Position paper DACSI **15-1009**

SFTR proposals

The NL market's view on the current proposals for a Regulation on reporting and transparency of Securities Financing Transactions:

The Prior Consent and Information Requirements of Article 15

(COM(2014)0040 – C7-0023/2014 – (2014)0017(COD))

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DACSI (the Dutch Advisory Committee Securities Industry) is the principal trade association in The Netherlands for firms active in the securities industry. The association represents the interests of its members as users/clients of infrastructure providers in the field of securities, e.g. exchanges, central counterparties, central securities depositories. With 11 members, DACSI represents the vast majority of the banks active in The Netherlands, and positions the Dutch view to the market infrastructure service providers and the regulatory authorities in The Netherlands and the European Union.

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Introduction

On 29 January 2014 the European Commission published a Proposal for a Regulation of the European Parliament and of the Council on reporting and transparency of Securities Financing Transactions (2014/0017 (COD), the **EC Proposal** for the SFTR). After a series of Working Party meetings of member state delegates, the Italian Presidency drafted a **Council Compromise Proposal** dated 14 November 2014[1]. Recently, the draft report of the Committee on Economic and Monetary Affairs of the European Parliament (the **Draft Rapporteur's Report**) was published.

This position paper reflects and explains the Dutch market's position with regard to one particular issue: the prior consent and information requirements of Article 15. We have concerns about the proposed wording.

DACSI fully supports the objective of the proposed SFTR to maintain and to enhance the stability of the financial markets through improving the transparency of SFTs, and the initiative to introduce legislation to achieve this. Various provisions in the EC Proposal are addressed by the Council Compromise Proposal and the Draft Rapporteur's Report, and several representative bodies are currently asking the Rapporteur's attention for their (and partially also our) concerns. We have a **particular concern** with regard to the prior consent and information requirements; this is not a national or a role-specific concern, but is **relevant for the entire industry**, as we explain in this paper.

The Prior Consent and Information Requirements and other conditions of Article 15(1) and 15(2)

The proposed Article 15(1) contains a Prior Express Consent Requirement (sub b) and an Information Requirement (sub a) with regard to the reuse of collateral.

1. The Prior Consent Requirement

There is a longstanding market practice of using the instrument of title transfer when providing collateral. Both the Council Compromise Proposal and the Draft Rapporteur's Report recognise that the Requirement should not be applicable in case collateral is provided by means of title transfer and propose that the Prior Express Consent Requirement of 15(1b) "**shall be deemed fulfilled** where a counterparty expressly agrees to provide collateral by way of title transfer collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC".

We fully welcome and concur with the arguments for this proposed amendment. However, the proposed wording "deemed fulfilled" would have severe disadvantageous consequences:

1. The construction of deemed consent is inconsistent with the applicable legal framework and creates **legal uncertainty** about the ownership/property rights, which is hence detrimental to the use(fullness) of title transfer. It is in direct conflict with Article 5 of the Financial Collateral Directive, which provides for the obligation to ensure that the collateral taker is entitled to exercise a right of reuse. It is also contrary to the fundamental right to property, which is further explained in the opinion of law firm Simmons & Simmons.[2] In sum, transfer of title means the complete transfer of all applicable rights to an instrument. It is therefore conceptually redundant and creating uncertainty to state that reuse requires prior consent, even if this consent is deemed to be given (e.g., one may ask whether and on what basis the consent can be revoked).
2. By parallel reasoning, the 'implied consent construction' could have **tax implications**: most conventions on double taxation use the concept of 'beneficial ownership' for the determination of the fiscal beneficiary. As the proposal amends the ownership of a recipient of collateral, it may cast doubts over the country's qualification

[1] Note 15424/14 from Presidency to Delegations

[2] Memo "Concerns as to obligations related to reuse under article 15(1) of the draft proposal SFTR" dated 17 December 2014, attached as Annex to this document

of beneficial ownership. This uncertainty may infringe the current principles regarding non-double taxation and beneficial ownership.

2. The Information Requirement

When collateral is provided by way of title transfer, there is no reason to require the disclosure of legal consequences or risk:

1. Since title transfer is a transfer of ownership, there are **no further legal consequences nor risks with regard to reuse**. Hence, following the transfer the collateral giver no longer has a right of ownership or the right to receive back exactly the same instruments given as collateral. He only has a claim against the collateral receiver 1) in a non-default situation to receive **equivalent** instruments and 2) in a default situation to receive the value of the collateral. In both cases (non-default or default situations) the collateral giver has no claim or right against a potential reuser of the collateral or a reuser of the reuser of the collateral. Consequently, the collateral giver runs no risk following the reuse of the collateral. The sole risk is the transfer of ownership itself, but this risk is not related to the reuse of the collateral.
2. The transfer of title itself is expressly **documented** and agreed upon under the relevant global market documentation, for example the Global Master Repurchase Agreement (GMRA) or Global Master Securities Lending Agreement (GMSLA). Any (deemed) consent is contrary to the stipulations of such agreements [3].

The sole consequences of the collateral provisioning are the title transfer itself and the right to reuse, is the latter being an implicit right.

Financial markets widely engage in title transfer collateral arrangements under standard legal documentation. It is therefore of the utmost importance to avoid any legal uncertainty and to address the above listed concerns by entirely disapplying the requirement for a prior (even though deemed) consent and the requirement for description of risks and consequences for reuse of title transfer collateral.

3. Our proposed solution

To address these concerns while not detracting from the intended effect of the provision as proposed by the Council, we propose to amend the title and subs (1) and (2) of Article 15, comparing to the Draft Rapporteur's Report (additions in bold face and underlined):

(EC Proposal)

Article 15

Rehypothecation of financial instruments received as collateral

1. Counterparties shall have the right to rehypothecation where at least all the following conditions are fulfilled:

(a) the providing counterparty has been duly informed in writing by the receiving counterparty of the risks that may be involved in granting consent as referred to in point (b) in particular the potential risks in the event of the default of the receiving counterparty;

(b) the providing counterparty has granted its prior express consent as evidenced by the signature of the providing counterparty to a written agreement or an equivalent alternative mechanism.

[3] These arguments are elaborated in the memo referred to in the previous footnote

2. Counterparties shall exercise their right to rehypothecation where at least all the following conditions are fulfilled:

(a) rehypothecation is undertaken in accordance with the terms specified in the written agreement referred to in point (b) of paragraph 1;

(b) the financial instruments received as collateral are transferred to an account opened in the name of the receiving counterparty.

3. ……

(Council Compromise Proposal)

Article 15

Reuse of financial instruments received under a collateral arrangement

1. Counterparties shall not have a right to reuse unless at least the following conditions are fulfilled:

(a) the providing counterparty has been duly informed in writing by the receiving counterparty of the risks and consequences that may be involved in granting consent as referred to in point (b) in particular the potential risks and consequences in the event of the default of the receiving counterparty;

(b) the providing counterparty has granted its prior express consent as evidenced by the signature of the providing counterparty to a collateral arrangement evidenced in writing or in a legally equivalent manner. This requirement shall be deemed fulfilled where a counterparty expressly agrees to provide collateral by way of title transfer collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC.

2. Counterparties shall not exercise their right to reuse unless at least all the following conditions are fulfilled:

(a) reuse is undertaken in accordance with the terms specified in the collateral arrangement referred to in point (b) of paragraph 1;

(b) the financial instruments received under a collateral arrangement are transferred from the account of the providing counterparty.

3. ……

(Draft Rapporteur's Report)

Article 15

Re-use of financial instruments received as collateral

1. Counterparties may re-use financial instruments received as collateral where at least the following conditions are fulfilled:

(a) the providing counterparty has been duly informed in writing by the receiving counterparty of the risks and legal consequences that may be involved in granting consent as referred to in point (b) in particular the potential risks in the event of the default of the receiving counterparty;

(b) the providing counterparty has granted its prior express consent as evidenced by the signature of the providing counterparty to a collateral arrangement evidenced in writing or in a legally equivalent manner. This requirement shall be deemed fulfilled where a counterparty expressly agrees to provide collateral by way of title transfer collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC.

The condition set out in point (b) shall be deemed fulfilled where the providing counterparty agrees to provide collateral under a title transfer financial collateral arrangement.

2. Counterparties may exercise their right to re-use only when at least all the following conditions are fulfilled:

(a) re-use is undertaken in accordance with the terms specified in the written agreement referred to in point (b) of paragraph 1;

(b) the financial instruments received as collateral are transferred from the account of the providing counterparty to a separate account opened in the name of the receiving counterparty.

3. …..

(DACSI amendments, compared to Draft Rapporteur's Report)

Article 15

Re-use of financial instruments received as collateral ***under SFTs***

1. Counterparties may re-use financial instruments received as collateral where at least the following conditions are fulfilled:

(a) the providing counterparty has been duly informed in writing by the receiving counterparty of the risks and legal consequences that may be involved in granting consent as referred to in point (b) in particular the potential risks in the event of the default of the receiving counterparty;

(b) the providing counterparty has granted its prior express consent as evidenced by the signature of the providing counterparty to a collateral arrangement evidenced in writing or in a legally equivalent manner. This requirement shall be deemed fulfilled where a counterparty expressly agrees to provide collateral by way of title transfer collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC.

The conditions set out in this paragraph 1 shall not apply where the providing counterparty agrees to provide collateral under a title transfer financial collateral arrangement **within the meaning of point (b) of Article 2(1) of Directive 2002/47/EC**.

2. Counterparties may exercise their right to re-use only when at least all the following conditions are fulfilled:

(a) re-use is undertaken in accordance with the terms specified in the written agreement referred to in point (b) of paragraph 1;

(b) the financial instruments received under a collateral arrangement are transferred from the account of the providing counterparty ~~to a separate account opened in the name of the receiving counterparty~~.

The conditions set out in point (a) of this paragraph 2 shall not apply where the providing counterparty agrees to provide collateral under a title transfer financial collateral arrangement **within the meaning of point (b) of Article 2(1) of Directive 2002/47/EC**.

3. …..

Annex: Memo “Concerns as to obligations related to reuse under article 15(1) of the draft proposal SFTR” dated 17 December 2014.

(to be included in final version).

Simmons & Simmons

DACSI 14-2400

Memo

To	Dutch Advisory Committee Securities Industry (DACSI)	From	Rezah Stegeman Pim Heemskerk
Subject	Concerns as to obligations related to reuse under article 15(1) of the draft proposal for a regulation (dated 14 November 2014) on reporting and transparency of securities financing transactions	Date	17 December 2014
		Our ref	FM/025616-00102/RAXS/PXXH

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1. Executive summary

1.1 This memo sets out why article 15(1) of the draft dated 14 November 2014 of the Presidency compromise proposal for a Regulation on reporting and transparency of securities financing transactions (the "Draft SFTR Proposal") needs to be amended, so that a title transfer collateral receiver is excluded explicitly from the obligations of article 15(1) Draft SFTR Proposal to:

(A) obtain the collateral provider´s prior consent to the reuse of collateral; and

(B) inform the collateral provider of the risks and consequences associated therewith.

1.2 The main reason is that these obligations are superfluous and inconsistent with the principles of title transfer collateral arrangements, amongst other things because the collateral receiver's right of reuse follows automatically from the very essence of a title transfer. Furthermore, the obligations have significant adverse effects.

1.3 An appropriate amendment of article 15(1) Draft SFTR Proposal would benefit legal certainty and eliminate the adverse effects of the obligations. However, an amendment providing that the obligations are deemed fulfilled in case of a title transfer collateral arrangement is insufficient, as such amendment would not benefit (and may even impair) legal certainty and would only partially eliminate the adverse effects of the obligations.

1.4 This memo makes no specific differentiation between the situations in which the obligations are either deemed or not deemed to be complied with in case of a title transfer collateral arrangement.

2. Contents

2.1 This memo provides the following:

(A) paragraph 3 (page 2): relevant obligations;

(B) paragraph 4 (page 2): reasons why the obligations are superfluous and inconsistent with the principles of title transfer collateral arrangements;

(C) paragraph 5 (page 5): reasons why the obligations have adverse effects; and

(D) paragraph 6 (page 6): required amendment of article 15(1) Draft SFTR Proposal.

3. **Relevant obligations**

3.1 Article 15(1) Draft SFTR Proposal requires a receiving counterparty engaging in reuse:

(A) to obtain consent to such reuse from the providing counterparty (article 15(1)(b) Draft SFTR Proposal) (the "Consent Obligation"), which Consent Obligation should be deemed fulfilled where a counterparty expressly agrees to provide collateral by way of title transfer collateral arrangement; and

(B) to inform the providing counterparty in writing of the risks and consequences that may be involved in such consent, especially in the event of the default of the receiving counterparty (article 15(1)(a) Draft SFTR Proposal) (the "Information Obligation" and, together with the Consent Obligation, the "Obligations").

3.2 According to article 3(1)(7) Draft SFTR Proposal, the term "reuse" includes the use by a receiving party of collateral it has received under a title transfer collateral arrangement. Consequently, article 15(1) Draft SFTR Proposal can be construed as meaning that:

(A) in order to comply with the Consent Obligation, the providing party must consent to the *reuse* as such, even if the collateral is provided through title transfer; and

(B) in order to comply with the Information Obligation, the receiving party must provide the providing party with explicit wording on the risks and consequences that may be involved in such *reuse*, even though these are inherent to a title transfer.

3.3 The fact that the Consent Obligation should be deemed fulfilled where a counterparty expressly agrees to provide collateral by way of title transfer collateral arrangement does not detract from this, as a *deemed* consent implies that consent is still required and that it may also, through explicit rejection, be withheld (see also paragraph 6.2 below).

4. **Reasons why the Obligations are superfluous and inconsistent with the principles of title transfer collateral arrangements**

I. Consent, risks and consequences implied by essence of title transfer collateral arrangement

4.1 The very essence of a title transfer collateral arrangement (unlike a security interest collateral arrangement)[1] is that all rights, title and interest in the collateral *transfers* from the collateral provider to the collateral receiver, which thus obtains outright ownership of the collateral. Thus, the logical consequences of a title transfer collateral arrangement are that:

(A) the collateral provider will lose all its proprietary rights with respect to the collateral to the collateral receiver;

(B) the collateral receiver, having obtained outright ownership of the collateral, will, by exclusion of the collateral provider, have all possible rights with respect to the collateral, among which the right to dispose of the collateral;

(C) the collateral provider will only have a contractual claim against the collateral receiver for the delivery of financial instruments *equivalent* to the collateral, if so stipulated in the collateral arrangement (and, consequently, the collateral provider will have no claim for the redelivery of the actual financial instruments initially delivered as collateral); and

[1] See T. Keijser, *Financial Collateral Arrangements*, Law of Business and Finance, Volume 9, Kluwer: 2006, p. 181.

(D) the collateral provider will not be able to claim the collateral with preference over other creditors of the collateral receiver.

Thus, both factually and legally, a title transfer collateral arrangement effectuates a legal transaction resembling a common sale of a good, which accomplishes that the ownership of the good - including all its rights - transfers from the seller to the buyer. Just like such buyer - as the new owner - is subsequently free to dispose of the good without any explicit stipulation to that effect being necessary, a collateral receiver under a title transfer collateral arrangement - as the owner of the collateral - is free to dispose (and therefore reuse) the collateral without the collateral providers prior consent being required. We believe these concepts of "ownership" and "title transfer" to be (internationally) uniform principles, which, as far as we are aware, are not only generally recognised across all jurisdictions within the European Union (the "EU")[2] (including the Netherlands[3], Germany and the United Kingdom), but also in most non-EU jurisdictions (including the United States of America[4]).

4.2 The above is supported by, amongst other things, Directive 2002/47/EC on financial collateral arrangements (the "Collateral Directive"), which presupposes that the right of use codified for security interest collateral arrangements under article 5 Collateral Directive does not need to be codified for title transfer collateral arrangements.[5]

4.3 The transfer of all right, title and interest in collateral is explicitly stipulated in most industry standard documentation for title transfer collateral arrangements, such as:

(A) the 1995, 2000 and 2011 Global Master Repurchase Agreements (each a "GMRA"), as published by the International Capital Market Association;[6]

(B) the 2000 and 2010 Global Master Securities Lending Agreements (each a "GMSLA"), as published by the International Securities Lending Association;[7] and

(C) the 1995 English law Credit Support Annexes and the 2013 English law Standard Credit Support Annex (each a "CSA"), as published by the International Swaps and Derivatives Association.[8]

4.4 To conclude, as follows from paragraphs 4.1 and 4.2 above, the collateral receiver's right to reuse the collateral and the risks and consequences involved therewith automatically follow from the very essence of a title transfer collateral arrangement (especially if documented under a GMRA, GMSLA or CSA; see paragraph 4.3 above). Therefore, in

[2] Most certainly as of 2002 by virtue of the Collateral Directive (as defined in paragraph 4.2).

[3] Under Dutch law, for instance, two main principles of ownership are: (i) *totality*, i.e. ownership encompassing all proprietary rights conceivable with respect to an asset; and (ii) *abstractness*, i.e. ownership not being able to be defined by an exclusive enumeration of such proprietary rights, as such rights may arise both under law and the nature of ownership as such, and such rights not requiring any explicit justification. These principles are reflected in the Dutch civil law description of "ownership" (*eigendom*) in article 5:1(1) Dutch Civil Code (*Burgerlijk Wetboek*), according to which ownership is "*the most comprehensive right*" a person can have to an asset. See T.H.D. Struycken, *De numerus clausus in het goederenrecht*, Serie Onderneming en Recht, Deel 37, Deventer: Kluwer 2007, par. 3.7.2. Also see See G.C.J.J. van den Bergh, 'Schijnbewegingen - Hercodificatie en eigendomsdefinitie in historisch perspectief', *Recht en Kritiek*, 13 (1987) 4, p. 327-341.

[4] See *supra* Keijser 2006, p. 177.

[5] The consideration behind this presupposition is that a right of use is implied by the concept of ownership. See *supra* Keijser 2006, who considers that "*it is obvious that the [collateral receiver under a title transfer collateral arrangement] has a 'right of use'*", and that such collateral receiver has "*an unlimited right of disposal*" and can "*dispose of the assets he has acquired in any way he deems fit*". Also see J.L. Schroeder, 'Repo Madness: The Characterization of Repurchase Agreements Under the Bankruptcy Code and the U.C.C.', *Syracuse Law Review*, 1996/46(3), p. 999-1050.

[6] See paragraphs 6(e), 6(f), 9(h) GMRA.

[7] See paragraphs 2.3 and 4.2 GMSLA.

[8] See paragraphs 3(a) and 5 CSA.

case of a title transfer collateral arrangement the collateral receiver's right of reuse and the risks and consequences involved therein are self-evident, even if not explicitly mentioned in the collateral arrangement or otherwise.

II. Obligations irrelevant for the legal position of the collateral provider

4.5 The legal position of the collateral provider as set out paragraphs 4.1(C) and 4.1(D) above applies irrespective of whether the collateral receiver has or has not reused the collateral. This means that irrespective of whether the collateral receiver will or will not reuse the collateral (and, consequently, irrespective of whether the collateral provider will or will not give its consent to such reuse or is informed of such reuse and the risks involved therein) the collateral provider:

(A) will only have a contractual claim against the collateral receiver for the delivery of financial instruments *equivalent* to the collateral (and, consequently, will have no claim for the redelivery of the actual financial instruments initially delivered as collateral); and

(B) will not be able to claim the collateral with preference over other creditors of the collateral receiver.

4.6 This applies both within and outside the collateral receiver's default or insolvency. Consequently, the consent and information required by the Obligations would not in any way be relevant for the collateral provider's legal position.

III. Information Obligation relates to non-existing information

4.7 In a strict interpretation of the Information Obligation, the collateral receiver must inform the collateral provider of the risks and consequences that may be involved in granting the *consent* to be obtained under the Consent Obligation.

4.8 Considering paragraph 4.5 above, the reuse of collateral, and therefore giving consent to such reuse, does not imply (legal) risks or consequences as such, since the legal position of the collateral provider without consent is equal to its position with consent. Therefore, it is unclear of which risks and consequences the collateral provider should be informed if it gives consent to reuse of collateral provided under a title transfer arrangement. It is indeed arguable that no such risks and consequences exist at all.

IV. Information Obligation illogically mutual

4.9 As follows from paragraphs 4.1 and 4.2 above, the counterparties to a title transfer collateral arrangement that has two financial instrument legs (such as a securities lending transaction, under which each counterparty receives financial instruments from the other counterparty) will each have a right of reuse. Typically, they will each want to be able to exercise their respective rights of reuse. The Obligations imply that the counterparties are required to:

(A) obtain each other's consent for the reuse of the collateral provided by the other counterparty; and

(B) inform each other of the risks and legal consequences that may be involved in such consent.

This results in the Information Obligation being illogically mutual, as a counterparty that informs another counterparty of the risks and legal consequences involved with a consent to reuse, may itself be expected to be aware of such risks and legal consequences and therefore does not need to be informed thereof by the other counterparty (if such need exists at all; please see paragraphs 4.1 through 4.8 above).

5. Reasons why the Obligations have adverse effects

I. Erosion of title transfer concept and concept of ownership

5.1 Article 15(1) Draft SFTR Proposal is not only legally inconsistent and superfluous, but it also has significant adverse consequences.

5.2 The introduction of the Obligations erodes both the essence of a title transfer collateral arrangement and the (international) uniformity of the concept of ownership. In particular, the Consent Obligation, notwithstanding article 15(4) Draft SFTR Proposal and the deemed consent under article 15(1)(b) Draft SFTR Proposal, suggests that the collateral receiver will only have the right of reuse if this is stipulated in the title transfer collateral arrangement (even if such a right of reuse should automatically follow from the very essence of a title transfer collateral arrangement and the concept of outright ownership; see paragraphs 4.1 through 4.3 above). The Consent Obligation could therefore give rise to undesirable argumentation *a contrario*, in the sense that it could form reason to argue that the collateral receiver does not have rights that it has not stipulated explicitly in the title transfer collateral arrangement. This may include rights that a collateral receiver under a title transfer collateral receiver will typically want to obtain, such as the right to collect payments and exercise voting rights on the financial instrument it receives as collateral.

5.3 The erosion of the essence of a title transfer collateral arrangement and the (international) uniformity of the concept of ownership could furthermore result in:

(A) an increased recharacterisation risk in certain jurisdictions (including the Netherlands), because title transfer collateral arrangements may be considered not to result in the collateral receiver obtaining all rights that are typically implied by outright ownership (unless so stipulated explicitly), and thus not to effectuate an outright title transfer;

(B) legal uncertainty amongst counterparties to title transfer collateral arrangements, also considering paragraph 5.1(A) above; and

(C) counterparties feeling urged to amend both new and existing title transfer collateral arrangements, also considering paragraph 5.1(B) above, thus creating less efficient markets for securities financing transactions.

5.4 These effects apply to both new and existing title transfer collateral arrangements, even in the absence of any transitional provision explicitly giving the Obligations retroactive effect.

5.5 Besides being undesirable, these effects are contrary to the rationale of the Collateral Directive.[9]

II. Impact on documentation

5.6 The Obligations may have a significant impact on the documentation of title transfer collateral arrangements:

(A) first, as set out in paragraph 5.3(C) above, counterparties could feel urged to include explicit wording regarding consent to reuse and the risks and consequences associated therewith in both new and existing title transfer collateral arrangements (which is especially cumbersome with regard to existing title transfer collateral arrangements); and

(B) second, counterparties could feel urged to amend both new and existing title transfer collateral arrangements in order to explicitly stipulate other rights than their

[9] See recitals (9), (10) and (13) Collateral Directive.

right of reuse, and thus address the erosion of the title transfer concept caused by the Obligations (see paragraph 5.3(C) above).

5.7 This applies notwithstanding any deemed compliance with the Obligations (see paragraph 6.2 below). Considering that the Obligations are superfluous (see paragraph 4 above), we consider this significant impact on documentation to be inappropriate and disproportionate. Furthermore, we consider this impact on documentation to be contrary to the rationale of the Collateral Directive.[10]

6. Required amendment of article 15(1) Draft SFTR Proposal

6.1 The Obligations are not only superfluous and inconsistent with the principles of title transfer collateral arrangements (see paragraph 4 above), but also have significant adverse effects (see paragraph 5 above). These adverse effects should be eliminated by explicitly excluding title transfer collateral arrangements from the scope of the Obligations through amendment of article 15(1) Draft SFTR Proposal.

6.2 For the avoidance of doubt, we note that such *explicit exclusion* from article 15(1) Draft SFTR Proposal is the only viable way to address the adverse effects of the Obligations. Any *deemed compliance* with the Obligations in case of a title transfer collateral arrangement is inappropriate and inadequate for these purposes for the following reasons:

(A) A deemed compliance should likely be construed as meaning that the Consent Obligation does apply in respect of a title transfer collateral arrangement but does not require counterparties to take any actual action in terms of documentation. Therefore, this would not prevent the Consent Obligation from being inconsistent with the concept of ownership and thus have the adverse effects set out in paragraph 5 above (and especially those set out in paragraphs 5.1 through 5.3 above). In addition, it suggests that a collateral provider can enter into a title transfer collateral arrangement while explicitly rejecting consent to reuse. It is unclear what the consequences of such rejection would be.

(B) Furthermore, the deemed compliance as currently contained in article 15(1) Draft SFTR Proposal only relates to the Consent Obligation, whereas the adverse effects set out in paragraph 5 above are also triggered by the Information Obligation (see especially paragraph 5.6 above).

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[10] See recitals (9) and (10) Collateral Directive.