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Ms Fleur Grey  
Senior Specialist  
Credit, Retail Banking and Payments Financial Services  
Australian Securities and Investments Commission

Via email: [responsible.lending@asic.gov.au](mailto:responsible.lending@asic.gov.au)

Dear Ms Grey

### **CP 309 Update to RG 209: Credit licensing: Responsible lending conduct**

COBA welcomes the opportunity to provide feedback to ASIC on its proposals to update Regulatory Guide 209 *Credit licensing: Responsible lending conduct* (RG209).

COBA is the industry body for Australia's mutual banks, credit unions, and mutual building societies. With over \$118 billion in assets and over \$96 billion in gross lending, the customer owned banking sector offers consumers a strong alternative to other lenders in credit products such as mortgages, credit cards and personal loans. Our members are all APRA-regulated authorised deposit-taking institutions (ADIs).

The responsible lending regime is critical to protecting consumers. This guidance articulates how ASIC expects credit licensees to meet their responsible lending obligations. COBA members have noted that there has been increased uncertainty recently about how credit providers meet these obligations. It is important that the updated guidance is clear enough that it protects consumers who may be at risk of substantial hardship while ensuring that it does not impair the provision of credit to those who are unlikely to be at risk. The guidance should help ensure that the regulatory framework is tightly targeted at the identified problem.

The responsible lending obligations are "high-level, principles-based obligations"<sup>1</sup> and ASIC's view at the time of their introduction was that without guidance industry would have difficulty interpreting the legislation. Given that it is almost a decade since ASIC's original "indicative guidance" was released, the current review is a valuable opportunity to emphasise the fundamental objective of the regime and to frame the guidance with due consideration of:

- consumer experience
- competition
- innovation
- efficiency and cost, and
- privacy.

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<sup>1</sup> RIS: ASIC Implementation of the credit legislation: Responsible lending conduct, February 2010

The fundamental objective of the regime is to ensure that a loan is not unsuitable for the consumer. This objective is to be achieved by obliging lenders to make an assessment about the consumer's requirements and objectives and about whether payment obligations would lead to substantial hardship.

Guidance on the regime should allow industry to tailor, as appropriate for their businesses, the processes they use to comply with the responsible lending obligations.

For example, the customer owned banking sector differs from other sectors in the lending market due to its ownership structure. COBA's member banking institutions are owned by their customers rather than by a separate group of investors. The customer-centric nature of our sector means responsible lending is fundamental to the operation and success of COBA members.

### **COBA's key points**

The review of RG209 should:

- ensure that the expectations around these obligations focus on the core policy intent to protect consumers
- clarify expectations about verification of different types of living expenses, including the role of benchmarks and treatment of discretionary expenditures, and
- be an opportunity to engage stakeholders in a comprehensive process to revisit the guidance.

### **Ensuring that the expectations around obligations focus on the core policy intent to protect consumers**

COBA recognises the importance of the responsible lending obligations to protect consumers. Ensuring that consumers are not put into unsuitable credit products protects them from unscrupulous lenders. More broadly these processes would generally form part of a prudent lender's processes and if implemented across industry provide a minimum level of protection for consumers.

However, COBA members have noted that the level of information required to be collected, or perceived to be required due to regulatory uncertainty, is increasing. This increases the burden on lenders without necessarily providing additional consumer protection for those who are not at risk of substantial hardship. Revised guidance that clarifies where credit providers do and do not need to focus their effort would be valuable (e.g. for higher-risk consumers and higher-risk products, particular expense types). This is most important for smaller lenders with more limited resources.

### **Using this review as an opportunity to engage stakeholders to further develop the guidance to navigate the complexity of responsible lending**

COBA supports the principles-based approach to guidance about responsible lending. However, COBA notes that the responsible lending regime is complex.

ASIC's review provides an opportunity to further tease out the views of consumer advocates, industry and regulators on aspects of responsible lending. A shared understanding between these stakeholders will ultimately benefit consumers. COBA notes that ASIC and AFCA should be aligned in terms of expectations on 'responsible lending'. COBA believes that there should be further consultation, potentially through roundtables, on broader aspects of RG209. This should be followed by public consultation on a draft RG 209. An extended timeframe for this consultation would be

prudent given that the ongoing Westpac case is likely to have significant implications on both the use of benchmarks and the interpretation of the responsible lending obligations<sup>2</sup>.

These aspects include, but are not limited to:

- what is and is not considered to be substantial hardship, and
- the concept of scalability and expectations about verification.

The concept of substantial hardship is critical for the responsible lending obligations as they seek to protect the consumer from this particular outcome. So further guidance on potential examples of what is and is not considered to be substantial hardship and potential areas for direction would be valuable.

The concept of scalability features quite prominently in the responsible lending guidance and COBA believes it should be retained. COBA members have noted there are two core circumstances which can drive scalability, consumer type and the product type. Similarly, COBA members would welcome additional discussion and guidance about situations where inquiries should be scaled up and should be scaled down. We understand some stakeholders are proposing potential frameworks around the risk of various products and consumers.

COBA notes there are also questions around how the revised RG 209 interacts with other requirements applying to the main providers of consumer credit, ADIs. For example, APRA is consulting on draft APS 220 and has an existing APG 223 on Residential Mortgages. In addition, credit providers will be subject to design and distribution obligations products from 6 April 2021. While these requirements may have different policy objectives, an inconsistent approach will be burdensome for credit providers, potentially anti-competitive and frustrating for consumers.

### **Clarifying expectations on verifying expenses**

As noted earlier, there is considerable uncertainty about the requirements to verify expenses. There are questions about the expectations around verifying discretionary expenses as well as the how and if benchmarks can be used in the verification process (see Appendix).

Verifying all a consumer's expenses is particularly difficult, potentially not possible in some cases and places too much onus on the lender. There are different levels of benefit to the verification for different types of expenses, for example, discretionary expenses vs. fixed expenses. It is not clear what the value is of verifying an expense that is unlikely to occur in the future or has the potential to be reduced without constituting 'substantial hardship'. For example, it is likely that a consumer's discretionary expenses will decrease, or be able to decrease, after they have taken out a mortgage.

This would make a compulsory line-by-line verification of a consumer's discretionary expenses excessive given the potential for a consumer to reduce them in certain cases. COBA recognises that such an approach would require more consistent categorisation of expenses across industry. In addition, there should also be consideration of the potential privacy implications of the line-by-line verification of living expenses.

Benchmarks such as a Household Expenditure Measure (HEM) should continue to play a role in the validation process. This is obviously limited to expenses that are part of the benchmark (generally non-discretionary expenses). Expenses that do not constitute part of a benchmark should be verified where necessary in other ways. Further clarification is required about how they can be used, particularly in light of the current Westpac case.

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<sup>2</sup> Particularly "If the court processes were to reveal some deficiency in the law's requirements" as described by the Royal Commission Final Report.

When used correctly, benchmarks are an objective, cost-effective and useful tool when validating customer expenses. This is significantly more efficient than verifying individual expenditures, which at present is usually done manually. Regulators such as APRA recognise this noting that “Benchmarks provide efficiencies in the lending decision, which is time-critical for many borrowers”<sup>3</sup>. Similarly, Treasury highlights that: “It is reasonable for lenders to take into account costs when assessing suitability for the purposes of complying with the law”.<sup>4</sup> Given that expense verification it is not an exact science, COBA believes that benchmarks should continue to play an important role if used correctly.

### **Ensuring consideration of competition**

Competition in the financial services market is essential to ensuring good consumer outcomes. It places pressure on banking institutions to lower costs associated with the delivery of financial services and products and drives innovation and deployment of new technology.

Regulators must keep in mind that regulation can further entrench the market power of the largest players to the detriment of consumers. COBA notes that ASIC must consider competition as part of its broader mandate.

The most prominent advantage of large banking institutions is their economies of scale, where additional regulatory costs can be absorbed across a larger cost base. As the dominant players in the market, they also have the benefit of incumbency with respect to data. Overly onerous requirements, particularly with respect to data verification, may advantage larger players who have access to much larger pools of data as incumbents. Similarly, restricting flexibility or requirements to use particular technologies can both prevent innovation and impose unnecessarily costs on licensees. Unreasonable restrictions on the use of benchmarks can also limit competition as benchmarks function as cost effective tools for smaller institutions.

Similarly, ambiguous guidance can also impact competition. Larger institutions are better equipped to deal with ambiguous requirements due to their larger legal departments and larger cost bases to absorb the impact of any potential penalties. For smaller institutions, ambiguity can lead to excessive conservatism in some licensees and lost commercial opportunities. This ultimately reduces competition and consumer choice. Guidance should be clear so that there is a common understanding of the expectations across industry.

Thank you for the opportunity to provide comments on this consultation. The attached Appendix responds to ASIC’s specific consultation questions. Please contact Mark Nguyen ([mnguyen@coba.asn.au](mailto:mnguyen@coba.asn.au)) or Luke Lawler ([llawler@coba.asn.au](mailto:llawler@coba.asn.au)) if you have any further questions.

Yours sincerely



**MICHAEL LAWRENCE**  
Chief Executive Officer

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<sup>3</sup> APRA, 2018, submission in response to the Financial Services Royal Commission Interim Report, p.18

<sup>4</sup> Treasury, 2018, submission in response to the Financial Services Royal Commission Interim Report, p.30

# Appendix – response to ASIC proposals

## B1 – ASIC’s General Approach

### **B1Q1 Would it be useful for licensees if ASIC were to identify the inquiries and verification steps that we consider should be taken? Why or why not?**

COBA would support ASIC identifying inquiries and verification steps on the basis that these steps are not too prescriptive. Any guidance about these steps must focus on what needs to be done as opposed to how it is done. For example, identifying the verification of income as a step as opposed to the verification of income in a prescribed manner as a step.

It is critical that, while these steps must not be too prescriptive, they must be clear. In general, where ASIC expects to enforce something (e.g. where it is not guidance and there is little licensee discretion) then the difference between what is a ‘requirement’ and what is ‘guidance’ must be clear.

Identifying particular steps may provide an effective ‘minimum’ for most circumstances and help to outline ASIC expectations. This may reduce the current uncertainty around RG 209, particularly regarding the verification of expenses. It is widely reported that this uncertainty has led to an increase in processing times for loans. For example, one COBA member has noted that this has seen an increase in assessment times ranging from an extra 30 minutes for “strong applications”, to two hours for “marginal applications” that require more thorough analysis. This does not include the time needed for additional inquiry and verification that can follow which can add several days, further inconveniencing and frustrating consumers. This is anecdotally reflected by other COBA members experiences. Recent media reporting has shown that this is reflected across the broader industry (at least in the context of ADIs).

This uncertainty is most pronounced for smaller entities that are unlikely to be able to absorb or contest the significant financial penalties for non-compliance. COBA members have noted that the increasing data requirements of responsible lending are burdensome. Greater clarity will provide more certainty for licensees about how they can meet their obligations. A clear set of expectations will provide a minimum level of protection for consumers as there is more uniformity in terms of the information used to assess if a contract is “not unsuitable”.

These identified steps could provide a reference point for the concept of scalability. RG 209 creates flexibility through ‘scalability’ and the ability to scale up or down inquiries and verification in certain circumstances.

### **B1Q2 If there are particular examples of industry practice that you consider should be reflected in any guidance, please provide details of those practices.**

COBA seeks further clarification about the use of benchmarks, particularly with respect to using benchmarks in the validation of non-discretionary expenses. See **COBA Comments in Proposal C3**.

COBA also seeks more clarification about ASIC’s expectations for verifying living expenses. In particular, there are concerns about whether ASIC expects the line-by-line analysis of historical transactions. See **COBA Comments in Proposal C1**.

COBA notes that it would also be valuable to get more clarification around the use of technology as there is increased digitalisation and automation. These technologies are likely to lead to a lower level of human intervention in meeting the responsible lending obligations.

**B1Q3 Are there any kinds of credit products, consumers or circumstances for which you consider it may be reasonable to undertake fewer inquiries and verification steps? Please identify the kinds of products, consumers and circumstances and particular features you think are relevant.**

COBA believes that there are certain situations where there could be fewer inquiries at the product, consumer and circumstance level. These situations could include where a consumer is:

- refinancing an existing loan
- exhibiting a clear saving pattern in excess of the servicing payment
- entering a shorter-term product
- entering a product where the servicing payment is a small proportion of available income
- an existing customer with the financial institution (i.e. licensee has transaction data)
- a high net worth or high-income customer, and
- clear that they have an exit strategy that does not cause substantial hardship.

In addition to these 'lower' risk situations, COBA encourages ASIC to provide further examples to identify products, consumers or circumstances that it considers to be "higher risk" and therefore likely to require more inquiry and verification steps.

COBA notes there should clarification around how scalability works where these product and consumer situations interact. For example, where a high-risk consumer has a low-risk product or where a low-risk consumer has a high-risk product.

Mortgage Prisoners

COBA believes that ASIC should consider the treatment of "mortgage prisoners" in the revised RG 209. According to the UK's FCA, these are: "Mortgage customers who have previously been unable to switch mortgages despite being up-to-date with their payments".<sup>1</sup> This situation arises due to recently tightened lending standards preventing consumers from refinancing. This also applies to those who are looking to refinance interest-only loans that have moved into their principal repayment phase.

COBA notes that the FCA has proposed that "for those customers who are up-to-date with their mortgage payments, and seeking to move to a more affordable deal without borrowing more, active lenders will be able to undertake a more proportionate assessment of whether they can afford the new loan".

This problem is starting to arise in Australia.<sup>2</sup>The approach could be reflected in requirements being 'scaled down' for these consumers. This would be a pro-consumer change given that it would allow consumers to refinance for a lower repayment. It is less likely that there would be additional harm in these cases if the consumer is already meeting their existing higher repayments.

**B1Q4 In your view, what aspects of the consumer's financial situation would a licensee need to inquire about in all circumstances? If you think some aspects of the consumer's financial situation do not need to be inquired about, please explain why.**

COBA believes that in most circumstances the licensee should inquire about the following aspects of a consumer's financial situation:

- consumer's income
- liabilities (debts such as mortgages, personal loans and credit cards)
- committed expenses that are generally unique to a customer's situation (i.e. school fees, child support, rent)
- non-discretionary expenses, and
- known changes to income or expenses in the near future.

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<sup>1</sup> FCA, 2019, CP19/14: Mortgage customers: proposed changes to responsible lending rules and guidance

<sup>2</sup> Mozo, The number of Aussie 'mortgage prisoners' is set to rise, according to Mozo research, 24 July 2018, available online <https://mozo.com.au/home-loans/articles/the-number-of-aussie-mortgage-prisoners-is-set-to-rise-according-to-mozo-research>

COBA notes that these are broadly specified in RG 209 para 32. If these are outlined as particular inquiries then COBA notes then it is likely that there would need to be guidance on definition particularly with respect to living expenses and further guidance on expectations around know changes to expenses including whether this includes expenses decreasing in future (i.e. a child finishing at a private school).

**B1Q5 In your view, what aspects of the consumer’s financial situation would a licensee need to verify in all circumstances? If you think some aspects of the consumer’s financial situation do not need to be verified, please explain why.**

COBA believes that verification in most circumstances should be done for a consumer’s income and a consumer’s existing liabilities and commitments.

The verification of income appears justified given that income is likely to be the greatest determinant of affordability and is unique to the consumer. COBA notes that ASIC proposes “positive verification” of income in all circumstances.<sup>3</sup> COBA supports this but notes that there could be some circumstances where it may not be required. Similarly, COBA notes that APRA has used similar language in its draft APS 220 regarding “effective” income verification.<sup>4</sup> COBA believes that both regulators’ expectations and terminology should align in this space.

The verification of existing liabilities and existing committed expenses is done on the basis that it is highly likely that these expenses will continue after the loan is funded and the consumer has little to no choice in reducing these expenses. Given that predictive outlook of this assessment, COBA notes that there are some future expenses related to loan purpose that cannot be verified such as registration, insurance, service and petrol costs in the case of a car loan. In these cases, we would expect that a benchmark figure or reasonable estimate from either the lender or consumer should be enough.

COBA considers that, at a minimum, non-discretionary expenses should be ‘tested’ for plausibility through the use of a benchmark.

There is no need to verify discretionary expenses in all circumstances, given that they can change in future. The “not unsuitable” assessment is forward-looking so the use of past data may not be efficient given the cost of verifying these discretionary expenses. The critical component regarding discretionary expenses is the process of determining continuing affordability and whether a consumer is plausibly willing to reduce these expenses if necessary.

**B1Q6 What would be the effect on consumers of ASIC identifying particular inquiries and verification steps? For example, what would be the effect on access to and cost of credit for consumers?**

COBA notes that the effect on consumers depends upon the particular inquiries and verification steps as well as a consumer’s individual circumstances.

COBA members have noted that there has been some negative consumer feedback about how processes have changed in recent years in terms of more onerous information requirements and increased processing times. COBA members have noted this is due to recent APRA changes and the uncertainty regarding RG 209.

One of the primary benefits to consumers is greater consistency across licensees subject to RG 209. There is also the potential for more consistency over time in terms of assessments. For consumers’ looking to borrow from licensees that are not already following these steps, it is likely to improve the quality of the responsible lending assessment. This is likely to benefit consumers who are at risk of substantial hardship.

However, there is a considerable potential for the costs to outweigh benefits. This will result in a negative effect on consumers.

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<sup>3</sup> ASIC, 2019, CP 309 para 41-43

<sup>4</sup> APRA, 2019, Draft APS 220 Credit Risk Management para 44(a)

Access to credit has the potential to be unnecessarily tightened if lending requirements are too onerous or inflexible. For example, if historical information is used as the basis for a loan decision, it does not reflect consumers' ability to change behaviour from the past. Recent concerns about the Royal Commission and regulators' credit 'crackdown' may have reduced access to credit for marginalised groups such as single parents, lower income earners and borrowers over 45 years of age.<sup>5</sup>

Overly onerous requirements such as the verification of historical information will also increase the cost of credit due to the additional time and effort required to undertake this process. This cost will be disproportionately higher for smaller lenders.

There are also negative consumer effects if the identified steps require inquiry and verification that is invasive of a consumer's privacy. For example, if they require a significant level of expense verification. The process of examining a consumer's transaction records and then questioning the consumer can be overly intrusive. This extra examination and intrusion could be justified if a consumer is at risk of being subject to substantial hardship, however, this would be an inconvenience for those that are clearly able to afford the loan. Similarly, it is potentially difficult to reconcile the invasion of any consumer's privacy in the name of protecting them from unscrupulous lenders, particularly where the substantial hardship risk is low.

COBA members have also noted questions about the privacy impact of verifying expenses that are not in the consumer's name but are paid by the consumer. For example, a consumer who has paid their partner's expenses in the past and will be expected to do so in future.

**B1Q7 What would be the effect on business costs of ASIC identifying particular inquiries and verification steps? Please provide details of the effect on compliance costs for the licensee, and any factors that are likely to affect the level of cost or cost savings.**

Potential business costs depend upon what ASIC identifies as these particular inquiries and verification steps.

If the licensee is not currently undertaking these steps, then it is likely to lead to an increase in costs. The extent of these costs will depend upon how far the licensee is 'below' ASIC's expectations and the ability of the licensee to implement a cost-effective solution – for example, not all licensees have invested to enable Comprehensive Credit Reporting (CCR) and different lenders are at different stages with digital solutions for capturing and categorising transaction data. Internal compliance monitoring costs are likely to be higher where lenders need to rely on manual assessment processes as opposed to automated tools to support credit decisions.

COBA notes that ultimately these costs will be borne by the consumer whether this is through increased pricing and inconvenience.

**B1Q8 In your view, what would be the effect (either positive or negative) on competition between licensees? Please provide details.**

The effect on competition is unknown given that ASIC has not identified these particular inquiries or verification steps.

Any changes must consider the significant advantage held by the largest banking institutions due to their economies of scale, which allow them to absorb additional regulatory costs across a larger cost base. This contrasts with smaller institutions, whose competitive capacity is affected by the need to divert scarce resources towards implementation of new regulatory requirements.

Changes to ASIC's guidance could reduce competition that is based on lending standards. This would generally be a positive outcome. This may be important in the broker space where multiple lenders are on the same panel. COBA notes that ADIs have recently been subject to increased APRA scrutiny in this area. Further clarity in RG 209 expectations could potentially enhance the competitive position of more prudent and conservative lenders.

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<sup>5</sup> Australian Broker, Royal commission's "top three losers", 15 May 2019, available online <https://www.brokernews.com.au/news/breaking-news/royal-commissions-top-three-losers-262819.aspx>



It is also possible that changes to ASIC’s guidance could harm the competitive position of smaller lenders if identified steps are too onerous and costly. As noted above, smaller institutions are less likely to be able to absorb additional costs. Depending upon these particular steps, it could also reduce the ability of institutions to compete that do not have economical access to automated systems or will have difficulty integrating these processes into existing systems. An unnecessary overreliance on data could unwittingly advantage those who are large holders of data (e.g. the major banks).

ASIC should take care to avoid reducing flexibility and innovation for lenders in meeting their responsible lending obligations.

## C1 – Verification of consumer’s financial situation

### COBA Comments

Verification is the most time consuming, difficult to execute and costly aspect of the responsible lending requirements. For the consumer, it has the potential to be the most invasive part of the process. The recent uncertainty about the required level of verification has led to increased conservatism in this area. This has led to negative impacts on consumers regarding the timeliness of approvals and information required from consumers.

A Grant Thornton survey of COBA members found that they considered RG 209 to be the most burdensome regulatory requirement.<sup>6</sup> This was due to the increasing depth of information required before they can lend to potential customers. COBA believes that this is at least partly due to the uncertainty around the verification requirements.

Verifying all a consumer’s expenses is particularly difficult, potentially not possible in some cases and places too much onus on the lender. There are different levels of benefit to the verification for different types of expenses, for example, discretionary expenses versus committed expenses. It is not clear what the value is of verifying an expense that is unlikely to occur in the future or has the potential to be reduced without constituting ‘substantial hardship’. For example, it is likely that a consumer’s discretionary expenses will decrease, or be able to decrease, after they have taken out a mortgage.

COBA recognises the importance of responsible lending laws. But ASIC needs to be clear about its expectations in order for licensees to efficiently meet responsible lending objectives. While reasonable steps to inquire and verify is required in legislation, the overarching objective of the legislation is not to verify expenses but rather create a reliable base of information on which to make an assessment about unsuitability. This not unsuitable test is a forward-looking and predictive assessment involving a significant degree of a licensee’s judgement. It is not simply a mathematical examination of the consumer’s past expenses, past income and the cost of servicing the additional credit in question.

The composition of a consumer’s expenses is critical to determine whether or not they are able to afford a loan without incurring substantial hardship. Assuming a given expense level, a consumer with a higher proportion of discretionary expenses will likely have more leeway than one with non-discretionary expenses.

The current RG 209 briefly touches on the distinction with respect to inquiry noting that:

- for reasonable inquiries in a financial situation, it draws a distinction between fixed and variable expenses<sup>7</sup>
- for potential reasonable inquiries, it highlights the existence of ‘discretionary’ expenditures

The revised RG 209 should make these distinctions regarding different verification requirements or expectations for these different expenses.

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<sup>6</sup> Grant Thornton, 2018, Rising fear over disproportionate cost of banking regulation, Media Release, 16 November

<sup>7</sup> ASIC, 2014, RG 209.32

If this distinction is made there may be further value in getting more clarity around the different types of expenses. This would need to be done in a way that accounts for changing consumer tastes and consumer judgements (i.e. an expense is not discretionary if a consumer believes it is non-discretionary) amongst other factors.

*Reasonable steps changing over time*

It is important that there is a technology-neutral approach to meeting the responsible lending requirements. This is based on the understanding that ‘what’ you do is more important than ‘how’ you do it. Regulatory guidance should not force licensees to adopt certain technologies.

It is likely that technological changes will assist licensees to more efficiently meet their obligations. CCR, Open Banking and the use of data aggregators can improve the efficiency of certain processes, particularly if they involve large amounts of transaction-level data. However, it is not the role of regulators to stipulate that this could be the only way to meet these requirements. Similarly, as noted above in our comments on Proposal C1, there must be limits to the level of transaction-level data review in general circumstances.

COBA notes that the use of CCR, Open Banking and data aggregation services are predicated on the assumption of consumer consent. At their barest level, they are simply mechanisms through which to acquire transaction-level data where it is necessary. The same could effectively be achieved using bank statements (but perhaps not as efficiently). While guidance may assist in getting consent, reasonable steps cannot be predicated on the assumption that a consumer would give consent.

**C1Q1 Please provide details of any particular types of information that you consider should be reflected in the guidance as being appropriate and readily available forms of verification?**

COBA does not suggest additional items, noting our views on the use of benchmarks in C3.

**C1Q2 Do you consider that the examples included in Appendix 1 are appropriate? Why or why not?**

COBA notes that these examples are appropriate forms of information where verification is required.

These examples must consider the level of verification (if any) required for discretionary expenses given their ability to change in future.

Similarly, COBA also provides comments in C3 regarding the use of benchmarks and expectations on the verification of non-discretionary expenses.

The guidance should be clear that licensees have the flexibility to use other forms of information and it is not necessarily limited to what is provided in this list. It should be that clear that it is not expected that a licensee would need to collect all this information. For example, if declared committed expenses do not match the bank statement, would the bank statement generally be sufficient as the evidence? Or would a licensee be required to seek the underlying contracts?

**C1Q3 Are there particular issues with using data aggregation services that you consider should be raised in our guidance? Please provide details of those issues, and information that you consider should be included in our guidance. For example, would it be useful to include specific guidance on matters the licensee could, or should, raise with the consumer before obtaining the consumer’s consent to use this kind of service?**

COBA notes that there are issues regarding third party services and who is liable under the e-Payments Code if pass code disclosure results in a financial loss or potential financial loss.

Given that the Code is under review, this guidance will need to consider any potential changes.

COBA has outlined our views on this issue below:<sup>8</sup>

<sup>8</sup> COBA, 2019, COBA submission CP 310 Review of the ePayments Code: Scope of the review, 5 April

Our view is that if customers freely disclose their pass code to third party sources for any purpose, and where that disclosure results in financial loss or potential financial loss to the customer (e.g. an unauthorised transaction), liability for that loss should rest with the customer.

However, if that customer's ADI has requested that their pass code be disclosed to a third party, liability for any loss through that third party should rest with their ADI.

On this basis, we suggest ASIC consider incorporating rules in the Code regarding pass code disclosure that are based on whether disclosure of a pass code was sanctioned by a customer's ADI, rather than being based around particular third-party services or service providers.

Irrespective of the above issue, COBA believes that more guidance about obtaining consumer consent could be useful.

## C2 – Obtaining and having regard to all information in all readily available information

### **C2Q1 Do you consider that the proposed clarification of guidance on reasonable verification steps would be useful? Are there any other aspects of our guidance on verification that you consider would be useful?**

This requirement to 'have regard' has the potential to require a forensic examination of a consumer's financial documentation. While COBA understands the rationale behind this proposal, this inadvertently may create a requirement to perform detailed reviews of every document received. This would be onerous, costly, cause unnecessary delays and would negatively impact the consumer.

In line with a 'risk-based' approach, one option for ASIC to consider is if there are certain (and limited) aspects of a financial situation where a more 'forensic' examination is expected. This would allow licensees to focus effort on the most important areas rather than undergo a process where it must examine every document for all information. A non-targeted approach also has privacy implications.

If implemented, it should be clear that the requirement should be scalable with guidance about scalability. For example, where an applicant has their main transaction account with the licensee, it may be prudent to review the data to verify income, expenses and liabilities at a general level with a higher level of scrutiny applied to higher risk applications.

Given our views on benchmarks (see **COBA Comments Proposal C3**), it is important to clarify that if a benchmark is used in accordance with RG 209 to test the plausibility of expenses then if verifying information is obtained for another purpose – e.g. a bank statement to verify income – licensees should not be expected to use that verifying information with respect to the expenses that form part of the benchmark.

### **C2Q2 Would an 'if not, why not' approach encourage improvements to current verification practices? Why or why not?**

COBA suggests that, with respect to this approach, the onus of the test should be changed from a negative to a positive test.

CP 309 notes that licensees should be able to explain "why it was not reasonable to obtain or refer to those forms of verification." In our view, this could more efficiently be reframed to explain "why it was reasonable not to obtain or refer to those forms of verification".

**C2Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)?**

This has the potential to require additional review above what is currently done. This may benefit consumers if this information reduces the likelihood of placing a consumer into a credit contract that risks substantial hardship. If it does not, it may just create additional cost. However, the requirements have potential disadvantages to consumers, such as the ability to obtain finance in a timely manner and may not consider the ‘predictive’ and forward-looking nature of the assessment.

See also COBA’s response to **B1Q6**.

**C2Q4 What additional business costs would be involved in this approach?**

COBA believes this approach will increase the business costs required to undertake an assessment. This is due to the additional close review of documents to ensure that they did not reveal any potential inconsistencies with other information.

It is not clear that this would provide a corresponding increase in the ability to determine whether a contract is “not unsuitable”.

See also COBA’s response to **B1Q7**.

**C2Q5 In your view, what would be the effect (either positive or negative) on competition between licensees? Please provide details.**

This proposal will have a negative impact on competition as it is likely to greatly increase the level of required information and review.

In particular, this is likely to be disproportionately costly for smaller licensees who may not have the resources to run the automated systems to detect these “potential” inconsistencies. As noted above, it is not clear that the benefits of additional review (reduced likelihood of substantial hardship) is likely to outweigh the costs (time and effort for additional review).

## C3 – Use of benchmarks

### COBA Comments

Benchmarks such as a Household Expenditure Measure (HEM) should continue to play a role in the verification or validation process. COBA recognises this should be limited to expenses that are part of the benchmark. Expenses that do not constitute part of a benchmark should be verified or validated where necessary in other ways.

When used correctly, benchmarks are an objective, cost-effective and useful tool when to test declared consumer expenses. This is significantly more efficient than verifying individual expenditures, which at present is usually done manually. Regulators such as APRA recognise this noting that “Benchmarks provide efficiencies in the lending decision, which is time-critical for many borrowers”<sup>9</sup>. Similarly, Treasury highlights that: “It is reasonable for lenders to take into account costs when assessing suitability for the purposes of complying with the law”.<sup>10</sup> Given that expense verification is not an exact science, COBA believes that benchmarks should continue to play an important role if used correctly.

The RG 209 guidance is clear that the use of benchmarks does not replace the inquiry or assessment steps of the responsible lending obligations.<sup>11</sup> However, it is unclear how benchmarks can be used for verification. Does the comparison of declared expenses against a

<sup>9</sup> APRA, 2018, submission in response to the Financial Services Royal Commission Interim Report, p.18

<sup>10</sup> Treasury, 2018, submission in response to the Financial Services Royal Commission Interim Report, p.30

<sup>11</sup> ASIC, 2014, RG 209.105

benchmark constitute verification if the declared expenses are above the benchmark? Or does it just provide that the information is plausible?

COBA is seeking clarification about whether the use of benchmarks could constitute verification of declared non-discretionary expenses where these expenses are part of the benchmark (i.e. a like for like basis). Given this like for like basis, COBA notes that it is important in this case that licensees have an understanding of how a borrower's estimate of the expenses (i.e. on a like-for-like basis with the benchmark composition) has been calculated, particularly where it is an outlier (i.e. well over or well below). This would generally be assisted by greater categorisation of declared expenses.

CP 309 and ASIC's recent reports provide various comments about the use of benchmarks, switching between referring to benchmarks as a verification tool or a plausibility test:

- CP 309 notes it will clarify "the role of expense benchmarks in the process for verifying a consumer's financial situation"<sup>12</sup>
- CP 309 considers that "benchmarks can be a useful tool to help determine whether information provided by the consumer is plausible (i.e. whether it is more or less likely to be true and able to be relied upon)."<sup>13</sup>
- REP 445 notes that "Lenders may use appropriate benchmarks as a verification tool to complement robust inquiries"<sup>14</sup>
- REP 516 notes "Such benchmarks can be used by lenders to verify whether the expense information provided by the consumer is accurate"<sup>15</sup>

COBA also raises the question about a situation where a consumer's verified expenses are lower than a 'like-for-like' benchmark, COBA submits that allowing the use of these expenses would provide a benefit to licensees willing to undertake a more in-depth verification process. However, COBA notes that in the case of ADIs such an approach may be curtailed by APRA's expectations.

**C3Q1 Do you consider that the proposed clarification of guidance about use of benchmarks would be useful? Why or why not?**

COBA agrees that it is a useful tool and should continue to be used in future. As noted above, COBA seeks further clarification on the use of benchmarks

The benchmarks used should be realistic estimates of the costs for a general consumer that is similar to that particular consumer. In line with this, the proposal to expect benchmarks to be adjusted for income ranges and dependents appear to be reasonable.

Regarding the inclusion of the geographical adjustment, COBA notes that this may be costly to incorporate into existing systems. This cost will increase based upon the expected level of geographical granularity required.

As previously noted, COBA also requires clarification regarding the use of benchmarks and the interaction with ASIC's Proposal C2.

COBA notes that COBA members as ADIs are already likely to be subject to expectations on monitoring benchmark use. More broadly, COBA notes that while the dependency on benchmarks can be reduced, this reduction level depends upon the economic circumstances of licensee's target demographics and conservatism of the benchmark amongst other factors.

**C3Q2 Please provide information on what buffer amounts you currently apply, or would otherwise consider to be reasonable.**

COBA notes that the determination of buffers on benchmarks should be left to individual licensees.

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<sup>12</sup> ASIC, 2019, CP 309.6

<sup>13</sup> ASIC, 2019, CP 309 Proposal C3(a) CP 309 page 15

<sup>14</sup> ASIC, 2015, REP 445 para 206

<sup>15</sup> ASIC, 2017, REP 516 para 869

Most, if not all licensees would have discounts applied to certain types of income, buffered rates for certain products and adjustments made on expenses dependent on income, dependents and geographic location. Introducing additional buffers could further limit access to the credit for consumers that would otherwise be able to afford the credit without being in substantial hardship.

Several of these buffers and haircuts arise from APRA guidance on lending standards. In line with this, to avoid inconsistencies, it would be more efficient to provide guidance outlining the need to consider buffers rather prescribing any additional buffers.

**C3Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)?**

This approach could reduce the risk that benchmarks underestimate the particular consumer's expenses.

Any approach that maintains the use of benchmarks as a potential substitute for line-by-line verification in certain cases is likely to increase the efficiency of the lending process. This ultimately benefits consumers through more timely and more cost-effective approvals.

There are risks that increased conservatism around buffers may prevent consumers who can afford credit from accessing credit, particularly if the consumer would not consider this to be substantial hardship.

**C3Q4 What additional business costs would be involved in this approach?**

COBA notes that there are a number of business costs associated with this approach. This includes the costs to

- adjust benchmarks to account for these adjustment factors
- make software changes and changes to the servicing model to incorporate multiple adjusted benchmarks (this cost can be considerable depending upon the systems)
- implement manual workarounds if system updates are not possible or are delayed
- increase verification practices if benchmark use is limited, and
- monitor the use of benchmarks (if not already done).

## C4 – Consumer's requirements and objectives

**C4Q1 Do you consider that the proposed clarification of guidance about understanding the consumer's requirements and objectives would be useful? Why or why not?**

Further guidance about understanding the consumer's requirements and objectives may be useful. However, COBA stresses that this guidance should not be in excess of current expectations. ASIC must ensure guidance is appropriate for all types of licensees given that REP493 finding and recommendations were based upon an examination of mortgage brokers. COBA acknowledges this relevance point is somewhat addressed in CP 309.65.

This guidance will ensure licensees are considering the consumer's requirements and objectives in a balanced manner and licensees are obtaining the right level of information across the board.

COBA members have noted the following areas of further clarification:

- regarding how in-depth the process needs to be. For example, guidance about whether a consumer's objectives relate to now, over next 5, 10 or 30 years or over the term of the credit facility.
- considering scenarios where the consumer has not considered their objectives over the long-term and their requirements are limited to the purpose for requesting credit. This includes clarification on whether it would be acceptable to the accept information

provided by the consumer as provided or if a more holistic and future looking response is required.

- guidance on whether this test is considered an 'objective' or 'subjective' test. For example, if an individual wants to gift their funds, a subjective test would say that is fine though an objective test may look towards the benefit of the funds and reject requirements or objective.
- further clarification on the difference between 'requirements' and 'objectives'.

**C4Q2 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)?**

COBA believes that this is likely to provide more consistency in terms of the level of inquiry and information into a consumer's requirements and objectives. This could reduce the chance of a consumer entering a credit contract that does not meet their requirements or objectives.

There may also be a benefit to consumers through greater awareness of the information required by licensees and through greater consumer understanding of how the proposed credit will meet their requirements and objectives.

**C4Q3 What additional business costs would be involved in this approach?**

COBA notes that the additional costs would be dependent on the proposed process and how different that process is in comparison to the licensees' current practices.

## D1 – Areas where responsible lending obligations do not apply

**D1Q1 Are there any forms of lending where the responsible lending obligations are being used by licensees in situations where the law does not require the responsible lending obligations in the National Credit Act to apply? Please describe the situations where this takes place.**

COBA notes that one potential consideration is with respect to AFCA's coverage of small business lending and 'responsible lending'. It would be beneficial to have clarity and alignment between ASIC and AFCA regarding what type of lending is and is not included in this 'responsible lending' scope.

**D1Q2 Are there any forms of small business lending where licensees are unsure about whether the responsible lending obligations in the National Credit Act apply? Please describe the situations which give rise to this uncertainty.**

There may need to be some clarification regarding small business lending where the purpose is for commercial purposes but secured by residential owner-occupied security.

## D2 – Fraud risks and impact on responsible lending obligations

**D2Q1 Would specific guidance about loan fraud and the impact on responsible lending obligations of the licensee be useful? Would guidance encourage broader improvements in processes for identifying fraud and reduce the risk of consumers entering unsuitable credit contracts as a result of fraud? Why or why not?**

COBA notes that the proposed guidance is focussed on third parties.

This guidance will be useful given that RG 209 outlines the need for processes in this area.<sup>16</sup> COBA believes this is likely to encourage improvements in fraud detection in this area. ASIC

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<sup>16</sup> ASIC, 2014, RG 209.55

should also be aware that APRA's draft APS 220 contains related processes with respect to third parties.

More broadly, COBA recognises that ASIC is currently undertaking a loan fraud project and this review's findings could be useful for this guidance.

COBA notes that there some concerns about whether such guidance would lead to a shift in liability onto the licensee rather than the individual consumer or intermediary.

**D2Q2 Please provide details of any risk factors that you consider it would be useful to identify, and additional verifying steps you consider to be reasonable in those circumstances.**

COBA notes that possible risk factors could include:

- credit reports not matching declared liabilities
- inconsistencies regarding credit history, addresses or background
- asset positions that are inconsistent with customer income or age, and
- presence of multiple names.

**D2Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)?**

Overly intrusive guidance could lead to a negative customer experience if it requires too much investigation and too many questions.

COBA also notes that this could change the starting point to the starting position to assume that the customer is not to be trusted. This could negatively impact licensee-consumer relationships.

**D2Q4 What additional business costs would be involved in this approach?**

COBA notes the costs depend upon ASIC's proposed guidance and whether a licensee is currently undertaking this guidance. COBA notes that as 'guidance' the licensee may avoid these costs but increase their risk of fraud.

## D3 – Use of repayment history information

**D3Q1 Would guidance about use of negative repayment history information and hardship indicators reduce the risk that credit providers consider it necessary to refuse applications for further credit products that may in fact be affordable for the consumer? Why or why not?**

Guidance on the use of negative RHI and hardship indicators would be useful. However, there must be a coordinated understanding in this area between AFCA and ASIC otherwise additional guidance may be of little value.

This guidance wouldn't necessarily discourage licensees from using these indicators as an automatic refusal trigger but would provide greater certainty that they would not be breaching their responsible lending obligations. Licensees would still make this decision depending upon their own risk appetite and AFCA considerations.

Separately, but related to CCR, COBA notes that members also seek advice as to whether CCR is considered to be both inquiry and verification for liabilities. This would remove the need to duplicate effort through seeking statements.



**D3Q2 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)?**

As noted in CP 309, this will increase access to credit for consumers subject to these hardship indicators or with other negative repayment history information.

**D3Q3 What additional business costs would be involved in this approach?**

Any approach could involve higher business costs depending upon the approach chosen. However, given that this is guidance to ‘allow’ a licensee to do something (lend to those with certain RHI or hardship indicators), the licensee can avoid these costs by not undertaking this particular type of lending. COBA notes that in this case it would restrict credit to these groups.

## D4 – Records of inquiries and verification

**D4Q1 Do you consider that guidance on industry best practice for recording the inquiries and verification steps that have been undertaken would be useful for licensees? Why or why not?**

COBA believe that indicative guidance will be useful to assist licensees. However, this guidance must take the form of ‘best practice’ guidance as opposed to a requirement.

In line with this, this means that licensees following this guidance would be likely to find it easier to demonstrate they have met their responsible lending obligations as opposed to following this guidance being part of the obligations.

This would allow each licensee to be able to make its own risk-based decision as to how it will keep the records that it will use to demonstrate compliance with these requirements.

**D4Q2 Please provide any comments on the particular recording practices identified as ‘best practice’ by ASIC, and whether you consider those practices are generally appropriate for licensees.**

These practices appear reasonable. COBA notes that there should be flexibility (as noted above in D4Q1) about how the licensee will keep these records. Any prescribed format will create unnecessary compliance costs.

The “concise narrative summary” should not be required if inquiries are structured and recorded appropriately and it has the potential to add an unnecessary additional layer of complexity to the inquiry process. This appropriate structure would meet the summary’s underlying aim to “connect the dots”. This potentially renders the summary as duplicative.

**D4Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)?**

COBA notes that there could be benefits to consumers regarding more consistent assessments if there are better record keeping practices (relative to if there were previously poor practices).

As noted in D4Q2, there is the potential for additional and unnecessarily costs if records are required to be kept in a prescribed format, or the “concise narrative summary” is a necessity in all situations.

**D4Q4 What additional business costs would be involved in this approach?**

See D4Q2.

## D5 – Content of written assessment

### **D5Q1 Would it be useful for ASIC to provide an example of a written assessment to illustrate the level of information that we think should be included? Why or why not?**

The proposed example is unlikely to be useful as it lacks the flexibility of how assessments work in practice and appears to be a ‘one size fits all’ approach.

It also has the potential to be unnecessarily duplicative and create an additional burden given that these assessments are not commonly requested by the consumer.

### **D5Q2 Please provide any comments on the example set out in Appendix 2.**

In line with our views in D5Q1, COBA provides the following comments:

- any example needs to be clear that it is not exhaustive with respect to its examples and categorisation
- any example must allow for flexibility in individual institutions’ assessments
- there is potential for duplication regarding some information — most of which is already captured in the application and system
- any example assessment must ensure that it does not require excessive time and effort to complete and only highlight what is considered to be the key aspects of the assessment, and
- any example must consider the use of benchmarks for expenses.

### **D5Q3 What are the benefits, risks and costs for consumers in this approach (including any effect on access to and cost of credit for consumers)?**

COBA notes that the key benefit of an example is that there is a consistent and complete approach to providing information in the written assessment. However, given this assessment is rarely requested this benefit may be minimal.

There risks to this approach include:

- Unnecessarily providing duplicate information in the assessment
- The example limiting flexibility in the lending process
- Lenders using this example as a ‘tick box’ approach to lending assessment.

### **D5Q4 What additional business costs would be involved in this approach?**

COBA notes that as with the proposals this depends upon how it aligns with a licensee’s current practices.

There may be significant business costs if this ‘example’ does not reflect the flexibility of the actual lending process.