Banking (Exemption) No. 1 of 2012

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Banking Act 1959 subsection 11(4)

Under subsection 11(4) of the *Banking Act 1959* (**the Act**), APRA may, in writing, vary or revoke a determination made under section 11 of the Act.

Banking (exemption) No. 104 (**the existing instrument**) was made by APRA on 18 August 2005 under subsections 11(1) and (4) of the Act. The existing instrument exempts particular non-APRA-regulated financial entities from the prohibition under section 66 of the Act against using or assuming particular words in relation to their financial business.

Banking (exemption) No. 1 of 2012 (**the new instrument)** revokes the existing instrument.

1. Background

Under section 66 of the Act, a person is restricted from using or assuming the words 'bank', 'banker' and 'banking' (**the restricted words**) in relation to a financial business unless APRA has granted either an exemption under subsection 11(1) of the Act or consent under subsection 66(1)(d).

The *Financial Sector (Collection of Data) Act 2001* (**FSCODA**) requires corporations engaged in the provision of finance in Australia to register with APRA, primarily for data collection purposes. FSCODA requires APRA to divide these 'registered financial corporations' (**RFCs**) into particular categories. For many years, APRA, and the Reserve Bank of Australia before it, allowed those RFCs listed under Category D (known as money market corporations) to use or assume the restricted words only in the expressions 'merchant bank', 'merchant banker' and 'merchant banking'[1]. At the time this policy came into being, merchant banks were interchangeable with money market corporations which operated in the short-term money markets to assist in financial intermediation at a time when authorised banks were prevented by law from doing so.

It is APRA's view that the term 'merchant bank' (and its derivatives) is no longer a term in widespread use and has been overtaken in common parlance by 'investment bank' (and its derivatives). APRA's policy is that consent to use 'investment bank' (and derivatives) should be granted only to financial entities authorised under the Act to carry on banking

[1] Subject to certain conditions, that the RFC must not state, imply or suggest that:
(i)the word *bank* is part of the name under which the corporation was registered under the law of a State or Territory; or
(ii) the word bank is a business name registered in relation to the corporation under the law of a State or Territory; or
(iii) the corporation is an authorised deposit-taking institution within the meaning of the Banking Act; or
(iv) the corporation is subject to prudential supervision by APRA.

business. This is to prevent the public from being misled about the regulatory status of authorised deposit-taking institutions (ADIs).

Further, the importance of a clear demarcation between regulated and non-regulated entities was evidenced by the collapse of very large – but unregulated – investment banks during the global financial crisis. This issue is therefore at the forefront of work currently undertaken by international policy-making bodies, including the Basel Committee on Banking Supervision, of which APRA is a member. APRA agrees with the importance of maintaining a distinction between the prudentially regulated and unregulated financial sector and is of the view that removing the ability of non-regulated financial entities to use the otherwise restricted terms 'bank', 'banker' and 'banking' would reinforce that distinction.

2. Purpose and Operation of the instrument

The purpose of the instrument is to revoke the existing instrument which effectively means that Category D RFCs will no longer be empowered to use the restricted terms. The instrument will take effect from the day of registration under the *Legislative Instruments Act 2003.*

3. Consultation

In April 2011, APRA wrote to all Category D RFCs consulting on the proposed revocation of the use of the term 'merchant bank' (and its derivatives). APRA subsequently consulted with the small number of RFCs which objected to the proposal and has agreed to allow a period of transition in which these entities will take steps to remove the restricted terms from use.

APRA also consulted the Office of Best Practice Regulation (OBPR), which confirmed that no further regulatory analysis in the form of a regulation impact statement is required due to the minor nature of this proposed revocation (OBPR ID 2011/13000).

4. Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

The legislative instrument the subject of this explanatory statement does not engage any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Accordingly, in APRA's assessment, this legislative instrument is compatible with human rights.