

Banking exemption No. 1 of 2017

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Banking Act 1959, section 11

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

On 14 December 2017, APRA made Banking exemption No. 1 of 2017 (the instrument), which replaces Banking exemption No. 1 of 2016 (2016 Exemption).

The instrument commences on 1 January 2018.

1. Background

Under section 7 of the Act, it is an offence for a person who is not a body corporate to carry on banking business in Australia, except where there is a determination in force under section 11 of the Act that section 7 does not apply to the person. Under section 8 of the 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 Act that section 8 does not apply to the body corporate.

The 2016 Exemption determined that the persons administering the RCDFs listed in Schedule 1 of that determination are exempt from the prohibitions in sections 7 and 8 of the Act from, provided that they comply with the conditions specified in Schedule 2 of that determination.

RCDFs are funds that have been set up to borrow and use money for religious and charitable purposes. While the business of such entities has traditionally fallen within the definition of ‘banking business’ under the Act, such entities have historically been exempt from the need to be authorised under the Act through a series of exemptions under subsection 11(1) of the Act, the most recent of which was the 2016 Exemption. The 2016 Exemption allows RCDFs to continue to operate, subject to revised conditions that seek to reduce the likelihood that an investor in an RCDF might confuse such an investment with a deposit. These conditions include:

- retail products offered to retail investors to have a minimum term or call period of 31 days;
- RCDFs will be allowed to release funds early where exceptional circumstances exist that warrant the early release;
- certain transactional banking facilities such as Electronic Funds Transfer at Point of Sale (EFTPOS), BPAY facilities and Automatic Teller Machine (ATM) facilities must not be offered to retail investors; and

- restrictions on use of certain words and expressions including ‘at-call’ and ‘deposit’.

The 2016 Exemption imposed the revised conditions on any new business of RCDFs from 1 January 2017, and on all business of RCDFs from 1 January 2018.

2. Purpose and operation of the instrument

The purpose of the instrument is to continue the exemptions under subsection 11(1) of the Act while including two additional RCDFs in the list of RCDFs that are subject to exemption. These new RCDFs have been created by the controlling entities of two RCDFs that are currently operating under the 2016 Exemption and which wish to keep separate “retail” business (conducted with persons that are not affiliates of the RCDF) in response to changes to the rules regarding Australian Financial Service Licences that will take effect on 1 January 2018.

Minor amendments have also been made relative to the 2016 Exemption to:

- include the words ‘in relation to the activities of the funds’ in paragraphs 1 and 2 of Schedule 1 in order to make it clear that the scope of the controlling entity’s exemption is limited to the activities of the fund listed in Schedule 1;
- remove certain transitional provisions that are present in Schedule 2 to the 2016 Exemption, as they will no longer be required when this instrument commences on 1 January 2018; and
- revoke Banking exemption No. 4 of 2014 made on 1 December 2014 and Banking exemption No. 2 of 2015 made on 12 November 2015. These two instruments had limitations as to the time in which they were to operate, which has now passed. As the instruments are redundant, they have been revoked.

3. Consultation

APRA consulted directly with each of the controlling entities of the RCDFs that are being added to the list of RCDFs. APRA did not consult in relation to the minor amendments as the changes are minor and machinery.

4. Regulation Impact Statement

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for this legislative instrument.

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

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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 7 of the *Banking Act 1959* (Banking Act), it is an offence for a person who is not a body corporate to carry on banking business in Australia except where there is a determination in force that section 7 does not apply to the person. 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 sections 7 and 8 of the Banking Act do not apply to Religious Charitable Development Funds, subject to conditions relating to the facilities offered in connection with the financial products, and any advertising or marketing in connection with the financial products. Religious Charitable Development Funds are funds formed for religious and charitable purposes and operated on a not-for-profit basis.

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.