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Dear David

Exposure Draft: Deposit Takers Bill – Submissions by Chapman Tripp

Introduction

1 Chapman Tripp welcomes the opportunity to make submissions on the exposure draft of the Deposit Takers Bill (the *Bill*).

2 Chapman Tripp is a leading New Zealand full service law firm with a strong practices in financial services, banking, litigation and general corporate, amongst other practice areas. Chapman Tripp acts on behalf of a number of overseas banks who would be adversely affected by the extended extraterritorial reach of the Bill as it is currently drafted.

Submissions overview: Overseas Banks should be relieved from the Bill

3 These submissions primarily concern the application of the proposed licensing and supervision regime in the Bill to those overseas banks which are not registered banks in New Zealand nor resident here. For the purposes of this submission, these overseas banks are described as *Overseas Banks*.

4 Overseas Banks provide, in many overseas locations, essential international personal and business banking services to New Zealand businesses and residents. Because the Overseas Banks' activities are conducted offshore, and they are regulated by their home country laws, up until now, New Zealand laws have applied solely to the Overseas Banks' New Zealand activities and the Reserve Bank has recognised (amongst other things) that when New Zealand customers solicit overseas banking services from offshore, they should not be subject to New Zealand's law.

5 The Deposit Takers Bill (particularly clause 4 of Schedule 2) would extend the reach of New Zealand's jurisdiction to all banking services conducted offshore for New Zealanders, subject to the yet-unknown prescribed threshold and relief contained in any potential declarations the Reserve Bank choses to make. There is no indication that existing non-objection letters, class authorisations or guidance will be replicated in Reserve Bank declarations, or continue in respect of the restriction on using restricted words in name or title (section 401 of the Bill).

6 Chapman Tripp submits that the Reserve Bank should consider specifically the position of New Zealand customers who currently have, or would wish to have, Overseas Bank accounts, and recognise that:

6.1 it would be unnecessary to replicate the regulatory oversight of overseas banks, which may be:

(a) subject to comparable overseas regulatory supervision, in some cases, in more than one jurisdiction; and

(b) by regulators with significant resources and reputations for probity and prudential thoroughness in some of the largest and most regulated countries in the world;

6.2 such overseas regulatory supervision means that there is already assurance of the safety and soundness of these banks, and that risks they pose to New Zealand's financial system's stability are already being appropriately managed, as indicated by the Overseas Banks' high credit ratings; and

6.3 in the context of their global operations, the New Zealand market is very small, and the Overseas Banks' returns from their New Zealand businesses are reportedly modest, so that increasing the New Zealand compliance costs and operational complexity for these overseas banks would create the very real risk that Overseas Banks would withdraw critical overseas banking services to New Zealand businesses and retail customers, to the detriment of their New Zealand customers and the New Zealand financial system.

7 Discouraging Overseas Banks offering offshore banking services to New Zealand customers would be clearly contrary to the Bill's main purpose as specified in section 3 – "to promote the prosperity and well-being of New Zealanders and contribute to a sustainable and productive economy by protecting and promoting the stability of the financial system". A reduction in the range of banking products and services offered to the New Zealand market by major Overseas Banks would undermine competition and consumer choice, and the financial system's stability would be weakened should Overseas Banks' services be unavailable to the New Zealand market.

RBNZ's history of dealing with Overseas Banks

8 Chapman Tripp has engaged with the Reserve Bank on behalf of its clients since 2014, and with the FMA since 2009, in relation to the provision of banking services by Overseas Banks to New Zealand residents, principally New Zealand residents who:

8.1 have opened accounts while overseas, before returning to New Zealand, and who wish to continue banking with the relevant Overseas Bank;

8.2 are branches or subsidiaries of international businesses with group-wide banking arrangements with Overseas Banks, who are expected to open accounts with those same Overseas Banks for group banking purposes; or

8.3 wish to establish overseas bank accounts or lending to facilitate their international businesses or forthcoming emigration.

9 Up until now, the Reserve Bank has acknowledged the very real needs of these customer groups and the vulnerability of these services to the extra-territorial reach of New Zealand oriented prudential regulation. The Reserve Bank:

9.1 issued Overseas Banks specific non objection letters to allow certain banking activities to be undertaken by Overseas Banks using the word "bank" or its derivatives;

9.2 issued guidance (Reserve Bank's *Guidance note for overseas banks on limitations on the use of restricted words*) which allowed the Overseas Banks' activities to continue to be operated under the current Reserve Bank of New Zealand Act 1989;

9.3 advised in 2015 that the Reserve Bank interpreted the Non-bank Deposit Takers Act 2013 so that Act did not apply extra-territorially to certain Overseas Banks; and

9.4 issued the Reserve Bank of New Zealand Act (Overseas Banks) Class Authorisation Notice 2019 to permit Overseas Banks generally to continue providing wholesale banking services critical to New Zealand wholesale businesses.

10 The FMA has also issued exemption notices on a class basis to allow Overseas Banks to offer simplified debt securities (bank call and term deposits) to retail investors.

11 In each case, the Reserve Bank and the FMA appropriately decided against extending New Zealand's domestic laws to Overseas Banks which were operating from other well-regulated jurisdictions, thereby refrained from regulating deposit-taking from New Zealand customers who would reasonably have not expected such protections from a New Zealand regulator. In doing so, the RBNZ has recognised the adverse consequences of imposing New Zealand laws on foreign operating and regulated Overseas Banks.

12 Chapman Tripp submits that the outcome of these considerations were appropriate then and are equally relevant to the Deposit Takers Bill.

How the Bill proposes to regulate banking services provided in other countries

13 The Bill (clause 4 of Schedule 2) adopts a new extraterritorial application approach which is based on the location of the customer. This change would extend the Deposit Takers Act jurisdiction further than the Non-bank Deposit Takers Act, and the Reserve Bank of New Zealand Act which (according to the Reserve Bank's *Guidance note for overseas banks on limitations on the use of restricted words)* does not apply to unsolicited sales and in other circumstances where the Overseas Banks are not actively soliciting customers in New Zealand.

14 As a consequence, any Overseas Bank who exceeds the currently unknown prescribed threshold would need to:

14.1 be licensed (potentially with additional requirements under sections 16(1)(f) and 17 as a result of being located overseas). There is no relief proposed for overlapping regulation in overseas jurisdictions;

14.2 pay levies to the Depositor Compensation Fund (if the levy regime has a minimum amount for Overseas Banks who do not offer protected deposits, as their banking should mostly be in foreign currencies);

14.3 comply with New Zealand's fit and proper requirements, which are likely to overlap requirements overseas;

14.4 get the Reserve Banks' approval for changes of control, amalgamations or entry into a significant transaction, which, at the least, would be considered inconvenient and easily over-looked;

14.5 monitor and comply with the Reserve Banks' standards and the Act's extensive deposit taker regulatory requirements, including registering its covered bond programs (the covered bond programs requirements currently have no jurisdictional limit);

14.6 satisfy the directors' due diligence duties, including satisfying restrictions on director indemnities and insurance;

14.7 be exposed to New Zealand enforcement actions, including imposed liquidation. Chapman Tripp submits the potential penalty of 0.1% of total assets of the body corporate and its subsidiary should be based on the New Zealand assets for Overseas Banks and branches of international banks registered in New Zealand to ensure the penalties are not disproportionally harsh on Overseas Banks and international banks registered in New Zealand; and

14.8 obtain an authorisation to use restricted words in name or title under section 404 or 405 (if existing relief is not replicated).

15 Chapman Tripp submits that it would be unsuitable for the restrictions on Directors' indemnities and insurance, and the requirement for the Reserve Banks' approval for changes of control, amalgamations or entry into a significant transaction, to apply to Overseas Banks, and registered banks in New Zealand which are branches of large international banks. If the director insurance and indemnity restriction applies to the international bank's board, the restrictions would be a disproportionate because it would apply to all the Board's activities in every jurisdiction, when this restriction should at least solely be in respect of the activities relating to the New Zealand branch. Likewise, the need for a New Zealand approval for a changes of control, amalgamations or entry into a significant transactions in respect of the international bank would be a fetter on transactions which should be governed by the international bank's home country jurisdiction. Instead, Chapman Tripp submits that approval for such

transactions should be substituted with, at the most, a notification requirement for Overseas Banks and registered banks which are branches of international banks.

A broad exemption power is necessary

16 Currently the Bill grants the Reserve Bank an exemption-making power solely from the credit rating requirements. The omission of a broader exemption making power, like under the Financial Markets Conduct Act, creates an "all or nothing approach" and (if the Deposit Takers Bill is to apply to Overseas Banks) prevents the Reserve Bank providing relief to cater for Overseas Banks' particular circumstances on a case-by-case basis, including the unusual position of already being heavily regulated overseas. Chapman Tripp recommends that the Reserve Bank is granted a broad exemption power so the Bill's requirements can be extended only so far as necessary in unusual circumstances.

17 It would also be desirable to allow a facility for mutual recognition of other jurisdictions' prudential and other requirements for Overseas Banks located in their home country. A facility like that adopted for overseas fund managers in the FMCA would avoid duplication of regulatory requirements across borders, and allow for greater access to international banking services. New Zealand is a trading nation dependent on free flow of money, so such a facility would be highly desirable for business.

18 A broad exemption power and a facility for mutual recognition would assist New Zealand's international trade opportunities, allow flexibility to support international treaty negotiations and preserve the fundamental principle of comity of nations – allowing home countries to regulate within their borders. They are also necessary to achieve the principles acknowledged in section 4 of the Bill, including the "desirability of taking a proportionate approach and of avoiding unnecessary costs" (section 4 (a) and(c) of the Bill).

The restriction on using restricted words uses a separate vague extraterritorial test

19 The restriction using restricted words in name or title in section 401 of the Bill applies to financial service providers, without reciprocating the extraterritorial limitations in section 7A of the Financial Service Providers (Registration and Dispute Resolution) Act 2008. These restrictions would apply to Overseas Banks to the extent the Overseas Banks "carry on activities directly or in directly in New Zealand". It would be helpful if the uncertainty in the extraterritorial application, which has already required the Reserve Bank's guidance to clarify, could be resolved by adopting a more suitable test which recognises that the Bill's restrictions are not intended to apply to activities performed overseas by Overseas Banks when the services are initially solicited by New Zealand customers.

20 We elaborate on our submissions below.

21 **Overseas Banks which are subject to comparable overseas regulatory supervision should be excluded from the proposed regime:** Overseas Banks, which are subject to comparable overseas regulatory supervision, should be excluded from the proposed regime. The purposes and principles set out in section 3 and section

4 do not justify these Overseas Banks being subject to New Zealand licensing, or supervision to the extent contemplated by the Bill. The financial system risks relating to these Overseas Banks would be more proportionately managed through requiring them to meet appropriate conditions in order to qualify for exclusion; possible conditions are specified in paragraph 34 below.

22 **Proposed regime should preserve the regulatory relief that has been given to overseas banks:** The Bill should adopt the existing regulatory relief that applies to Overseas Banks, and retain the Reserve Bank's developed underlying jurisprudence, contained in:

22.1 Reserve Bank's no-objection letters which have been granted to date;

22.2 Financial Markets Conduct (Overseas Banks Offering Simple Debt Products) Exemption Notice 2021 (*FMCA Exemption Notice*); and

22.3 Reserve Bank of New Zealand Act (Overseas Banks) Class Authorisation Notice 2019 (Class Authorisation Notice);

22.4 Reserve Bank's Guidance note for overseas banks on limitations on the use of restricted words; and

22.5 the Reserve Bank's interpretation of the Non-bank Deposit Takers Act in 2015 so that Act did not apply extra-territorially to certain Overseas Banks,

in respect of both the licensing and other Deposit Taker requirements and the use of the restricted names requirements in the Bill.

23 The Bill should provide that the Overseas Banks are not deposit takers and can continue to be authorised to use the name "bank" or its derivatives in their titles when carrying out the activities covered by any no-objection letter applying to them or the Class Authorisation Notice. The policy justification for the existing regulatory relief will remain after the proposed new regime comes into force. Preservation of existing relief could be achieved by providing on-going exclusions from the proposed regime for the overseas activities in express relief. Without such relief, Overseas Banks would need to close all existing permitted banking arrangements with New Zealand resident customers, if those Overseas Banks decide it would not be economic to be governed by all or, because of the omission of a broad exemption power and tailoring of the Bill's requirements to their circumstances, any one of the Bill's requirements.

24 The Bill and the 1989 Act also prohibit the use of a restricted word in an advertisement (section 410 of the Bill). However, there is no corresponding power for the Reserve Bank to authorise the use of the "bank" name in such advertisement. The authorisation power should extend to the advertising restrictions also.

25 **Exclusions should be added into the Bill:** The Bill should provide for:

25.1 specific exclusions in the definitions of "Borrowing" or "Lending" in Schedule 2 for non-consumer lending and non-consumer transactional accounts provided by Overseas Banks; and

25.2 banking products and services provided by Overseas Banks to persons in New Zealand on a non-solicitation basis.

26 The proposed exemptions referred to in paragraph 25.1 would preserve the existing relief for these activities for wholesale customers contained in the Class Authorisation Notice. However, under the proposed regime, this relief should be expanded to cover lending and transactional accounts provided by Overseas Banks to persons who are not "consumers" under the Credit Contracts and Consumer Finance Act 2003. This extension would ensure that the proposed regime does not detrimentally affect SMEs' ability to access much needed lending from Overseas Bank sources, and to open and operate overseas transactional accounts required for their international business activities, including facilitating export and import payments.

27 A non-solicitation exclusion would ensure that the proposed regime does not restrict the ability of New Zealanders to contract with Overseas Banks in other jurisdictions without the protections of New Zealand law, if they wish. As the Reserve Bank has recognised in its *Guidance note for overseas banks on limitations on the use of restricted words*, New Zealand banking regulation is not intended to restrict New Zealand customers seeking banking services in other jurisdictions in circumstances where they should recognise their activities would be governed solely by foreign law.

28 These submissions are explained in further detail below.

Deposit takers subject to comparable overseas regulatory supervision should be excluded from the proposed regime

29 As currently drafted, Schedule 2 provides that the proposed licensing and supervision regime applies to any person who carries on the business of "borrowing" and "lending" money.

30 An Overseas Bank would be brought within the territorial scope of the proposed regime if an offer of debt securities by the Overseas Bank is received by a person in New Zealand, unless:

30.1 the Overseas Bank demonstrates that "it has taken all reasonable steps to ensure that persons in New Zealand may not accept the offer" (clause 4 of Schedule 2);

30.2 the Overseas Bank takes deposits solely from wholesale investors for durations longer than five days (clause 2 of Schedule 2);

30.3 the debt securities the Overseas Bank offers in aggregate to persons in New Zealand is less than any threshold prescribed in the regulations (if any) and all other requirements prescribed in any such regulations are satisfied (clause 5 of Schedule 2); or

30.4 the Reserve Bank issues a notice declaring that the Overseas Bank is not a deposit taker for the purposes of the Act (clause 6 of Schedule 2).

31 Chapman Tripp submits that in its current form the proposed regime should not apply to Overseas Banks which are subject to comparable overseas regulatory supervision, unless the particular circumstances of the Overseas Bank (maybe the inadequacy of home country regulation) warrant it being subject to the proposed regime (in whole or part).

32 Excluding Overseas Banks which are subject to comparable overseas regulatory supervision from the Bill's application is justified by the section 4 principles:

32.1 the desirability of taking a proportionate approach to regulation and supervision (section 4(a)). The legislative purposes set out in section 3 would be substantially achieved where Overseas Banks are subject to comparable overseas regulatory supervision. Therefore, it would be a disproportionate regulatory approach for the proposed regime to apply to these Overseas Banks, unless their particular circumstances require otherwise.

32.2 the need to maintain competition within the banking sector (section 4(b)). Minimising duplicative New Zealand compliance costs for Overseas Banks assists the maintenance of competition through making it more commercially viable for them to offer their products and services on the New Zealand market. Increasing those compliance costs creates the significant risk that Overseas Banks will consider that it would not be commercially viable to offer their services to persons in New Zealand, especially when the level of their New Zealand business would likely be regarded as insignificant relevant to the overall scale of their business.

32.3 the need to avoid unnecessary compliance costs (section 4(c)). Because the section 3 purposes would be substantially achieved where the Overseas Banks are subject to comparable overseas regulatory supervision, the compliance costs of requiring them to comply with the proposed regime would be largely unnecessary.

32.4 the desirability of maintaining awareness of, and responding to, the practices of overseas supervisors that exercise functions in relation to any licensed Overseas Banks or any holding companies of any licensed Overseas Bank (section 4(d)). Excluding Overseas Banks which are subject to comparable overseas regulatory supervision from the ambit of the Bill would suitably recognise the role of the overseas supervisors.

32.5 the desirability of ensuring that the risks referred to in section 3(2)(c) are managed (including long-term risks to the stability of the financial system) (section 4(e)). These risks are managed where Overseas Banks are subject to comparable overseas regulatory supervision.

32.6 the desirability of sound governance of deposit takers (section 4(e)). Comparable overseas regulatory supervision ensures the sound governance of the Overseas Banks.

32.7 the desirability of Overseas Banks effectively managing their capital, liquidity, and risk (section 4(f)). Comparable overseas regulatory supervision ensures the Overseas Banks are effectively managing their capital, liquidity and risk.

33 If required, a more proportionate regulatory approach to manage risks to the financial system's stability with respect to Overseas Banks would be to impose appropriate conditions which they must meet in order to qualify for exclusion from the proposed regime.

34 Possible conditions could include:

34.1 that the Overseas Bank is subject to overseas prudential regulation and supervision that is at least substantially the same as that applying in New Zealand, including relating to Board composition, disclosure of financial position and capital adequacy, and the requirements relating to deposit taking (alternatively, particular jurisdictions could be prescribed);

34.2 that the Overseas Bank is subject to reporting and information supply obligations to the Reserve Bank relating to the compliance with the overseas regulation and supervision requirements, their financial standing and governance, and level of New Zealand business;

34.3 that the Overseas Bank has a New Zealand place of business or an authorised agent in New Zealand;

34.4 that the Overseas Bank distributes advertisements targeting New Zealand investors only directly to its existing New Zealand customers, or other persons in New Zealand through a New Zealand licensed deposit taker that is part of the same group as the Overseas Bank and acting on behalf of the Overseas Bank;

34.5 that the Overseas Bank makes a copy of its most recent financial statements (or group financial statements) available (including on its website) and informs its New Zealand customers that a copy is available on request;

34.6 that the Overseas Bank (or its holding company) has at least a prescribed investment grade credit rating for its long-term senior unsecured obligations from a recognised international credit rating agency; and

34.7 that the Overseas Bank provides prescribed disclosures (including in any advertisements) to New Zealand customers notifying them that it is not a deposit taker licensed by the Reserve Bank but rather regulated and supervised in the relevant overseas jurisdiction, and the existence of any overseas investor preference.

35 The above conditions are broadly similar to those must be met for overseas banks to offer simple debt products in reliance on the Financial Markets Conduct (Overseas Banks Offering Simple Debt Products) Exemption Notice 2021.

Bill should preserve the existing regulatory relief

36 The Group receives the benefit of the existing regulatory relief contained in the:

36.1 Reserve Bank's no-objection letters on which certain Overseas Banks have relied up to this point;

36.2 Financial Markets Conduct (Overseas Banks Offering Simple Debt Products) Exemption Notice 2021 (*FMCA Exemption Notice*); and

36.3 Reserve Bank of New Zealand Act (Overseas Banks) Class Authorisation Notice 2019 (*Class Authorisation Notice*); and

36.4 the *Guidance note for overseas banks on limitations on the use of restricted words*.

37 This existing regulatory relief reduces the New Zealand regulatory burden for Overseas Banks when they provide certain banking products and services to the New Zealand market, thereby making such banking services commercially viable.

38 As mentioned, the compliance costs of the proposed regime are likely to adversely affect the commercially viability of the Overseas Banks' existing services to New Zealand customers, at least at the current level.

39 The Financial Markets Authority (*FMA*) has recognised the real likelihood that Overseas Banks would cease providing products and services to the New Zealand customers as a result of the compliance costs imposed by New Zealand regulation. In its Statement of Reasons in the FMCA Exemption Notice, the FMA states:

- *without the exemptions, overseas banks may not offer or continue to make available simple debt products to New Zealand retail investors. Overseas banks would face compliance costs associated with monitoring the ongoing residence of their customers and either terminating the banking relationship when a customer moves to New Zealand or alternatively registering in New Zealand:*
- *the FMA is therefore satisfied that the granting of the exemptions is desirable to promote the purposes of the Act, specifically by promoting the confident and informed participation of businesses, investors, and consumers in the financial markets and avoiding unnecessary compliance costs: … .*

40 It would be expected that the Reserve Bank would take a similar view, in accordance with the Memorandum of Understanding between the two institutions. However, by contrast, there appears to have been cursory consideration given to the implications of

the proposed regime's compliance costs for Overseas Banks. The Bill's Regulatory Impact Statement states (at 15):

> ***Where do the costs fall?***
>
> *Financial sector*
>
> *We expect that there will be costs to the financial sector associated with the new prudential framework for deposit takers, although the extent of any cost increase will be dependent on how the Reserve Bank chooses to operationalise some of the legislative changes (e.g. whether the Reserve Bank undertakes on-site inspections in the context of a more intensive model of supervision). There will be one-off costs to the financial sector to implement the changes introduced by the new prudential framework. Some of these costs may be passed on to customers of deposit takers, although the extent of this is difficult to determine.*
>
> *Customers will also be among the main beneficiaries of the strengthened financial system safety net described in the previous section.*
>
> *Deposit takers will continue to face costs arising from being subject multiple regulatory regimes, both domestically (the Financial Markets Authority and the Commerce Commission) and in some cases from overseas (for example, branches and subsidiaries of Australian banks also come under the regulatory regime of the Australian Prudential Regulation Authority (APRA)).*

41 Chapman Tripp submits that the existing regulatory relief should be preserved when the proposed regime comes into force, so that Overseas Banks would not come within the proposed regime when they solely carry on the activities currently covered by the existing regulatory relief. This could be achieved through:

41.1 the activities covered by the existing regulatory relief being excluded from the proposed regime's scope; or

41.2 grandfathering relief being provided so the proposed regime would not apply to Overseas Banks where they carry on only those activities that are covered by the existing regulatory relief in the context of business relationships established before the proposed regime came into force.

42 Further, the Bill should provide that Overseas Banks are not deposit takers and continue to be permitted or authorised to use a restricted word in their titles when carrying on in New Zealand the activities covered by the Class Authorisation Notice and any no-objection letter that has been issued to them by the Reserve Bank.

Non-consumer lending by overseas deposit takers exclusion required

43 Chapman Tripp submits that the "lending" definition which defines a deposit taker in clause 2(2)(b) of Schedule 2 to the Bill should be amended to provide an exclusion for non-consumer lending by Overseas Banks. Currently "lending" includes all forms of credit contracts, which has the potential to capture all forms of business financing from

Overseas Banks. Overseas Bank funding is an essential source of capital for businesses, and should not be undermined by the imposition of regulations designed for local lenders, which would impose additional business costs and potentially limit the available sources of business funding. The financial system benefits from the availability of overseas lending to compliment the limited financing options available from New Zealand institutions.

Any lending relief should not be limited to "wholesale investors" under the Financial Markets Conduct Act, as it is under the Class Authorisation Notice.

44 Chapman Tripp submits that, for Overseas Banks, the lending definition should apply solely to loans to persons who are "consumers" under the Credit Contracts and Consumer Finance Act 2003 – i.e., not to persons who intend to use the credit wholly or predominately for business or investment purposes. Then such consumer lending should be regulated only when it exceeds a prescribed threshold and is denominated in New Zealand dollars and, if secured, secured over New Zealand property. Lending in other circumstances is unlikely to affect the banking system, and is much needed by New Zealand businesses.

45 From 15 March 2021, the "wholesale investor" tests were narrowed and, in particular, the "large" test now requires that the person (and entities controlled by that person) meet a $5 million net assets or total consolidated turnover threshold. This higher threshold means that significant numbers of SMEs would not be regarded as wholesale investors.

46 Non-consumer lending relief is required to ensure that SMEs can access much-needed lending from Overseas Banks, often at terms and rates that are better than is available in New Zealand. Without such an exclusion, there is a significant risk that Overseas Banks will reduce lending to SMEs to avoid being brought within the scope of the proposed regime.

Non-consumer transactional accounts exclusion required

47 Chapman Tripp submits that the "borrowing" definition which defines a deposit taker in clause 2(2)(b) of Schedule 2 to the Bill should be amended to provide for an exclusion for non-consumer transactional accounts operated by Overseas Banks.

48 The Explanatory Note to the Exposure Draft indicates that it was decided that the proposed regime would cover the provision of transactional accounts to wholesale investors (at page 7):

> *An exception is that firms that wholly borrow from wholesale investors and do not borrow for very short terms (5 days or less) are not captured. This is intended to remove wholesale funded firms from the regime, as long as they are not able to effectively provide a 'transactional account' for wholesale investors. Firms that do provide 'transactional accounts' are intended to be captured even if the accounts are only for wholesale investors.*

49 There is no policy justification identified in the Explanatory Note for this decision in respect of Overseas Banks, which seems inconsistent with the Class Authorisation

Notice granted by the Reserve Bank which relieves the provision of transactional accounts, together with ancillary activities, provided to wholesale customers. It is not apparent that transactional accounts give rise to any greater risks to the stability of the financial system than other wholesale deposit taking.

50 Further, Chapman Tripp submits that, for Overseas Banks, any transactional account exclusion should not be limited to wholesale investors, but rather should extend to persons who are not consumers under the Credit Contract and Consumer Finance Act. As noted above, significant numbers of SMEs would not be regarded as wholesale investors under the Financial Markets Conduct Act.

51 The absence of a non-consumer transactional account exclusion in the Bill creates the significant risk that Overseas Banks would decline to allow SME exporters and importers to open and operate overseas transactional accounts, to avoid the risk of being brought within the scope of the proposed regime.

Reverse solicitation exclusion required

52 Chapman Tripp submits that the Bill should be amended to provide that an Overseas Bank would not be subject to the proposed regime if a New Zealand person, on their own initiative, approaches the Overseas Bank to open an overseas bank account, and to receive associated services, while that person is in New Zealand.

53 Chapman Tripp submits that there is no policy justification for Overseas Banks being subject to the proposed regime only because they provide banking products and services on a reverse solicitation basis. As noted by the Reserve Bank in its *Guidance note for overseas banks on limitations on the use of restricted words:*

> ***A New Zealand person, on their own initiative, approaches an overseas bank to open a bank account ("reverse solicitation").***
>
> *22. In this scenario, the relevant activities occur outside New Zealand. The Reserve Bank considers that the section 64(1)(c) limitation is not intended to restrict the ability of New Zealand persons to contract with overseas banks if they wish. It would be unduly restrictive to treat an overseas bank as carrying on an activity in New Zealand simply because they are approached by a New Zealand person. Overseas banks relying on reverse solicitation to avoid the limitation in section 64(1)(c) are advised to document the unsolicited nature of the request to open a bank account. Reverse solicitation also presupposes the absence of any prior communication made to the person in relation to the requested account.*

Prescribed threshold regulations should be released for consultation

54 The Reserve Bank should urgently release an exposure draft of the regulations that will set the prescribed threshold to enable Overseas Banks to gauge whether the proposed restrictions would be relevant to them. It is conceivable that the prescribed threshold may be low if the Bill is replacing the Non-bank Deposit Takers Act, so that New Zealand based finance companies are captured. Stakeholders require the prescribed threshold details (including whether different thresholds will apply in different circumstances) to properly assess the Bill's suitability, adequacy and implications.

55 The prescribed threshold for Overseas Banks should be higher than the threshold that applies to New Zealand deposit takers, because they are less likely to be systematically important to the New Zealand financial system. Their services can more easily be replicated by the many other Overseas Banks existing in well regulated countries, if needed and our regime is facilitative to offshore funding and deposit taking.

56 Setting that prescribed threshold at an appropriate level for Overseas Banks would better ensure that the proposed regime applies to Overseas Banks only where it is justified by the purposes and principles in section 3 and section 4. Absent a suitable territorial exception, a suitably high threshold for Overseas Banks would go a considerable way to addressing the concerns many Overseas Banks would have about the proposed regime's territorial scope.

57 Finally, there may be practical issues relating to how and when Overseas Bank assess whether they exceed the prescribed threshold, which that should be subject to consultation.

Conclusion

58 Please let us know if you have any questions about Chapman Tripp's submissions or if you would like Chapman Tripp to provide further explanations or solutions in support of its submissions.

Yours faithfully

Tim Williams
Partner