee or proposes to take in respect of such breach. Where the trustee states that it does not propose to take any action it should disclose its reasons for not taking action.

### **Periodic Securitisation Compliance Report for SPV Structured as a Company**

Where the SPV is structured as a company then the Securitisation Manager and the board of the SPV company should furnish a report which addresses the same issues as those which the securitisation trustee is required to address for an issue where the SPV is structured as a trust with the addition of the following items:

- a. Whether the requirements for independent directors of the SPV have continued to be met,
- b. Whether the requirements for the shareholding of the SPV have continued to be met.

### **Periodic Audit Report**

The periodic audit report is not intended to replace the full audit of the SPV's accounts and financial statements but is intended to provide a brief and timely view on two critical matters and act as an alert.

The periodic audit report should provide the auditor's opinion on:

- a. The reconciliation and conformity of the periodic servicing reports and the periodic trustee compliance report and the completed over period reported on with receipts and payments by the trustee and payments scheduled to be made to investors.
- b. Whether all breaches in timely remittance of funds by the servicer have been reported.
- c. Where an opinion cannot be expressed as to compliance then the reasons shall be stated.

### **Reporting by note trustee and security trustee**

The transaction documentation should impose an obligation on any note trustee and any security trustee to report to the SPV auditor, securitisation trustee, securitisation manager and the board of the SPV as applicable and to any listing exchange if it becomes aware of any breach of the transaction document or failure to make a scheduled payment.

The obligation to report is an ongoing obligation and reports should be made as soon as practicable after the party becomes aware of the breach.

The transaction documentation should also include an obligation to provide such information and assistance as is reasonably required to enable any other party to a transaction to fulfil its reporting obligations. The provision of a report should not relieve the party from fulfilling its obligations under the transaction documents or under the law.

## **APPENDIX “F”- Contents Financial Accounts**

### **General**

The financial accounts and half-yearly financial accounts shall contain all the information required in the Act and these regulations and be prepared in accordance with Kenyan accounting standards and where no such standard exists in accordance with international accounting standards, subject to the requirement to include additional information which may be required by the Act or this Guidance Note.

All accounts shall contain comparative figures for the previous period.

The items listed under the various financial statements and the Notes to the Accounts, where applicable, shall be disclosed.

Care should be taken to clearly distinguish between the accounts of the originator and any trustee and those that are the accounts of the SPV (trust or company).

### **Statement of Income, Expenses and Distribution**

The following shall be disclosed separately:

- a. Income from all sources identified by source,
- b. Expenses identified by type and to whom paid,
- c. Any impairment provision,
- d. Earnings before interest and taxation,
- e. Net profit attributable to asset backed security holders (as beneficiaries), notes should indicate the profits attributable to each class of holder and each tranche as per the waterfall and priority arrangements set out in the trust deed,
- f. Finance costs if any attributable to asset backed security holders broken up into class or tranche if applicable,
- g. Capital or principal distributions attributable to asset backed security holders broken up into class or tranche if applicable,
- h. Change in net assets attributable to asset backed security holders broken up into class or tranche, if applicable,
- i. Earnings payable per asset backed security by class and tranche, if applicable.

### **Statement of Cash Flow**

The following should be disclosed separately:

- a. Cash flows from operating activities
  - i. Income from assets broken into type if more than one and separately disclose any penalty or other additional income received due to late payment
  - ii. Interest received on cash deposits
  - iii. Drawings on credit enhancements
  - iv. Drawings on liquidity lines
  - v. Receipts from derivatives

- vi. Net cash flows from operating activities
- b. Cash flows from financing activities (if Applicable)
  - i. Buybacks
  - ii. Distributions to asset backed security holders
  - iii. Proceeds from borrowings (if any)
  - iv. Repayment of borrowings (if any)
  - v. Net cash flows used in financing activities
- c. Cash flows from investing activities
  - i. Investments acquired
  - ii. Investments repaid
  - iii. Net cash flows from/used in investing activities
- d. Net increased in cash and cash equivalent
- e. Cash and cash equivalents held at beginning of financial year
- f. Cash and cash equivalents held at end of the financial year

**Statement of Assets and Liabilities**

The following shall be disclosed separately:

- a. Assets
  - i. Cash
  - ii. Trade and other receivables as described in detail in the notes
  - iii. Loans an receivables as described in detail in the accounts (iv)
  - Total Assets
- b. Liabilities
  - i. Trade and other payables
  - ii. Other liabilities
  - iii. Distributions payable, by type, class and tranche, if applicable
  - iv. Total liabilities excluding net assets attributable to assert backed security holders as beneficiaries
- c. Net assets attributable to asset backed security holders, broken up if applicable by class and tranche
- d. Represented by
  - i. Asset backed security holders funds
  - ii. Retained earnings
  - iii. Net assets attributable to asset backed security holders

**Statement of Change in Net Assets**

The following shall be disclosed separately:

- a. Net assets attributable to holders of asset backed securities at beginning of period
  - i. Buybacks, if any, detailed by class and tranche, if applicable

- ii. Capital distributions, if any, detail by class and tranche, if applicable
- iii. Net profit attributable to asset backed security holders, detail by class and tranche, if applicable
- iv. Other distributions, if any, detail by class and tranche, if applicable
- b. Net assets attributable to asset backed security holders at end of year, by class and tranche, if applicable.

### **Notes to Accounts**

As a minimum the following matters shall be set out in the notes to the accounts –

- a. Trust or SPV information
- b. Basis of accounting and conventions employed
- c. Application of accounting standards, application date and impact of each on the accounts
- d. Basis of valuation
- e. Details of all fees and expenses paid by category including, e.g. any trustee's fees and expense, servicer's fees and any excess servicer fee paid or payable, fees paid to any securitisation manager, legal fees including any fees paid for recovery or protection of assets, credit enhancement and liquidity line fees, accounting and audit fees and the extent to which such fees vary from the assumed fees and expenses in the original cash flow model as utilized for the offering memorandum
- f. Currency and basis of any foreign currency translation
- g. Taxation and other imposts, charges and duties
- h. Borrowings, secured or unsecured and confirm authorized by trust deed or transaction documents for a company SPV
- i. Impairment of assets, principles adopted, conventions, when default deemed, recoveries, write backs, and losses
- j. Description of items included in each category and assumptions
- k. Derecognising of assets and liabilities
- l. Include details of interest rate exposures, if any, and sensitivities to movement
- m. Cash – less than 3 months
- n. Investments as authorised by transaction documents, show by maturity bands
  - i. Less than 3 months
  - ii. Between 3 months and 12 months
  - iii. Between 1 year and 5 years
  - iv. Greater than 5 years
- o. In relation to cash flow address liquidity
- p. In relation to borrowings interest rate exposures and maturity profile
- q. Credit risk exposures
- r. Market risk exposures

## **ANNUAL AND HALF-YEARLY REPORTS**

### **Report of the securitisation trustee for a trust SPV**

The securitisation trustee shall report on the activities and operation of the trust and the assets.

The following matters shall be set out in every annual and half-yearly report of the securitisation trustee:

- a. The name of the trust and the names and addresses of the following:
  - i. the trustee;
  - ii. note trustee, if any, and security trustee, if any;
  - iii. the servicer or servicers;
  - iv. the seller, transferor, assignor or originator of the assets;
  - v. any guarantor or other credit enhancer or provider of a liquidity facility or other risk management product in respect of the securitisation transaction;
  - vi. any securitisation manager;
  - vii. any rating agency which has rated some or all of the asset backed securities ;
  - viii. any other material party to the securitisation transaction, and
  - ix. the auditor.
- b. The date of establishment of the trust.
- c. Provide a summary of the nature of the assets backing the asset backed securities.
- d. Detail the asset backed securities originally issued and those outstanding as at the reporting date by tranche and class.
- e. Include a statement as to the income of the trust and priority of payment of expenses, fees any other outgoings and distributions to the investors in the asset backed securities provided for in the transaction documents.
- f. A statement of the amount/s (if any) to be distributed to investors in the reporting period by class and by tranche, if applicable and how this contrasts with the scheduled distributions.
- g. Details of the rating, if any, of all or any of the asset backed securities and of changes, if any, in the rating and of any known pending rating action or review.
- h. Detail any legal actions taken by or against the trustee or in respect of the trust assets or by or in respect of any party to the securitisation transaction and comment on their relevance of potential relevance to the trust and to investors in the asset backed securities.
- i. Details of any changes in the law or regulatory environment which could impact on the assets or the performance of the trust.



- j. Any other significant information which would enable investors as beneficiaries and potential investors to make an informed judgement on the performance of the assets and of the securitisation trust during the period and the results as at the end of that period.

Attached to the report shall be a report of the note trustee and security trustee, if any, which report on any non-compliance with the transaction documents including the calling of meetings, presenting of reports and making of scheduled payments.

#### **Report of the securitisation manager and board of company SPV**

The report in respect of a transaction where the SPV is structured as a company shall be prepared by the securitisation manager and approved by the board of the SPV.

The matters included in the report shall be for a trust SPV adjusted to recognise the differences in structure for a company and a trust and the relationship and obligations of the board and the securitisation manager.

#### **Portfolio statement**

The report of the securitisation trustee or securitisation manager, as applicable, should include details of the performance of the assets and of the SPV (trust or company) and detail the likely impact of changes from in, scheduled receipts cash flows, expenses and outgoings and assumptions incorporated in the original offering memorandum and the cash flow model for the securitisation transaction.

The statement should:

- a. detail any drawings or calls made on credit enhancements, liquidity lines or the utilization of other supports or risk management products and the implications of such for the SPV in the period and potential implications for future periods,
- b. Include a statement of the SPV's projected ability to meet scheduled distributions or payments in the future,
- c. Include details of a stress test on the asset portfolio and on the ability of the SPV to meet scheduled expenses, payments and distributions, and
- d. Include comment on any other matter which is relevant to the performance of the portfolio and the SPV including, any deficiencies that a trustee, the SPV or the Securitisation Manager has identified in the processes or operations of the securitisation transaction or of respective parties.

#### **Trustee's, Securitisation Manager and Board of SPV Compliance Report**

Include a summary of the securitisation trustee's or securitisation manager's (as approved by the SPV board), as applicable, periodic compliance reports for the period updated to the reporting date.

Include details of any action taken by the trustee or which the trustee recommended or recommends should be taken or by the securitisation manager or board of the SPV.

Detail any meetings of investors, resolutions passed and actions taken as a result and attach the minutes as a Schedule to the report.

Detail any requests to the trustee, securitisation manager or board of the SPV from the Authority or any action taken by the Authority and the outcome or any pending action.

Include a summary of the auditor's periodic compliance reports, any action recommended or taken and the results of such.

Contain a statement as to whether the trustee, securitisation manager or board of the SPV is aware any breach of the trust deed, the servicing agreement or other transaction document, the Act or the regulations and the details and implications of such and the trustee's response or proposed action, if any, as a consequence.

### **Report of the Auditor**

The report of the auditor to the investors or beneficiaries for any annual accounting period must include a statement as to matters raised in any auditor's periodic statement that have not been addressed to the satisfaction of the auditor and shall state –

- a. Whether in the auditor's opinion the accounts prepared for that period have been properly prepared in accordance with generally accepted accounting principles and relevant accounting standards and in accordance with the trust deed and transaction documents (as applicable), the Act and this Guidance Note;
- b. Without prejudice to the foregoing, whether in the auditor's opinion a true and fair view is given of the cash flows and of financial position of the trust or the company SPV as at the end of that period;
- c. If the auditor is of the opinion that proper accounting records have not been kept by the trustee or company SPV or that the accounts are not in agreement with the trust's or company's accounting records, that fact together with any resulting qualification;
- d. If the auditor has not been given all the information and explanations which, to the best of his knowledge and belief, are necessary for the purposes of his audit, that fact together with any resulting qualifications;
- e. If the auditor is of the opinion that the information given in the report of the trustee, the securitisation manager and the company, as applicable, for that period is inconsistent with the accounts, that fact together with any resulting qualifications, and

- f. If the auditor, during the course of its audit, has become aware of any breaches of the transaction documentation including, any trust deed, the Act, the Guidelines and details of such.

## **APPENDIX “G” – Trust Deed Guidelines**

### **1. Introduction**

The requirements stated in this Guidance Note are in addition to the obligations imposed on any party under the general law and principles of equity and the provisions of the Act. It is not intended that this Guidance Note operate to reduce or waive any right that a party has at law.

A trust deed is required when any party acts as a trustee including, as a securitisation trustee, note trustee or security trustee. Where a party fulfils more than one role then the roles may be combined in one document provided that the roles and obligations of each role are clearly set out and segregated. This Guidance Note are intended to set out key requirements and act to supplement standard provisions and drafting and are not intended to be comprehensive.

### **2. Establishment and Objective of the Trust - Preamble and Recitals**

The deed should clearly establish the trust and set out clearly the objectives and purpose of the trust.

The preamble and recitals should include:

- a. The identities of parties to the trust deed,
- b. A brief description of the securities to be issued or for which the security supports,
- c. A statement that all regulatory, board and other approvals relevant to the role and the transaction and the entering into the deed have been obtained,
- d. For the note trust- the date of issue of the ABS and details of clearing and settlement.

The objectives of the trust deed should be limited to the specific securitisation transaction. Limitations should be included on the power to amend the deed.

### **3. Description of the ABS**

The trust deed must provide the following:

- a. Key features of the ABS constituted, held or secured by the trust deed depending on whether a securitisation, note or security trust deed,
- b. Where the SPV is a trust and the ABS is issued in the form of a debt security then it must be made clear that the trustee is issuing the ABS in its capacity as trustee and not in a personal capacity and that the right to recovery against the trustee in respect of the ABS is limited recourse and is limited (except in the case of negligence, fraud, misconduct or breach by the trustee of its fiduciary duties) to the assets of the trust,

- c. Details of any depository, clearing system or paying agent, note trustee or security trustee as the case may be,
- d. Whether the ABS are, if debt securities, secured or unsecured,
- e. The ranking of different ABS holders and relative to other obligations of the SPV and the trustee's obligations.

The description should link the trust deed with the transaction documents and other parties to the transaction.

#### **4. Role of Trustee**

The role, obligations and responsibilities of a trustee (**as securitisation trustee, note trustee or security trustee**) should be clearly set out and the role, obligations and rights of the trustee relative to other parties clearly delineated and reflect the specific transaction documents.

Where required parties having an obligation to the trustee or under the transaction documents should, if not a party to the trust deed, by executing a schedule to the trust deed agree to be bound by the provisions of the trust deed to the extent that they apply to that party.

The powers should be adequate to permit the trustee to carry out its specified function but should be limited to those functions required for the securitisation and ancillary matters and address the matters set out below.

The trustee should be a party to the transaction documents to the extent required to permit it to fulfil its role.

Attention should be paid to the laws of Kenya and recognise that precedents from other jurisdictions may not be compatible.

#### **5. Covenant of Seller/s and Originator/s**

The trust deed must include a covenant by the SPV, where a company, the seller/originator, the servicer and any securitisation manager to comply at all times with the terms of the trust deed and the transaction documents. This may be adopted by the execution of a schedule.

#### **6. Representations, Covenants and Warranties by Issuer**

The trust deed should include a covenant by a company SPV, or where a trust then by the SPV trustee in its capacity as the issuer, of the ABS to pay amounts due subject to the limited recourse provisions included in the transaction documents and at all times to comply with the transaction documents.

#### **7. Powers and Duties of the Trustee**

The powers of the trustee should be limited solely to the purpose and objectives of the trust and the role that it is to undertake in the securitisation transaction and matters ancillary and incidental to undertaking that role and fulfilling the trustee's responsibilities. In this regard general powers, provided in The Trustee Act CAP 167, should be considered and where not appropriate to the transaction should be expressly excluded.

A specific obligation should be included for the trustee to comply with the Act and Guidelines including, where required the appointment of auditors and the preparation and submission of reports and notifications.

The trust deed must include a statement by the trustee that it is approved by the Authority to act in the role.

The trust deed should clearly set out and delineate the role, duties and obligations of the trustee/s from that of other parties to the securitisation transaction and must set out:

- a. Those matters which are within the power of the trustee to decide and those that require reference to the ABS holders or the consent of another party (e.g. security trustee, ABS holders or a class of ABS holders),
- b. The trustee should be empowered to deduct, withhold and pay taxes and to lodge necessary returns and provide information as may be required by regulators or authorities,
- c. Where there is a breach of the transaction documents, including the trust deed, the circumstances in which the trustee may waive the breach provided:
  - i the trustee is satisfied that the breach will not materially prejudice the interests of ABS holders or any class of ABS holders, or impact on the order of payment or priority , or
  - ii where the trustee is authorised to do so by the specified majority of all ABS holders, or by the majority of ABS holders who would have been materially prejudiced.
- d. Where there is a request from a party to the transaction to vary or modify any of the terms of the trust deed or the transaction documents the circumstances in which the trustee/s may agree to such change provided that:
  - i the trustee is satisfied that the change will not materially prejudice the holders of the ABS or any class of ABS or impact on the order of payment or priority and the trustee has given at least five business days prior notice in writing to the ABS holders, or
  - ii the trustee is satisfied that the modification or variation is necessary to comply with a mandatory provision of the law or with a condition or requirement imposed by a regulatory authority and the trustee has given at least five business days prior notice in writing to the ABS holders, or
  - iii the trustee is authorised to do so by the specified majority of all ABS holders, or by the majority of a class of ABS holders.
- e. Fees payable to the trustee and expenses to which the trustee is entitled to recover, and
- f. Additional services that the trustee is entitled to provide to the trust for a fee.

The trust deed would usually include a specific indemnity from a company SPV (or the trustee of a trust SPV) to other trustee/s in respect of fees and any expenses or liability that it incurs in undertaking the role of the trustee. In the case of a securitisation trust the trustee should specifically be entitled to recover such expenses and fees etc. from the assets of the trust.

The trustee's right to indemnity may be subrogated to the claims of any other party including the ABS holders or may be in priority. The order of payment should be clearly stated.

The trust deed should specifically set out the circumstances in which the trustee may delegate its powers and its ability to appoint agents. Any such power should comply with the Act and Guidelines.

A securitisation trustee should be obligated to, where required, appoint an auditor and cause accounts to be prepared and to provide information and assistance to other parties required to prepare accounts and reports under the Act, this Guidance Note or the transaction documents.

The trustee should have specific obligation under the trust deed to maintain segregated accounts and not to mix assets of the trust with the assets of the trustee or those of any other person.

The trust deed should include provisions relating to the duties and obligations of the trustee/s and must include the following:

- a. A duty to exercise reasonable diligence given the capacity it is appointed in to ascertain, based on reports, certificates or opinions furnished to the trustee whether the SPV or any party to the transaction has committed a breach of the terms and conditions of the ABS or of the transaction documents or whether an event of default has occurred or is continuing,
- b. Where a report, certificate or opinion is required by the Act or the transaction documents to be provided to the trustee and such is not provided within the specified time to exercise reasonable efforts to obtain such report and to take reasonable follow up action,
- c. Where there is an event of default or the trustee has enforcement powers the trustee must be obliged to exercise such rights and powers as are vested in it by the transaction and, based on its obligations as trustee in the particular role, to use a reasonable degree of skill and diligence in exercising such rights and powers, and
- d. A duty to provide such information as any credit rating agency, authority, auditor or investor or party acting in a professional capacity for any such person may require in relation to:
  - i The occurrence of which the trustee is aware or the declaration by the trustee of an event of default, and
  - ii A material breach of the transaction documents of which it has become aware which has not been waived by ABS holders or remedied by the SPV.

## **8. Liability of Trustee and Limits on Liability**

There must be a specific provision in all trust deeds that states that no provision or any covenant in the trust deed or in any transaction document shall be construed as relieving, exempting or indemnifying a trustee from a breach of trust or for a failure to show a degree of care and diligence required of a trustee fulfilling the particular role.

Trust deeds in all cases should provide that the trustee is only liable (except in the case of negligence, fraud, misconduct or where applicable for breach of fiduciary duty) to the extent of the assets of the SPV.

## **9. Investment of Funds**

The trust deed should expressly provide for those investments the trustee/s is authorised to invest in. In drafting these provisions the structure of the transaction should be considered and the power should be wide enough to encompass, where applicable, credit enhancements and risk management products as well as empowering the trustee to purchase securities issued by it as part of the ABS transaction.

## **10. Limitations on Borrowing, Incurring Liabilities and Encumbering Assets**

Specific provisions based on the structure of the transaction should be included. These provisions are important in establishing “bankruptcy remoteness”. The powers should be wide enough to permit the actions anticipated by the structure of the transaction.

## **11. Events of Default**

Events of default appropriate to the structure of the transaction should be specifically included. Where there is more than one class of ABS holder then consideration needs to be given to the payment waterfall (priority) and to ensure that the ability to call default is compatible with both the waterfall and the concept of bankruptcy remoteness of the SPV.

The trustee/s should have the obligation from reports that are required to be made to it to monitor whether an event of default has occurred.

The obligations of the trustee in the event of an event of default occurring should be clearly stated and the mechanics should be compatible with the transaction documents viewed on a holistic basis. The obligations should, for example, address the requirements to take action or to call meetings including, time limits for the calling of meetings and level of vote required.

## **12. Reporting to and by Trustee**

The trust deed must set out reporting obligations of the various parties under the transaction documents and the Act and the time period for such reporting. Periodic reporting obligations as set out in the Act and this Guidance Note should be included in the trust deed and the transaction documents. Reporting obligations should reflect the requirements set out in **Appendix “E” and Appendix “F”**.

## **13. Meetings**

The trust deed must include provisions relating to the trustee’s obligations to call meetings and include notice periods, method of voting, voting percentages to carry a resolution and quorums required for various categories of resolutions. Except where the originator or seller is the only ABS holder the votes of the seller or originator or any party related to the seller or originator should be excluded in establishing a quorum or for voting purposes.

There should be a provision requiring meetings to be convened at the request of the SPV, any trustee or a specified percentage of ABS holders.

#### **14. Removal of Trustee**

Provisions should be included, including voting percentages, relating to the resignation or removal and subsequent appointment of a new trustee/s.

Any removal of a trustee must be with the consent of an agreed majority of the senior ranking ABS holders.

The Authority should be notified of any meeting to be called to consider the removal of a trustee or the appointment of a new trustee.