28 February 2020

Manager, Regulatory Reporting, Data Analytics
Australian Prudential Regulation Authority
GPO Box 9836
Sydney NSW 2001

By email: dataanalytics@apra.gov.au

Dear Sir/Madam,

Confidentiality of data used in ADI quarterly publications and additional historical data

The Australian Financial Markets Association (AFMA) welcomes the opportunity to make comment on APRA's proposal to determine data sources for its quarterly publications to be non-confidential. AFMA's comments express the views and concerns of our foreign ADI membership.

Confidentiality of unaudited data

AFMA's members acknowledge that APRA's objective in publishing individual ADI data is to "improve the transparency of the data APRA collects, and aligns with wider government open data policies" and that it "will bring the ADI industry more into line with the accessibility of data for the insurance and superannuation industries".

The Australian Government's public data policy statement states in part:

> *The Australian Government commits to optimise the use and reuse of public data; to release non sensitive data as open by default; and to collaborate with the private and research sectors to extend the value of public data for the benefit of the Australian public.*
>
> *Public data includes all data collected by government entities for any purposes including; government administration, research or service delivery. Non-sensitive data is anonymised data that does not identify an individual or breach privacy or security requirements.*[1]

The data that APRA is proposing to make public is sensitive private data. As it has been collected for prudential purposes it is held in trust by APRA for its purposes under the

[1] https://www.pmc.gov.au/sites/default/files/publications/aust_govt_public_data_policy_statement_1.pdf

APRA Act. While under the broad definition of the Public Data Policy Statement it becomes public data as it has been collected by the Government, this does not mean that the confidentiality of the data should be breached. In any reasonable assessment this is still private data that is held in trust.

It is also sensitive data under the Public Data Policy Statement that when published on an entity level identifies individual companies. This may also breach privacy requirements in the case of certain transactions involving individuals.

In alignment with the requirements of the APRA Act, AFMA's members believe the publishing of unaudited data must be balanced against the commercial interests of the entities whose data APRA would publish. It is incumbent on APRA to demonstrate how the publication of this data would add clarity, and provide tangible benefits to prospective users of the data. We note that APRA has yet to advise of the public benefit that is driving the current proposals.

In a market economy it is generally appropriate for firms to be entitled to maintain the confidentiality of their internal data. This is data that is produced by the firm based on the activities of the firm. It is accepted that for prudential purposes, internal confidential data may need to be provided on a regular basis to a regulator. However, this is very different to a requirement that data be made public, particularly where this data is commercially sensitive.

We do not accept that APRA should as standard practice look to publish all confidential data that it has obtained through its prudential regulatory reporting processes through the mechanism of making a determination that this confidential information is in fact not confidential for the purposes of publication.

While we accept that APRA has legislative freedom to make a determination that information is or is not confidential for the purposes of publication it is important that this question is approached in the appropriate way by APRA. It is unlikely to have been Parliament's intention that almost all information provided to APRA would be carved out through being declared not confidential, as to do so renders a significant section of the APRA Act largely superfluous in relation to that data.

There is a strong presumption in favour of the protection and secrecy of information under the APRA Act. Protected information is defined in the Act as:

> *…information disclosed or obtained (whether before or after the commencement of this section) under, or for the purposes of, a prudential regulation framework law and relating to the affairs of:*
>
> *(a) a financial sector entity; etc.*[2]

[2] Australian Prudential Regulation Authority Act 1998, Section 56.

It is an offence for this information to be disclosed by an APRA officer with a penalty of 2 years imprisonment unless the disclosure is in accordance with the appropriate subsection.

The relevant subsection in this case requires the satisfaction of Section 57 (3) Determination of Confidentiality which requires that:

> *(3) APRA must not make a determination under subsection (2) unless APRA gives interested parties for the determination a reasonable opportunity to make representations as to whether or not the relevant reporting document contains, or relevant reporting documents of that kind contain, confidential information.*

'Interested parties' here are defined in this section of the Act as:

> *…an entity or body that is required to give the document under section 13…*
> *or*
> *…an association or other body representing an entity or body, or a class of entities or bodies, required to give a document of that kind under section 13…*

This section is not relevant to those that have not supplied the documents (or their representatives) but are interested in finding out the information. Those parties can contribute information as to what the public interest might be in the release of the documents but their views on whether the item is confidential are not invited by the section as to whether the information should be kept confidential. It can readily be inferred that this is because the firms that generate the information are best placed to determine whether the information is sensitive for their business.

APRA must then make a determination reflecting a balance between the information provided by those that provide the documents or their representatives, of which AFMA would be one, around the confidentiality of the documents and the public interest representations from other parties.

We note this differs from the consultation document which states:

> *APRA encourages all parties to make representations and submissions on:*
> - *details of the specific data items that should remain confidential…*[3]

This appears to invite views from all parties on whether data is confidential. We encourage closer alignment of the process with the intention of the Act in this regard.

As a relevant party under the Act to advise on this matter, AFMA advises that the data that is proposed to be published and the reasons for changes to this data are unquestionably confidential information, as they are highly sensitive matters that each business will as a matter of course go to extensive lengths to keep confidential within their firms, using sophisticated information security measures. Information provided for

[3] https://www.apra.gov.au/consultation-on-confidentiality-of-data-used-adi-quarterly-publications-and-additional-historical

prudential purposes should not then be released by the regulator in a way that risks damage to a business's legitimate commercial undertakings.

Specific concerns

Beyond our procedural concerns and our report from the industry on the sensitivity of the data that we have provided on behalf of the industry, we note a number of specific concerns with the proposed arrangements.

We have concerns that:

- the release by APRA of market sensitive information may be incompatible with the obligations imposed on firms by ASIC's continuous disclosure regime for locally listed entities. There may also be interactions in the case of Foreign ADIs with foreign inside information requirements;
- the proposal is also expected to risk harm to competition by revealing strategic information that firms may have intended to use to compete in the market;
- while AFMA acknowledges APRA may adopt controls to ensure data quality, there is a fundamental difference in the review and approval processes over data submitted as part of regulatory returns on business day 10 after a month-end – which is subject to considerable time pressures – and audited information such as a set of published annual accounts. The publication of as yet unaudited material has considerable potential to be detrimental to the commercial interests of those entities impacted by its publication, and so increase the potential to degrade the business environment;
- there is the potential for the information to detract from clarity of information for investors;
- there is a risk that the proposed arrangements will detract from the openness of dialogue that entities currently have with the regulator;
- the arrangements appear out of step with regulators from major jurisdictions (as such, we encourage exploration of standard practice in major jurisdictions); and
- finally, we are concerned that the benefits that distribution of the data to some parties may bring might be readily achievable through more target means than the immediate publication of sensitive and confidential business data.

We discuss these concerns in more detail below.

Market sensitive information

AFMA strongly objects to the publication of this information as proposed. This is unaudited, business critical information of the highest sensitivity. It is likely that much of the information could count as inside information where it is related to listed entities.

We suggest APRA review the potential implications in relation to listed entities. Listed entities have extensive continuous disclosure obligations, with associated procedures that carefully assess and approve releases in a controlled way at a scheduled time. There is a risk that market sensitive information might be released by APRA in a way that is

incompatible with these procedures and that will provide some investors with what would otherwise be inside information.

For this reason we do not support the release of the information as proposed. If there is to be a release of this information these issues must be worked through in more detail.

We note also that as the information is proposed to be non-confidential from the time it is received by APRA as distinct from the later time when it is published, it may also be available to some parties ahead of others in the market though the Freedom of Information (FoI) request mechanism. Again, this would risk uncontrolled information leakage to the market.

Competition impacts

In a market economy firms will endeavour to find small advantages to give them the edge over competitors. We believe it is likely that the continuous exposure of entity level information will decrease the value of these advantages and thereby impact the potential for investing in competitive advantages, as they will be more likely to be exposed to competitors.

As many firms compete in a regionally competitive marketplace there is also the risk that the information will be of assistance to foreign entities that would seek to draw business away from the jurisdiction. If this were to occur, it would be to the detriment of businesses working within the Australian jurisdiction and the benefit of those working elsewhere.

Commercial interest

The publication of entity level quarterly data relating to balance sheets, income statements, asset quality and liquidity coverage ratios for ADIs poses the risk of commercial disadvantage. A key competitive factor for ADIs is their level of funding costs and their asset and liability mix. By revealing this information to other market participants, an ADI's decisions around its level of HQLA and asset mix as well as its sources of funding may become available to competitors (whether ADI or non-ADI), fostering an uneven business environment detrimental to prudentially regulated entities.

In addition, ADIs conducting other businesses in their entity (e.g. custody, prime broking etc.) may have sensitive portions of their revenue and cost base revealed to their competitors. Again, this could cause commercial detriment. Similarly, for smaller entities the level of property exposure and facility impairment could reveal the identity of a large borrower (for the relative size of the institution) to other competitors in the market, and this could potentially pose a range of issues relating to client confidentiality that should be respected, and cause a competitive detriment which should be avoided.

The proposals, as presented, effectively require a significant number of ADIs to publish as yet unaudited financial results quarterly in circumstances where those entities have not elected to seek funding from public markets. This would create an uneven playing field

whereby entities that are regulated differently are subject to less requirements for public disclosure for the same level of activity.

Clarity

We contend that the publication of individual ADI data would not necessarily provide clarity to users of the information, as the income statements of foreign ADI branches, and entities operating under different or unique business models, are not comparable. Published suites of entity level data will not necessarily convey a meaningful picture of economic performance to readers unfamiliar with each institution's particular business model.

To elaborate, an entity may have made decisions around capital investment, internal business arrangements and other matters which might temporarily affect its level of profitability when measured against its peers. These may have no impact on market behaviour but could impact an entity's reputation or perception in the marketplace, a situation that could be avoided with publication made at an industry aggregate level, as opposed to individual institution level.

We are concerned that APRA's proposal, which would effectively place in the public domain information without appropriate context, is therefore not appropriate. When public markets require entities to place their performance and results into the public domain, they do so with appropriate levels of reporting context. Individual entity information without appropriate context may not be useful to researchers or other decision makers.

Open Dialogue

AFMA's members are also concerned with the proposal to require entities with large movements or revisions for a data series to publish the explanation behind the entity's changed submissions. This proposal is inconsistent with the requirement that entities engage with APRA in an open, honest manner and bring issues promptly to APRA's attention. Such openness is an important feature of a cooperative and successful regulatory system.

At present, an entity can bring forward an issue to APRA (and the agencies) in confidence, even if not strictly required to do so under RPG 702. Nevertheless, the entity is afforded the opportunity to raise a potential problem without undue reputational risks. Similarly, an entity can give colour around large movements in data reporting that may be unnecessarily commercially prejudicial if made public. Making these remarks public has the potential to invite a lower level of disclosure and frankness between the entity and the regulator or agency, and outcome the industry is keen to avoid.

Comparability with the global regulatory reporting environment

APRA's entity-level publication proposals do not appear to be aligned with that of other major country prudential regulators. This suggests that the publication of entity level quarterly as yet unaudited data is not widely embraced by APRA's northern hemisphere peer regulators. We recommend that APRA benchmark this aspect of data publication to that of its peers, acknowledging that New Zealand publishes certain entity level data.

Public Interest

AFMA understands that the public sector, in particular the academic sector, may have the most significant interest in the data APRA proposes to be published. We would also support the view that subsequent papers emanating from this community would provide some public benefit.

These demands for greater access to confidential commercially sensitive information by the public sector must be balanced against the commercial needs of the private sector which underpin our successful economy in our market-based system. As a public sector body itself APRA must ensure it manages these competing demands appropriately. This may involve a decision-making process that includes the private sector or uses an independent party to assess the merits of publication on defined criteria.

AFMA also holds that there are likely alternative pathways that APRA can take to provide data, for example through the use of information requests under a confidentiality agreement. This is a more targeted approach and maintains the public benefit without imposing a detriment on the banking community. AFMA recommends that APRA give careful consideration to this and similar alternatives.

Concluding remarks

We submit that, for the reasons outlined above, individual entity data currently afforded protection under the APRA Act should continue to be afforded this protection, absent which publication has the potential to be of substantial detriment to the commercial interests of the affected entities.

Yours sincerely

Damian Jeffree
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