14 August 2017

The Manager
Banking, Insurance and Capital Markets Unit
Financial System Division
The Treasury
Langton Crescent
Email: lenderrules@treasury.gov.au

PRINCIPAL MEMBERS

Attention:

The Manager, Banking, Insurance and Capital Markets Unit,

Thank you for the opportunity to provide a submission to in regard to the *Treasury Laws Amendment (Non-ADI Lender Rules) Bill 2017.*

The GRCI is the Australian and New Zealand membership association for compliance and risk managers. Our members, are Heads of Compliance, compliance managers and officers in a variety of organisations, who are responsible for building the frameworks for the compliance of their organisations.

GRCI has gone out to members who may potentially be affected by the proposed changes, seeking their input to help Treasury work toward a practical solution that will achieve the intended regulatory outcomes.

We respectfully submit the following detailed feedback on the proposals:

Under the Bill, APRA will be given new rule making powers which apply to non-ADI lenders. These new powers will allow APRA to make rules relating to the lending activities of non-ADI lenders, where APRA has identified material risks of instability in the Australian financial system.

Our members understand the motivation for this change. In theory this makes sense, particularly in light of the perceived 'housing bubble' and the potential risks to the market as there are now a significant number of non-ADI lenders either in their own right or on white label lending for ADIs. In practice, though, they suggest that APRA will need to clearly identify and articulate the material threat to financial stability before making any rules.

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APRA's ability to collect data from non-ADI lenders will be improved by an alteration of the definition of registrable corporations in FSCODA. The new definition will seek to capture entities who engage in material lending activity, irrespective of whether it is their primary business.

Again, our members think this is a sensible action and will provide more comprehensive data on the industry that will enable better assessment of the risk to the financial environment, however the alteration to FSCODA must be framed in such a way that APRA may only collect data on the part of the business that is engaged in lending.

It is important to note that these powers do not equate to ongoing regulation by APRA of non-ADI lenders. APRA will not prudentially regulate and supervise non-ADI lenders as it does ADIs.

This is appreciated by members, otherwise the burden upon non-ADI lenders might be onerous, however members also suggest that the data obtained may result in reconsidering this resolution in the longer term.

Schedule 1 creates new definitions in the Banking Act to clarify the application of the provisions relating to non-ADI lenders.These changes will ensure that APRA is able to make rules relating to the lending activities of non-ADI lenders. In order to ensure that the activities of non-ADI lenders are appropriately captured under this new regime, further definitions have been added to the Banking Act including 'lending finance'. This definition makes it clear that conduct of a non-ADI lender relating to lending finance including the lending of money, with or without security or any other activities which either directly or indirectly result in the funding or originating of loans or other financing, which has the ability to cause or promote instability in the financial system, will be captured by this regime. These changes give APRA authority to make rules concerning the lending activities of non-ADI lenders where those activities may materially affect financial stability. [Item 1, subsection 5(1) of the Banking Act]

Feedback from members indicates that they would like to have disclosed early, what enforcement powers APRA will have at its disposal for these rules and non-ADI lenders.

The rule making powers for non-ADI lenders include the ability to impose different requirements to be complied with by all non-ADI lenders or by a specified class of non-ADI lenders or by one or more specified non-ADI lenders.

Members had a number of questions and suggestions in regard to this amendment. The queried how APRA would know if non-ADI lenders are responding. They also noted that threats to financial stability tend to occur on a broad basis. The expectation is that any rules made to address a threat will

therefore be applied on a broad basis. APRA will need to clearly identify the threat posed by particular non-ADI lenders if it makes rules in respect of a class of lenders or a specified lender.

Members also noted that this would need to be carefully monitored and applied, so as not to have the unintended consequence of being discriminatory or reducing competition.

Rules made by APRA under this provision may be varied or revoked from time to time, as determined by APRA and must be made in writing.Where rules apply to a class or classes of non-ADI lenders, the rules will be legislative instruments. [Item 2, Division 2, subsection 38C(1)and subsection 38C(12) of the Banking Act]

Members noted that while this will give some protection to the non-ADI lenders from any kind of knee-jerk reactions by APRA but again, careful consideration by APRA will be necessary to ensure that non-ADIs who were not problematic, could continue lending.

It was also highlighted that with this flexibility and power for APRA also comes a responsibility to ensure that changes are well and widely communicated and this market is educated and kept informed of their current requirements.

APRA's new rule making powers for non-ADI lenders are not intended to relate to lending matters which are properly the responsibility of the Australian Securities and Investments Commission (ASIC), such as responsible lending obligations. APRA is required to consult with ASIC before making any non-ADI lender rules, to ensure that any such rules are targeted appropriately, cognisant of any interaction with the various regulatory regimes for which ASIC is responsible... It will ensure that the work of APRA and ASIC in this area is consistent. [Item 2, subsection 38C(9) of the Banking Act]

Members agreed that this is appropriate and hope that the dialogue between regulators can be maintained and supported.

Schedule 2 provides consequential amendments to the FSCODA to ensure that it applies to non-ADI lenders, as regulated in new Part IIB of the Banking Act. These amendments include updates to the definition of registrable corporations which widens the class of corporations which must be registered under the FSCODA... which will enable collection of information relevant to the exercise of APRA's new powers under Part IIB of the Banking Act. [Items 1 and 2, subsection 7(1) and paragraphs 7(1)(a), (b) and (c) of the Financial Sector (Collection of Data) Act 2001]

Members support this change.

In addition, APRA will have a power to make a determination in writing to specify a corporation, or a class of corporations, for the purposes of the FSCODA. Such a determination will enable any corporations which are not captured by the widening of the class of registrable corporations in section 7 of the FSCODA to be specified by APRA.

Whilst members thought that this would provide very good flexibility to allow for changes and new economic and financial structures as part of the economy, they emphasized that due process is required here to ensure APRA does not overreach with this power. APRA will need to set out the reasons for its determination, specifying the perceived protection to financial stability, and there must be a mechanism for the specified corporation to challenge the determination. Treasury should give consideration as to which body will oversee this process.

Certain classes of corporation are excluded from the definition of registrable corporations under the FSCODA. As a result of these changes to the Banking Act and FSCODA, a further class of entities will be specifically excluded from being characterised as registrable corporations.In particular, new subsection 7(2A) will clarify that where a corporation has assets, consisting of debts due as a result of the provision of finance, and principal amounts outstanding on loans or other financing, which do not exceed $50,000,000 or any greater or lesser amount as prescribed by regulations, such a corporation is not a registrable corporation for the purposes of the FSCODA. This provision is designed to ensure that corporations with a stock of debt on their books, and a flow of debt through their books, which does not exceed $50,000,000, will not be registrable corporations for the purposes of the FSCODA. [Item 6, subsection 7(2A) of the Financial Sector (Collection of Data) Act 2001]

Members were divided in regard to this proposed change. Whilst some thought it reasonable, others were concerned that while they appreciate the consideration given to not overburdening smaller entities, they felt that the aggregation of figures may be material.

Section 31 of the FSCODA will be amended to provide that a determination by APRA not to exempt an organisation taken under paragraphs 7(1A)(a) and 7(2B)(a) (which are not legislative instruments) are reviewable decisions. [Item 8, section 31 of the Financial Sector (Collection of Data) Act 2001]

Members appreciated the discretion this proposal offers.

Section 32 of the FSCODA will be updated to reflect the definition of provision of finance to clarify that it includes the carrying out of activities, whether directly or indirectly, that result in the funding or originating of loans or other financing. This addition ensures the internal consistency within the FSCODA and carries through the concept of provision of finance which is central to the definition of non-ADI. Additionally, it is intended to capture corporations that provide finance indirectly, such as through interposed corporations or trusts. [Item 9, paragraph 32(1)(aa) of the Financial Sector (Collection of Data) Act 2001]

Members were supportive of the suggested amendment.

The provision of finance for the sole purpose of intra-group activities between related corporations has been specifically excluded from the definition of provision of finance. The intention is to specifically exclude corporations that provide finance via intra-group activities in amounts which otherwise render the corporation as a registrable corporation under the FSCODA. [Item 10, paragraph 32(1A) (b) of the Financial Sector (Collection of Data) Act 2001]

Members were supportive of the suggested amendment.

Similarly, the provision of financial advice is specifically excluded from the operation of the new provisions. It is not intended that entities whose activities are limited to the provision of financial advice would be covered by the non-ADI lender regime. [Item 10, paragraph 32(1A) (a) of the Financial Sector (Collection of Data) Act 2001]

Members were supportive of the suggested amendment.

We would welcome discussing our submission further, should you have any questions and I can be contacted directly should you need any assistance.

Kind Regards,

Naomi Burley
Managing Director