

Banking (prudential standard) determination No. 2 of 2023

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Banking Act 1959, section 11AF

Under subsection 11AF(1) of the *Banking Act 1959* (the Act), APRA has the power to determine standards (prudential standards), in writing, in relation to prudential matters to be complied with by authorised deposit-taking institutions (ADIs) and authorised non-operating holding companies (authorised NOHCs). Under subsection 11AF(3) of the Act, APRA may, in writing, vary or revoke a prudential standard.

On 27 February 2023, APRA made Banking (prudential standard) determination No. 2 of 2023 (the instrument), which revokes *Prudential Standard APS 120 Securitisation* made under Banking (prudential standard) determination No. 10 of 2022 and determines a new *Prudential Standard APS 120 Securitisation* (APS 120).

The instrument commences upon registration on the Federal Register of Legislation.

1. Background

APRA released a new suite of prudential standards in November 2021 that impose regulatory capital requirements (the new capital standards) on ADIs for the purpose of ensuring ADIs hold sufficient capital to address the risks associated with their operations. The changes followed recommendations from the 2014 Financial System Inquiry to increase capital requirements for ADIs such that they meet ‘unquestionably strong’ capital benchmarks and to meet Australia’s commitment for internationally agreed standards for prudential regulation for ADIs by implementing capital standards based on the framework agreed by the Basel Committee on Banking Supervision.

The new capital standards, which came into effect from 1 January 2023, necessitated a series of consequential amendments to other existing prudential standards to ensure consistency of APRA’s broader prudential framework with the new capital standards. The key changes, finalised in October 2022, included ensuring APRA’s broader prudential framework reflects changes made in the new capital standards. For example, in the treatment of exposures to New Zealand and in terms of liquidity requirements which need to be amended as a result of the changes to residential mortgage risk weights in the new capital standards; and updating cross references to the new capital standards.

APRA is now making further amendments to correct some cross references in APS 120 that were not included correctly within the prudential standard.

2. Purpose and operation of the instrument

The purpose of the instrument is to revoke APS 120 made under Banking (prudential standard) determination No. 10 of 2022 and replace it with a new version of the prudential standard incorporating the correct cross references.

APS 120 requires ADIs to adopt prudent practices in managing the risks associated with securitisation and to ensure that sufficient regulatory capital is held against the associated credit risk.

Where the instrument refers to an Act, Regulation, prudential standard or Australian Accounting Standard, this is a reference to that instrument as in force from time to time, and which is available on the Federal Register of Legislation at www.legislation.gov.au.

APS 120 provides for APRA to exercise various discretions. Decisions made by APRA exercising those discretions are not subject to merits review. This is because these decisions are preliminary decisions that may facilitate or lead to substantive decisions which are subject to merits review.

A breach of a prudential standard is also a breach of the Act, as the Act provides that regulated entities must comply with the standard. However, there are no penalties prescribed for such breaches. Instead, an ADI's breach of a provision in the Act is grounds for APRA to make further, substantive decisions under the Act in relation to the ADI. Those decisions are:

- (a) to revoke an authority to carry on banking business (section 9A of the Act); and
- (b) to issue a direction to the ADI, including a direction to comply with the whole or part of a prudential standard (section 11CA of the Act).

It is only at this stage that an ADI is exposed to a penalty: loss of its authority under section 9A or 50 penalty units if it breaches the direction (section 11CG of the Act). In nearly all cases¹ the decision is preceded by a full consultation with the ADI to raise any concerns it may have in relation to the decision.

A decision of APRA to impose a direction is subject to merits review under section 11CA of the Act, which is appropriately available at the point where an ADI could be exposed to a penalty.

A decision of APRA to revoke an authority under the Act is subject to merits review, unless either:

- (a) APRA has determined that access to natural justice and merits review is contrary to the national interest or contrary to the interests of depositors with the ADI; or

¹ Subsection 9A(4) of the Act specifically provides that APRA does not need to consult where APRA is satisfied that doing so could result in a delay in revocation that would be:

- (a) contrary to the national interest; or
- (b) contrary to the interests of depositors with the ADI.

- (b) the authority is an authority that is to cease to have effect on a day specified in the authority (section 9A(8) of the Act).

3. Consultation

The new version of APS 120 corrects minor cross referencing errors and there is no change to the policy intent of the prudential requirements. As such further public consultation was not required in determining the new version of APS 120. APRA previously consulted on the consequential amendments to the ADI capital reforms in July to August 2022 prior to making Banking (prudential standard) determination No. 10 of 2022.

4. Regulation Impact Statement

The Office of Impact Analysis advised that no Regulation Impact Statement is required for the amendments to APS 120 as the changes to the prudential standard are minor and machinery.

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* (HRPS Act).

Overview of the Legislative Instrument

The purpose of the instrument is to revoke *Prudential Standard APS 120 Securitisation* and replace it with a new version of the prudential standard to correct cross references to paragraphs in the prudential standard. APS 120 sets out prudential requirements that apply to authorised deposit-taking institutions (ADIs). ADIs are bodies corporate that have been granted the authority, under the *Banking Act 1959*, to carry on banking business in Australia.

Human rights implications

APRA has assessed the 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 HRPS Act. 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.