



Banking (restricted word or expression) No. 2 of 2015

Consent regarding “Offshore Banking Unit”

Banking Act 1959 – section 66

SINCE there is no determination in force under section 11 of the *Banking Act 1959* (the Act) that section 66 does not apply,

I, Sarah Goodman, a delegate of APRA:

- (a) under paragraph 66(2)(c) of the Act REVOKE the Consent to use restricted expression Offshore banking units made on 16 June 2005; and
- (b) under paragraph 66(1)(d) of the Act, CONSENT to the assumption or use in Australia of the restricted word or expression “banking” (or words of like import) by the class of persons specified in the schedule in relation to the financial business carried on by each member of the class.

This consent is subject to the conditions I IMPOSE under paragraph 66(2)(a) of the Act, specified in the Schedule.

This instrument commences on the date it is registered in the Federal Register of Legislative Instruments.

Dated 14 September 2015

[Signed]

Sarah Goodman
Executive General Manager
Policy and Advice

Interpretation

In this instrument

APRA means the Australian Prudential Regulation Authority.

Federal Register of Legislative Instruments means the register established under section 20 of the *Legislative Instruments Act 2003*.

financial business has the meaning given in subsection 66(4) of the Act.

restricted word or expression has the meaning given in subsection 66(4) of the Act.

Note 1 This instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (the LIA) (see section 5). The requirement in subsection 66(2A) of the Act, for publication of this instrument in the *Gazette*, is satisfied by registration on the Federal Register of Legislative Instruments (see subsection 56(1) LIA).

Note 2 Under subsection 66(1) of the Act, a person who carries on a financial business is guilty of an offence if the person assumes or uses, in Australia, a restricted word or expression in relation to that financial business, where:

- (i) subsections 66(1AB) and 66(1AC) do not apply; and
- (ii) APRA has not consented to that assumption or use; and
- (iii) there is no determination in force under section 11 of the Act that subsection 66(1) does not apply to that person.

The penalty is 50 penalty units or, in the case of a body corporate, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a penalty of up to 250 penalty units. Under subsection 66(1AA), an offence against subsection 66(1) is committed on the first day on which the offence is committed and on each subsequent day that the circumstances giving rise to the offence continue, including the day of conviction or any later day.

Note 3 Under subsection 66(2) of the Act, APRA may at any time impose conditions, or additional conditions, on a consent or vary or revoke conditions imposed on a consent or revoke a consent.

Note 4 Under subsection 66(3) of the Act, a person who has been given a consent under section 66 and who contravenes a condition applicable to the consent (where there is no applicable determination in force under section 11 of the Act) is guilty of an offence. The penalty is 50 penalty units or, in the case of a body corporate, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a penalty of up to 250 penalty units. Under subsection 66(3A) of the Act, an offence against subsection 66(3) is committed on the first day on which the offence is committed and on each subsequent day that the circumstances giving rise to the offence continue, including the day of conviction or any later day.

Note 5 Under subsection 66(2B) of the Act, APRA must notify the Australian Securities and Investments Commission if APRA grants or revokes a consent or imposes, varies or revokes conditions on a consent given under section 66 of the Act.

Schedule

Conditions

Offshore banking unit

1. An offshore banking unit may use the word *banking* as part of the expression *offshore banking unit*, in relation to its offshore banking business, subject to:
 - (a) if the offshore banking unit is an ADI – condition 3;
 - (b) if the offshore banking unit is not an ADI – conditions 3 to 6.

Body corporate related to an offshore banking unit

2. A body corporate that is related to an offshore banking unit may use the word *banking* as part of the expression *offshore banking unit*, in relation to the offshore banking unit's offshore banking business, subject to condition 1.

Condition applying generally

3. The offshore banking unit or body corporate related to the offshore banking unit must not use the word or expression, *banking* or *offshore banking unit*, in a misleading or deceptive way.

Example 1: If the offshore banking unit concerned is not an ADI, the word or expression must not be used in such a way as to represent or suggest that the offshore banking unit is an ADI, is otherwise authorised to carry on banking business in Australia, or is supervised by APRA.

Example 2: If the offshore banking unit concerned is an ADI, the word or expression must not be used in such a way as to represent or suggest that transactions which the offshore banking unit undertakes in the course of its offshore banking business constitute deposit-taking, or some other kind of banking business within the meaning of the Act, where this is not the case.

Conditions applying to an offshore banking unit that is not an ADI

4. If the offshore banking unit issues, or arranges (whether as an agent, broker, trustee or in any other capacity) for another person to issue, an investment product to an investor, the offshore banking unit must ensure that a consumer warning is given to the investor in the following manner:
 - (a) if, before the investment product is issued to the investor, information relating to the investment product is given to the investor in one or more paper documents (whether or not such information is also given to the investor in another form) – the warning must be clearly and prominently set out in one of those documents;
 - (b) if, before the investment product is issued to the investor, information relating to the investment product is given to the investor in one or more electronic communications (whether or not such information is also given to the investor in another form) – the warning must be clearly and prominently set out in one of those electronic communications;

- (c) in any other case – the warning must be clearly and prominently set out in a paper document or electronic communication that is given to the investor before the investment product is issued to the investor.
5. The consumer warning only has to be given where:
- (a) the offshore banking unit is a resident; or
 - (b) the offshore banking unit is a non-resident and the conduct of the offshore banking unit in issuing, or arranging for the issuing of, the investment product to the investor is done in carrying on business in Australia.
6. The consumer warning does not have to be given in any of the following circumstances:
- (a) where the investor is a related body corporate of the offshore banking unit;
 - (b) where the investor is a professional investor;
 - (c) where the investment product is provided for use by or in a business that is not a small business;
 - (d) where no consideration is provided (whether directly or indirectly) for the issue of the investment product; or
 - (e) where the investor has previously been given the consumer warning in the manner specified in condition 3 in relation to an investment product which is of the same kind as the investment product that is issued to the investor.

Interpretation

- A. In the consents and the conditions:

Act means the *Banking Act 1959*.

APRA means the Australian Prudential Regulation Authority.

ADI (which is short for authorised deposit-taking institution) has the meaning given in section 5 of the Act.

consumer warning means a statement that:

- the offshore banking unit is not authorised under the Act to carry on banking business in Australia and is not prudentially supervised by APRA; and
- any deposit, other loan or investment made to or with the offshore banking unit will not be covered by the depositor protection provisions in section 13A of the Act.

Corporations Act means the *Corporations Act 2001*.

debenture has the meaning given in section 9 of the Corporations Act.

financial product has the meaning given in Division 3 of Part 7.1 of the Corporations Act.

franchise has the meaning given in section 9 of the Corporations Act.

investment product means a transaction which consists of or includes:

- (a) the lending of money (with or without security) by the investor to the offshore banking unit or another person (whether by way of deposit or any other kind of loan); or
- (b) the investment of money by the investor in a managed investment scheme managed by the offshore banking unit or another person.

investor means a customer or client of the offshore banking unit.

issue has the meaning given in section 761E of the Corporations Act (which, for the purposes of this definition, is to be read as if *investment product* were substituted for *financial product* and subsection 761E(7) were omitted).

managed investment scheme:

- (a) has the meaning given in section 9 of the Corporations Act; and
- (b) also includes a scheme operated outside Australia which satisfies paragraph (a) of the definition of *managed investment scheme* in section 9 of the Corporations Act but which is not a body corporate or a franchise.

non-resident has the meaning given in section 6 of the Tax Act.

offshore banking business means the financial business carried on by an offshore banking unit in the capacity of an offshore banking unit.

Note: For the kinds of business activities that are carried on by offshore banking units, see section 121D of the Tax Act (definition of *OB activity*).

Offshore banking business is not banking business within the meaning of the Act, although it may include such banking business. To the extent that it includes such banking business which is carried on in Australia, it can only be carried on by an offshore banking unit that is an ADI.

offshore banking unit means an offshore banking unit within the meaning of section 128AE of the Tax Act.

professional investor has the meaning given in section 9 of the Corporations Act.

resident has the meaning given in section 6 of the Tax Act.

small business has the meaning given in subsection 761G(12) of the Corporations Act.

Tax Act means the *Income Tax Assessment Act 1936*.

- B. A reference to *issuing an investment product to the investor* means:
- (a) insofar as the investment product consists of or includes the lending of money by the investor – borrowing the money from the investor;
 - (b) insofar as the investment product consists of or includes the investment of money by the investor in a managed investment scheme – issuing an interest in the scheme to the investor in consideration for the money, otherwise than by way of secondary trading in the interest (whether or not there is also other consideration for the issue of the interest).
- C. An investment product is taken to be *of the same kind* as another investment product if:
- (a) both of the investment products are debentures issued by the same person; or
 - (b) both of the investment products are issued by the same person on the same terms and conditions (other than terms and conditions relating to the price of the product or the period of the investment); or
 - (c) both of the investment products are a financial product and are taken to be the same kind of financial product under the test in subsection 1012D(10) of the Corporations Act.
- D. Whether a body corporate is *related* to another body corporate is to be determined in the same way as under the Corporations Act.
- E. A reference to *an Act or provision of an Act* is a reference to that Act or provision as in force from time to time.