

## **Banking exemption No. 1 of 2015**

### **EXPLANATORY STATEMENT**

**Prepared by the Australian Prudential Regulation Authority (APRA)**

*Banking Act 1959*, subsection 11(1)

Under subsection 11(1) of the *Banking Act 1959* (**Banking Act**), APRA may, in writing, determine that any or all of the provisions of the Banking Act referred to in paragraphs 11(1)(a) to (e) do not apply to a person, or to a class of persons, while the determination is in force. Under subsection 11(4) of the Banking Act, APRA may, in writing, vary or revoke a determination made under subsection 11(1).

On 19 March 2015, APRA made Banking exemption No. 1 of 2015 (**2015 Exemption**) which revokes Banking (Exemption) Order No. 96 dated 22 May 2003 (2003 Exemption).

The 2015 Exemption commences on the date of its registration.

#### **1. Background**

Under section 8 of the Banking Act, it is an offence for a body corporate to carry on banking business in Australia if the body corporate is not an authorised deposit-taking institution or the Reserve Bank, except where there is a determination in force under section 11 of the Banking Act that section 8 does not apply to the body corporate.

The 2003 Exemption determined that section 8 of the Banking Act does not apply to a registered entity under the *Financial Sector (Collection of Data) Act 2001* if the entity complies with certain conditions. Those conditions were intended to ensure that if the registered entity takes money on deposit, an investor would be provided with a prudential supervision warning. The warning serves to inform the investor that the investment is provided by an entity that is not registered under the Banking Act, and is not supervised by APRA, and that the investment will not be covered by the depositor protection provisions set out in section 13A of the Banking Act.

The 2015 Exemption imposes a number of new conditions designed to clearly distinguish products offered by RFCs to retail investors from banking products.

#### **2. Purpose of making the instrument**

The purpose of the 2015 Exemption is to continue to exempt registered entities from section 8 of the Banking Act, subject to meeting the conditions set out in the 2015 Exemption.

Since the 2003 Exemption was made, and most notably since 2008, turmoil in the international financial system and the non-prudentially regulated financial sector (or ‘shadow banking’ sector), has demonstrated the need for the operations of shadow banking entities to be reviewed. In Australia, there have been a number of failures within the non-prudentially regulated financial sector, with resultant impacts on retail investors.

In December 2012, the Australian Government announced a number of proposals to improve the regulation of registered entities that issue debentures to retail investors. These proposals were designed to provide a clearer distinction between debentures offered by registered entities and deposit products offered by ADIs. APRA consulted on the proposals in April 2013. APRA released its final position on changes to the 2003 Exemption in November 2014. The proposals and consultation has resulted in a number of new or modified conditions including:

- restricting the use of certain terms, including ‘deposit’ and ‘at-call’ by registered entities in connection with investment products offered, issued or sold;
- requiring all debentures offered, issued or sold by registered entities to have a minimum 31-day maturity for new business written from 1 July 2015. For existing at-call debentures issued or sold prior to that date, the debentures will need to adhere to the conditions in the 2015 Exemption by not later than 1 January 2016;
- on maturity of a debenture, a registered entity may roll the investment into another debenture with a term to maturity of at least 31 days. Rollovers may occur even in the absence of a statement from the investor concerning the proceeds of their investment. Where an investor requests to redeem their funds on maturity of their investment, they will be able to have their money paid to them as cash, cheque or direct credit to an account at an ADI;
- registered entities will not be allowed to provide certain ‘transactional banking facilities’, namely, Automatic Teller Machine (ATM) access, BPAY, Electronic Funds Transfer at Point of Sale (EFTPOS) and cheque account facilities.

The new conditions only apply with respect to products offered to retail investors; there will be no change with respect to products marketed to wholesale investors.

### **3. Consultation**

APRA consulted with registered entities on these proposals through the release of a consultation paper in April 2013 setting out details of the proposals, and the publication of a letter on 24 May 2013 providing additional information and clarification on the operation of the transition period in relation to the proposals.

### **4. Regulation Impact Statement**

The Office of Best Practice Regulation advised that analysis in the form of a regulation impact statement (RIS) is required given the changes being proposed. APRA has adhered to this requirement and the RIS has been assessed as complying with the Government’s requirements in this regard. APRA has lodged a RIS as supporting material.

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

A Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at Attachment A to this Explanatory Statement.

## **Attachment A**

### **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

#### **Banking exemption No. 1 of 2015**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

Under section 8 of the Banking Act, it is an offence for a body corporate to carry on banking business in Australia if the body corporate is not an authorised deposit-taking institution or the Reserve Bank, except where there is a determination in force that section 8 does not apply to the body corporate.

This Legislative Instrument determines that section 8 of the Banking Act does not apply to a registered entity under the *Financial Sector (Collection of Data) Act 2001* where the entity takes money on deposit, subject to conditions including giving a prudential supervision warning to an investor in certain circumstances, the nature of investment products and debentures that are offered, issued or sold, and any advertising or marketing in connection with such products.

#### **Human rights implications**

APRA has assessed this Legislative Instrument and is of the view that it 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, the instrument is compatible with human rights.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.