



Financial Sector (Business Transfer and Group Restructure) determination No. 2 of 2017

Financial Sector (Business Transfer and Group Restructure) Act 1999

I, Wayne Byres, Chair of APRA, under section 46 of the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (the Act) and subsection 33(3) of the *Acts Interpretation Act 1901*:

- (a) REVOKE Financial Sector (Business Transfer and Group Restructure) determination No. 1 of 2015, including Transfer Rules No. 1 of 2015 made under that determination; and
- (b) MAKE Transfer Rules 2017 – Voluntary Transfers, in the form set out in the Schedule, for the purposes of subsection 10(2) and section 13 of the Act.

This instrument commences on the day it is registered on the Federal Register of Legislation.

Dated: 22 September 2017

[Signed]

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Wayne Byres
Chair
APRA

Interpretation

In this Determination

APRA means the Australian Prudential Regulation Authority.

Schedule

Transfer Rules 2017 – Voluntary Transfers comprises the 11 pages commencing on the following page.

Transfer Rules 2017 – Voluntary Transfers

Financial Sector (Business Transfer and Group Restructure) Act 1999

Introduction

1. These Rules are made under section 46 of the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (the Act). They apply to a voluntary transfer of business, under Part 3 Division 2 of the Act, from one ADI to another, or from one life insurance company to another.
2. For the purposes of subsection 10(2) of the Act, these Rules prescribe the form and content of an application for approval of a voluntary transfer of business.
3. For the purposes of paragraph 13(a) of the Act, these Rules prescribe certain ways in which a voluntary transfer may be adopted by or on behalf of a transferring body, a receiving body, or members of a transferring or receiving body.

Note **Matters to consider before lodging a formal application**

Transferring and receiving bodies are encouraged to discuss a proposed transfer of business with APRA before lodging a formal application.

Applicants should also consider the need to raise their application with, or provide information in relation to the proposed transfer of business to, other agencies, such as the ATO, ASIC, the ACCC and the FIRB.

To avoid delays in processing their application, early in their transfer planning the applicants should consider whether:

- (a) the transfer involves any shares to which the takeovers provisions under Chapter 6 of the *Corporations Act 2001* would apply;
- (b) it will be necessary for the receiving body to apply for licences or seek relief from ASIC in relation to the business proposed to be transferred;
- (c) any charges registered over the assets of the transferring body can or should be released as part of the transfer process;
- (d) where a total transfer of business is proposed, the transferring body will proceed to de-registration, and whether all matters incidental thereto will be addressed, including whether:
 - (i) in the case of a friendly society – surpluses, including those in the management fund, will be appropriately distributed (for example, either returned to the members at the time of the transfer, or transferred to the receiving body);
 - (ii) in the case of an ADI – capital will be returned to the members or transferred to the receiving body;
 - (iii) any licences, consents, approvals (including those under the *Banking Act 1959* or *Life Insurance Act 1995*), trademarks, business names and any other thing relating to the transferring business will need to be cancelled or (if possible) transferred to the receiving body, or whether the receiving body will need to apply for any such instrument that is not transferable; and

- (iv) the transferring body will be in a position, after the transfer has taken place, to prepare financial statements for the transferring body and lodge them if required to do so (e.g. in accordance with the *Corporations Act 2001*, the *Financial Sector (Collection of Data) Act 2001* or the *Life Insurance Act 1995*). Directors are not relieved of these responsibilities by the transfer of business.

Form and content of applications (subsection 10(2) of the Act)

4. Subsection 10(2) of the Act provides that an application for an approval of voluntary transfer must be in the form prescribed by these Rules and must contain or be accompanied by the information required by these Rules.
5. Subject to **rule 6**, an application to APRA under section 10 of the Act for approval of a voluntary transfer of business must be in the form of the three letters described in **rules 7 to 10 (inclusive) and rule 15**.
6. However, APRA may, by writing:
 - (a) require that a body provide information in its application, in addition to that required by rule 5, where APRA considers that the additional material will assist APRA in determining under section 11 of the Act whether to approve the body's application or assist APRA in performing any other function under the Act in relation to the application;
 - (b) waive a requirement for a body to provide particular information in its application where APRA considers that the information is not necessary for APRA to determine under section 11 of the Act whether to approve the body's application or perform any other function under the Act in relation to the application; or
 - (c) allow a body to supplement or vary information provided in or with the application (eg to alter the information provided under paragraph (g) of rule 7 to propose a new method of adoption of the transfer).
7. The **first letter** must be a joint letter to APRA from the transferring and receiving bodies, and must be signed by the CEO of each body and contain or attach the following information:
 - (a) the names of the transferring and receiving bodies and the ACN or ARBN of each body; and
 - (b) the proposed date of transfer; and
 - (c) whether the proposed transfer is a total or partial transfer; and
 - (d) if the proposed transfer is a partial transfer, a description of the assets and liabilities being transferred that meets the requirements of section 19 of the Act; and

- (e) any statement to APRA in terms of subsection 20(1) of the Act which should include a statement describing the extent to which taxation liabilities of the transferring body will be transferred to the receiving body; and
- (f) for each body, particulars of the way of adoption to be used and why it is appropriate for the particular transfer; and
- (g) if the proposed way of adoption in relation to a body is the usual way of adoption set out in rule 12, a draft of the information document (a draft information document) to be distributed to relevant members of the body for voting purposes (which must include the information set out in rule 8 and, before it can be sent to members, be approved by APRA under rule 9); and
- (h) if the proposed way of adoption in relation to a body is *not* the usual way of adoption set out in rule 12, supporting reasons for this, including how it is proposed to take into account the interests of members (or relevant a class of members) of that body; and
- (i) details of other regulatory approvals that may be required for the transfer; and
- (j) details of how it is proposed to take into account the interests of policy owners, depositors, creditors or other investors; and
- (k) any legal documentation relating to the proposal.

Note 1 APRA will, in accordance with requirements of the Act, consult with the ATO (to ensure that the transfer will not breach a taxation law), the ACCC (to ensure that the transfer will not breach the *Competition and Consumer Act 2010*), ASIC (to ensure that the transfer will be consistent with the *Corporations Act 2001* or other relevant legislation) and, if necessary, the FIRB, to ensure the transfer will not breach the *Foreign Acquisitions and Takeovers Act 1975*.

Note 2 Where approvals are required under another Act, such as the *Banking Act 1959* (section 63), the *Financial Sector (Shareholdings) Act 1998* and/or the *Insurance Acquisitions and Takeovers Act 1991*, an application requesting that approval should be attached to the first letter. The application under the other Act may refer to information supplied in first letter. The application under the other Act must, of course, contain any additional information required by the other Act or necessary for the application under the other Act to be dealt with. APRA and Treasury will endeavour to process these applications jointly.

Note 3 Where authorisation of an acquisition of shares or assets may need to be sought under the *Competition and Consumer Act 2010*, the receiving body should make an initial approach, or directly apply, to the ACCC. Where approvals may be required under the *Foreign Acquisitions and Takeovers Act 1975*, a receiving body that is or may be a 'foreign person' should make an initial approach, or directly apply, to the FIRB.

Note 4 The onus is on applicants to have made the relevant applications and received the relevant approvals at the time required by the other Act under which the approval is required. Subsection 11(2) of the Act provides that APRA must not approve a transfer of business if it considers that the transfer should not be approved having regard to the provisions of certain other Acts.

Note 5 Where the transferring and receiving body both propose that the transfer will be adopted by the way in rule 12, the first letter will need to attach a draft information document for members of the transferring body and a separate draft information document for members of the receiving body.

8. A draft information document (see paragraph 7(g)) must include:
- (a) a brief description of what a transfer of business transaction is, both in practical terms and in the context of the Act; and
 - (b) a brief description of the proposed transfer which must, at a minimum, include the following:
 - (i) whether it is a total or partial transfer of business; and
 - (ii) if it is a partial transfer, a description of the business; and
 - (iii) the reason for the transfer of business; and
 - (iv) the proposed transfer process; and
 - (v) the proposed effective date of transfer; and
 - (c) particulars of:
 - (i) the financial position of the transferring body and the receiving body; and
 - (ii) any independent advice obtained by the bodies or either of them (in summary form); and
 - (iii) any material changes in the financial position of the bodies since the date of the last balance sheet laid before the annual general meeting; and
 - (d) particulars of any interest (financial or otherwise) that any officer of any of the bodies has in the proposed transfer of business; and
 - (e) particulars of:
 - (i) any compensation or other consideration proposed to be paid to; and
 - (ii) any other incentive or benefit proposed to be given to; and
 - (iii) any agreement, that is conditional upon the transfer of business, entered into with

an officer, member, depositor, policyholder or investor in relation to either the transferring or receiving body, in relation to the proposed transfer of business; and

- (f) details of the effect of any such compensation, consideration, incentive, benefit or agreement referred to in paragraph (e); and
- (g) particulars of the arrangements in place for interested parties to raise questions or be heard on issues relating to the transfer and whether an independent moderator will be engaged; and
- (h) descriptions of the transferring body and the receiving body; and
- (i) particulars of the composition of the boards (including the names of the directors and any proposed changes to the boards) of the transferring body and the receiving body; and
- (j) particulars of the effects of the transfer, including:
 - (i) changes to the rights and liabilities of the transferred members when they become members of the receiving body (compared with their rights and liabilities as members of the transferring body) and if there will be no such change, a statement to that effect; and
 - (ii) the proposed formula for conversion of membership interests in the transferring body to membership interests in the receiving body; and
 - (iii) a comparison of the fees, charges, interest rates, bonus rates and surrender values of relevant products of the transferring and receiving body; and
 - (iv) a statement from the receiving body's directors of their intentions in relation to future management of the business, including the treatment of current products and services, branches and staff; and
 - (v) any proposed changes to the rules or constitution of the receiving body; and
 - (vi) where the transferring body is a friendly society – a statement that the rules governing the operation of the benefit funds being transferred to the receiving body will, after transfer, form part of the receiving body's constitution (unless and until altered); and
 - (vii) where the receiving body is a friendly society – an explanation of any proposed changes to the benefit fund rules; and
 - (viii) if the proposal is for a total transfer of business, an explanation of arrangements for de-registration of the transferring body and distribution of any surplus funds; and
- (k) if:

- (i) the draft information document is for members of the transferring body, a recommendation by the board of directors of the transferring body in relation to the transfer; and
 - (ii) the draft information document is for members of the receiving body, a recommendation by the board of directors of the receiving body in relation to the transfer; and
- (l) if the draft information document is for members of the transferring body, written assurances from the board of the transferring body that:
- (i) (if all the business of the transferring body is to be transferred) it will ensure that the transferring body will be de-registered and all funds will be returned to members, or physically transferred to the receiving body, as appropriate; and
 - (ii) it will make arrangements to ensure that the directors of the transferring body are responsible for preparation and sign off of financial statements of the company, and are not relieved of the need to lodge financial statements in relation to any period prior to the transfer date by a transfer of business; and
- (m) if the draft information document is for members of the transferring body, a statement by the directors of the transferring body of the consequences of members not approving the transfer; and
- (n) any other information that is material to the making of a decision by a member whether or not to approve a transfer, being information that is within the knowledge of directors of the body and has not previously been disclosed to members of that body;
- (o) where the transfer of business proposal will trigger the application of Part 5 of Schedule 4 of the *Corporations Act 2001* in relation to a body, and the draft information document is for members of that body:
- (i) the information required by that Part; and
 - (ii) a brief statement outlining the nature of that trigger, an explanation of the extent to which the proposal will affect the mutual status of the body, and the effect on the members of the body; and
- (p) any other information that APRA, in writing, specifies must be included in the information statement.

Note In relation to subparagraph 8(b)(v), a transfer will be taken to have effect immediately on the expiration of the day preceding the effective date of transfer.

9. APRA may, in writing:

- (a) approve a draft information document if APRA is satisfied that:

- (i) it complies with rule 8 (including providing any additional information required by APRA under paragraph 8(p)); or
 - (ii) any non-compliance with rule 8 should be waived; or
- (b) approve a draft information document subject to such amendments specified in APRA's approval to ensure that it does comply with rule 8.

Note 1 Before approving a draft information document APRA will consult with ASIC and these consultations are likely to cover whether the contents of the draft information document are consistent with the disclosure requirements that would be required under Part 5.1 or sections 636 and 638 or Part 5 of Schedule 4 of the *Corporations Act 2001* (as the case may be) if the transfer proceeded under those provisions.

Note 2 The above provisions of the *Corporations Act 2001* must be complied with where applicable.

10. The **second letter** must be a letter from the receiving body, signed by the CEO of that body, and must contain or attach the following information:

- (a) an indicative purchase price, details of how the transfer will be funded and its impact on solvency and/or capital ratios and profit levels; and
- (b) an explanation of the due diligence and/or actuarial valuation process undertaken or to be undertaken (APRA may arrange for an independent expert to make a report of the proposal); and
- (c) business plans, including discussion of how the purchase fits within the receiving body's strategy and any likely changes to naming, activities undertaken and the scale of operations; and
- (d) integration plans, including the impact on product lines (and any likely impact on fees and charges), distribution/branch networks and staffing (including the number of staff transferred and the terms and conditions of the transfer); and
- (e) a description of the management and organisational structure of the receiving body post-transfer and, where relevant, any changes to the board of that body; and
- (f) details of risk management systems (including group reporting arrangements) applying to the transferred business; and
- (g) written assurances from the board of the receiving body that it:
 - (i) is satisfied, on the basis of appropriate due diligence, that the liabilities and assets transferred are fairly valued; and
 - (ii) will have management resources, systems and controls in place to manage effectively the business transferred; and

- (iii) will meet all APRA requirements and directions, and will have systems in place to meet all prudential and statistical requirements; and
- (iv) will observe any prudential requirements imposed by, or agreed with, APRA relating to the transfer; and
- (h) where the receiving institution is foreign owned or incorporated outside Australia, written advice from the home supervisor as to whether it consents to the transfer of business.

Note For the purposes of subsection 10(2) of the Act, a **third letter** (to be sent after adoption of the transfer has taken place) is prescribed in rule 15 below.

Prescribed adoption processes (paragraph 13(a) of the Act)

11. Rules **12 to 14** below prescribe ways in which a transfer may be adopted by or on behalf of a body, or by or on behalf of members of a body, for the purposes of paragraph 13(a) of the Act.

Note 1 **Parallel legislative obligations**

In addition to the prescribed or varied (where applicable) adequate adoption process, a transferring or receiving body may be required to comply with additional requirements.

Where the transfer of business proposal would vary or cancel class rights of members under Part 2F.2 of the *Corporations Act 2001*, the procedures in the *Corporations Act 2001* for holding meetings of different classes will be required. Part 5 of Schedule 4 to the *Corporations Act 2001* may also apply.

Applicants should also consider any obligations that may arise towards policy owners or depositors from the reporting obligations in Chapter 7 of the *Corporations Act 2001* including, but not limited to, those arising under section 1017B in planning a transfer of business.

Applicants should also consider the laws referred to in section 43 of the Act and the way those laws apply, as prescribed in the *Financial Sector (Transfers of Business) Regulations 1999*.

Note 2 A prescribed way of adopting a transfer will only constitute ‘adequate adoption’ (within the meaning of section 13 of the Act) of a transfer if, in accordance with paragraph 13(b) of the Act, APRA considers that the adoption of the transfer in that way adequately takes into account the interest of members of the body.

Note 3 Before proceeding to adopt a transfer, the applicants should discuss with APRA whether APRA is likely to consider that their proposed method of adoption of the transfer will adequately take into account the interests of members (within the meaning of paragraph 13(b) of the Act).

Note 4 Consistent with requirements under section 12 of the Act, APRA will consult with ASIC on whether a form of adoption adequately takes into account the interests of members (within the meaning of paragraph 13(b) of the Act). Under the required consultation process, ASIC will advise APRA about the proposed form of adoption and whether, in the circumstances, it constitutes compliance with or an acceptable substitute for member protections contained in the *Corporations Act 2001* as mentioned below.

12. For the purposes of paragraph 13(a) of the Act, the following way of adopting a transfer (the usual way of adoption) is prescribed:

- (a) the transfer is approved by members of the body in the following way:
 - (i) if the constitution of the body provides for only one vote per member – by 75% of votes cast by members (whether in person or by proxy) on the resolution to adopt the transfer, at a general meeting of members; or
 - (ii) if the constitution of the body does not provide for only one vote per member – by 75% of members voting (whether in person or by proxy) on the resolution to adopt the transfer, at a general meeting of members; and
- (b) before the transfer is approved, the body gave all members notice of the general meeting at which the resolution approving the transfer was to be adopted at least 21 days in advance of that meeting; and
- (c) the notice referred to in paragraph (b) set out the date, time and place of the general meeting; and
- (d) the notice referred to in paragraph (b) was accompanied by the approved information document for members of the relevant body; and
- (e) for the purposes of meeting, the body treated all members as having made an election under regulation 12.4.03 of the *Corporations Regulations 2001* to receive notices under subsection 249J(1) of the *Corporations Act 2001* (whether or not they in fact did so elect).

Note 1 The way of adopting a transfer prescribed in rule 12 is likely to be required in relation to most transfers of business. That is, in terms of paragraph 13(b) of the Act, APRA is unlikely to be satisfied that the ways prescribed in rules 13 and 14 below will adequately take into account the interest of members of the transferring and receiving bodies unless special circumstances are present (although APRA will consider each matter on its merits).

Note 2 The effect of paragraph 12(e) is that all members must be given notice of the meeting at which the resolution is to be passed, including members who, under regulation 12.4.03, have elected, or are taken to have elected, not to receive notices of meetings under subsection 249J(1). In addition, in relation to the meeting, the body must treat all members on the basis that they are entitled to the benefit of subsection 249H(1), subsection 249P(6) and paragraph 249Z(b) of the *Corporations Act 2001*: see regulation 12.4.03(4) of the *Corporations Regulations 2001*.

13. For the purposes of paragraph 13(a) of the Act, the following way of adopting a transfer is prescribed:

- (a) the transfer is approved by a resolution of the board of directors of the body; and
- (b) if APRA determined in writing that certain requirements must be complied with in relation to notice to directors of the meeting at which the resolution was to be made (including requirements as to the content of such notice),

the body complied with those requirements before the directors made the resolution.

Note For the purposes of paragraph 13(b) of the Act, APRA is unlikely to consider that the adoption of a transfer in this way adequately takes account of the interests of members of the transferring and receiving bodies unless special circumstances are present (although APRA will consider each matter on its merits).

In deciding whether the way of adopting a transfer prescribed in this paragraph does satisfy paragraph 13(b) of the Act, and for the purposes of paragraph 11(1)(c) of the Act, APRA will consult with ASIC, and is likely to consider:

- (a) whether, in the circumstances of the proposed transfer, the interests of members (including members who are depositors or policy owners) are such that the usual way of adoption in rule 12 need not apply;
- (b) whether the transfer of business proposal is such that the interests of members would not be substantially affected by the transfer (for example, where only a small portion of the business is being transferred); and
- (c) whether arrangements will be put in place for members (including depositors or policy owners) to raise questions and be heard on issues, and whether an independent moderator will be engaged.

14. For the purposes of paragraph 13(a) of the Act, if a transferring or receiving body is not incorporated in Australia, the following way of adopting a transfer is prescribed for that body:

- (a) the transfer is approved by a decision of a senior executive, or a group of senior executives, of the body, being an executive or executives who have been approved by APRA in writing for the purposes of this paragraph; and
- (b) that decision was taken in accordance with a procedure approved by APRA in writing (APRA having determined that the procedure adequately takes into accounts the interests of the body and members of the body); and
- (c) (without limiting paragraph (b)) if APRA determined in writing that certain requirements must be complied with in relation to notice of any meeting, or notice of the proposed transfer (including the content of any such notice), the body complied with those requirements before adopting the resolution.

Note For the purposes of paragraph 13(b) of the Act, APRA is unlikely to consider that the adoption of a transfer in this way adequately takes account of the interests of members of the transferring and receiving bodies unless special circumstances are present (although APRA will consider each matter on its merits). In deciding whether the way of adopting a transfer prescribed in this paragraph does satisfy paragraph 13(b) of the Act, APRA will consult with ASIC, and is likely to consider the matters set out in the note to rule 13 above.

15. After the transferring and receiving bodies have adopted the transfer, and before APRA approves the transfer under section 11 of the Act, the

transferring and receiving bodies must jointly forward a **third letter** to APRA. The letter must be signed by the CEO of each of those bodies, and must:

- (a) provide evidence that the transfer of business has been adopted by each of the bodies, either by the method proposed in the first letter, or in one of the other ways prescribed; and
- (b) attach copies of any other regulatory approvals necessary for the transfer.

Note 1 Evidence of the adoption of the transfer by a body may include, but is not limited to, a copy of the relevant minute of the meeting at which the resolution was passed, certified by the Chairman to be an accurate copy of the minute.

Note 2 Before proceeding with adequate adoption, applicants should consult with APRA as to whether: (1) APRA is likely to consider that the adoption of the transfer in that way adequately takes into account the interests of members of the body as required by paragraph 13(b) of the Act; and (2) APRA considers that the information provided in and with the first and second letters is in accordance with these rules and otherwise satisfactory.

Interpretation

16. In these Rules:

ACCC means the Australian Competition and Consumer Commission established under section 6A of the *Competition and Consumer Act 2010*.

ACN has the meaning in section 9 of the *Corporations Act 2001*.

ADI means an authorised deposit-taking institution in terms of subsection 4(1) of the Act.

approved information document means a draft information document that has been approved by APRA under rule 9 together with any amendments required under APRA's approval.

APRA means the Australian Prudential Regulation Authority established under the *Australian Prudential Regulation Authority Act 1998*.

ARBN has the meaning in section 9 of the *Corporations Act 2001*.

ASIC means the Australian Securities and Investments Commission within the meaning of the *Australian Securities and Investments Commission Act 2001*.

ATO means the branch of the Commonwealth known as the Australian Taxation Office.

body means a transferring body or a receiving body.

CEO means the Chief Executive Officer of the transferring body or the receiving body (as the case requires) and if the body does not have a person with the title of CEO or Chief Executive Officer means the most senior executive

officer of the body for the time being, by whatever name called, and whether or not he or she is a member of the governing body of the body.

draft information document has the meaning in paragraph 7(g) of these Rules.

FIRB means the non-statutory Commonwealth body known as the Foreign Investment Review Board established to advise the Treasurer on foreign investment matters.

friendly society has the meaning in the *Life Insurance Act 1995*.

life insurance company has the meaning in subsection 4(1) of the Act.

member means a member of the transferring body or a member of the receiving body, as the case may be.

partial transfer has the meaning in subsection 4(1) of the Act.

receiving body has the meaning in subsection 4(1) of the Act.

Rules means these *Transfer Rules 2017 – Voluntary Transfers*.

total transfer has the meaning in subsection 4(1) of the Act.

transferring body has the meaning in subsection 4(1) of the Act.

usual way of adoption has the meaning given in Rule 12 of these Rules.

voluntary transfer has the meaning in subsection 8(1) of the Act.