



FINANCIAL SERVICES FEDERATION

30 April 2020

Committee Secretariat
Finance & Expenditure Select Committee
Parliament Buildings
WELLINGTON

By email to: fe@parliament.govt.nz

Financial Markets (Conduct of Institutions) Amendment Bill 2019

The Financial Services Federation (“FSF”) is grateful to the Committee for the opportunity to provide this submission on the Financial Markets (Conduct of Institutions) Amendment Bill (“the Bill”) on behalf of its members.

By way of background, the FSF is the industry body representing the responsible and ethical finance, leasing and credit-related insurance providers of New Zealand. We have sixty members and affiliates providing these products to more than 1.5 million New Zealand consumers and businesses. Our affiliate members include internationally recognised legal and consulting partners. A list of our members is attached as Appendix A. Data relating to the extent to which FSF members (excluding Affiliate members) contribute to New Zealand consumers, society and business is attached as Appendix B.

As can be seen from Appendix A, the FSF has 3 Non-Bank Deposit Taker (“NBDT”) members and some credit-related insurance provider members who are already required to be licensed by the Reserve Bank of New Zealand (“RBNZ”) and who will be directly affected by this proposed conduct regime. The FSF does not represent registered banks but does represent responsible consumer credit providers who could be described as Non-Deposit-Taking Lending Institutions (“NDLIs”). Whilst not directly in the scope of this regime, as responsible providers they will naturally consider the application of a conduct regime to their own businesses.

The FSF would like to start by saying that it is particularly grateful for the additional time in which to prepare this submission in recognition of the unprecedented national State of Emergency that New Zealand currently finds itself in. However, despite New Zealand being set to move out of the current State of Emergency shortly, the FSF considers that this in no way

means that it is appropriate for new licensing requirements or drastic regulatory changes to be introduced. An immense number of New Zealand businesses are struggling to stay afloat, and financial institutions are not only struggling themselves, but are doing everything they can to help their customers throughout this highly uncertain time.

The FSF has collected data from the financial institutions that comprise its membership which shows that for both consumer and business finance, the number of requests for assistance and the number of loan contracts that have been varied as a result of a request for assistance, has increased astronomically from the fortnight prior to New Zealand going to Alert Level 4 to the first fortnight under Level 4, as displayed in Figures 1 and 2 below. This clearly demonstrates that the current focus of financial institutions is on helping the significantly increased number of people suffering hardship. These efforts in helping people would be detrimentally hindered by the introduction of new licensing requirements or drastic regulatory change, to which financial institutions would have to divert their attention in order to be compliant.

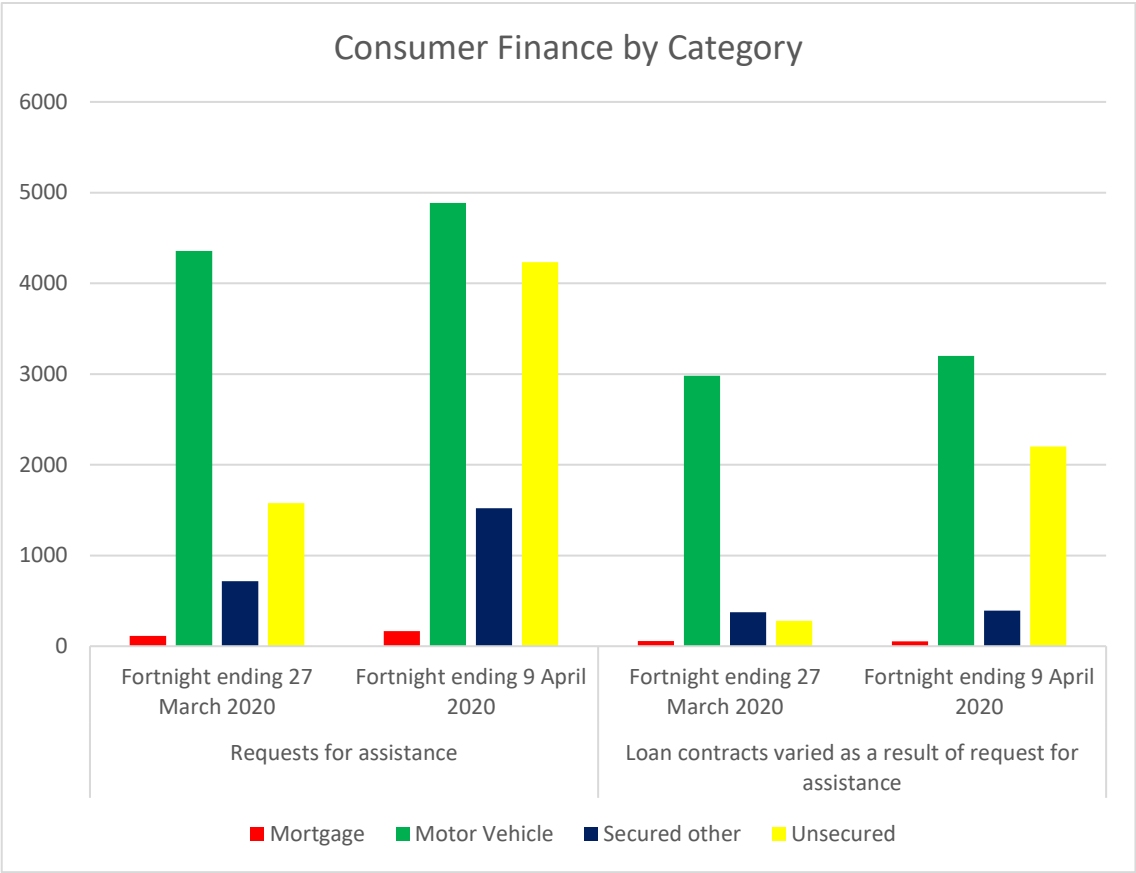


Figure 1.

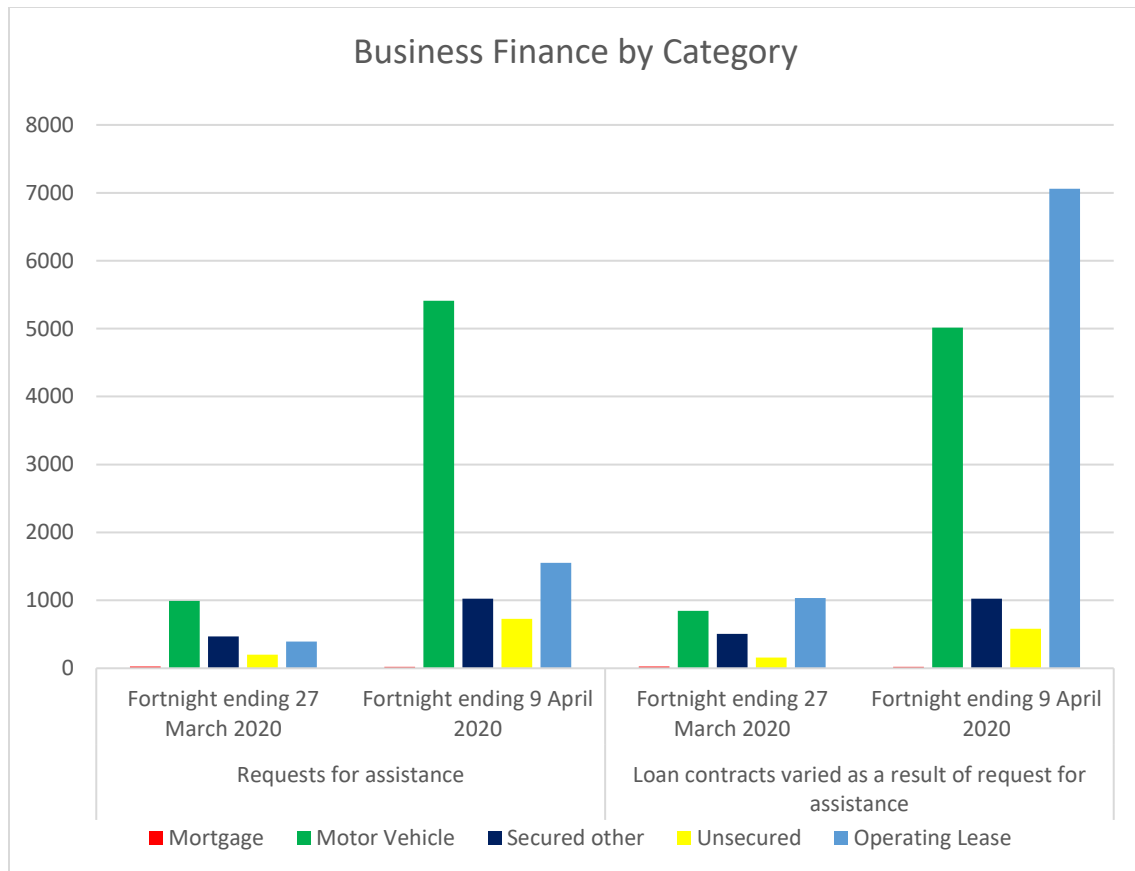


Figure 2.

The FSF will identify a number of issues with the proposed legislation throughout this submission, primarily that of over regulation, which was already an issue prior to the COVID-19 emergency. Now these issues pose more detrimental threats on financial institutions than ever. The FSF submits that a balance must be struck, as a landscape of over-regulation and under-enforcement will not serve the purpose of improving customer outcomes.

The FSF therefore requests your consideration to further delay the passage of the Financial Markets (Conduct of Institutions) Amendment Bill so as to avoid placing additional burden on the financial institutions currently doing all in their power to help New Zealand businesses and consumers. It is on this basis that the FSF makes the following submission.

Introduction

The FSF is supportive in principle of any legislative reform that prevents harm being done to consumers or provides more protection to them so long as the reform is balanced and reasonable and does not, as an unintended consequence, make access to financial products, services and advice more difficult for the consumers it is designed to protect.

In the submission made in response to the Ministry of Business, Innovation and Employment's ("MBIE") Options Paper: Conduct of Financial Institutions in June of last year when a conduct regime for financial institutions was first mooted, the FSF made the point that other legislation was in the process of being reviewed. Namely the Credit Contracts and Consumer Finance Act 2003 ("CCCFA") and New Zealand's insurance contract law. The FSF submitted that these reviews would address at least some of the issues the Bill seeks to address. The FSF also made the point that these reviews should be completed before implementing another regime to regulate aspects of the same conduct in order to avoid potential regulatory gaps or overlaps.

The FSF notes that the review of the CCCFA has now been completed with the passing late last year of the Credit Contracts Legislation Amendment Act 2019. The insurance contract law review however has not progressed any further. The FSF therefore urges caution to ensure that when this law is reviewed any overlap between the provisions of this Bill and that of the insurance contract law are avoided.

It must also be noted that at this stage the Bill largely appears to be a piece of framework legislation that allows for the creation of Regulations which are more substantive and extensive in their scope. The FSF therefore hopes that the Regulations, when drafted, add the much-needed clarity and specificity that the Bill itself is lacking.

The FSF is also wary of any unintended consequences which may arise from the implementation of the Bill. MBIE set out in their Regulatory Impact Statement that they anticipate that compliance costs will be moderate to high. The potential for high compliance costs is concerning to the FSF, as the consumers of banking and insurance products who are the intended beneficiaries of the Bill, are likely to have to bear the compliance costs incurred by financial institutions and their intermediaries.

Additionally, the FSF is forever mindful of the need for targeted enforcement of existing law. A holistic assessment of the current legislative regimes operating within the context of consumer finance and insurance reveals a multitude of protections already available to consumers. A balance must be struck, as a landscape of over-regulation and under-enforcement will not serve the purpose of improving customer outcomes.

Requirement for financial institutions to obtain a licence

The FSF strongly questions the need for those institutions that will be within the scope of the legislation to obtain yet another licence in order to be able to operate. Registered banks, licensed insurers and licensed non-bank deposit takers, are as their names suggest, already licensed. Whilst the FSF understands that this regime is aimed specifically at the conduct of these institutions, the FSF can think of no valid reason why the obtaining of yet another license by these institutions is seen to be advantageous.

Furthermore, any of these already licensed institutions that provide financial advice are also required to have a financial advice providers licence issued by the Financial Markets Authority (“FMA”) and will be required to also comply with the Code of Professional Conduct for Financial Advice Services. Financial institutions also take great pains in order to be compliant with the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (“the AML Act”). The AML Act sets out that adequate and effective procedures, policies, and controls for screening staff and senior managers must be included in the financial institution’s AML/CFT programme. There is also the requirement under the Financial Services Providers (Registration and Disputes Resolution) Act 2008 (“FSPRA”) for all financial institutions to be registered on the Financial Services Providers Register (“FSPR”) and to belong to an approved independent disputes resolution scheme. Then there is the upcoming requirement under the revised CCCFA, for financial institutions providing consumer credit to have their directors and senior managers certified by the Commerce Commission as being fit and proper persons. As it stands, some financial institutions may need to be compliant with at least four separate licensing or registration regimes in order to conduct what is essentially the same activity.

The FSF therefore submits that a licence or registration under any of the relevant legislation is already indicative of the financial institution meeting the eligibility criteria in any relevant regulations; that the institutions key personnel are fit and proper; and that the entity is capable of effectively performing the service of acting as a financial institution.

Therefore, it is highly questionable whether an additional licence under the Financial Markets Conduct Act would add any further value or benefit to either the institutions concerned or, more importantly, to consumers of financial products and services.

The FSF therefore urges that serious consideration be given to the suggestion that any terms of the proposed regime, that are not already covered under existing registration or licensing requirements, be included within the criteria for the granting of such existing registration or license to reduce the numbers of licenses or registrations affected institutions will be required to hold and the very real prospect of these affected institutions having to repeat aspects of the registration or licensing process more than once for each of the licenses they will be required to hold.

The scope of the Bill

The FSF is very pleased to see that in line with the submission made by the FSF last year on the Options Paper, in which clarity was sought surrounding the scope of the regime, the Bill specifically sets out that those financial institutions who are required to comply with the provisions are banks, licensed insurers, Non-Bank Deposit Takers (NBDTs) and any intermediary of those financial institutions where the entity provides a relevant product or service.

However, the Bill’s Explanatory Note sets out that the scope of the regime is intended “at this stage” to apply to banks, insurers and NBDTs. The FSF seeks clarification of whether the scope

of the Bill is likely to change or broaden in the course of the Bill's passage to enactment. The FSF would be very disappointed if changes were implemented without notice such that other institutions were captured within its scope. In particular, the FSF is concerned that if such changes were made, its non-deposit-taking lending institution members ("NDLIs") would be captured without sufficient opportunity to consider the implications.

Fair conduct principle

The FSF, as the industry body for *responsible* non-bank financial institutions, places a great deal of value on fairness and best practice. Therefore, the FSF fully supports a principle of fair conduct that helps to provide better, fairer, outcomes for consumers.

However, the current wording of the Bill is extremely vague and the FSF is concerned about the lack of an objective definition of what will be considered "fair". Clause 9 of the Bill will insert a new section 446B, which simply defines the fair conduct principle as the requirement to treat consumers fairly, including by paying due regard to their interests. In order for financial institutions to interpret this and set an objective standard with which they can comply, they will need to expend a great deal of resources. The cost of compliance will then be passed on to the consumer. The FSF submits that more clarity and guidance is needed in order to ensure optimum transparency surrounding what is or is not acceptable conduct under the legislation and with what exactly it is that institutions are being asked to comply.

Fair conduct programmes

In line with the FSF's concerns around a lack of objective definition of "fairness" as set out above, there is similar concern around the duty set out in the proposed section 446G that financial institutions establish, implement and maintain an "effective" fair conduct programme. Without an objective definition of what is "fair" it is unclear how a financial institution will be able to assess the effectiveness of any fair conduct programme. The FSF therefore seeks clarity around this matter, and a point of reference against which to assess the effectiveness of a fair conduct programme.

The FSF expects that there will be a number of intermediaries who offer the relevant products and services of a range of financial institutions. As the intermediary's fundamental duty will be to take all reasonable steps to comply with the financial institution's fair conduct programme, the FSF is concerned about how they are to comply with a number of different, often competing, fair conduct programmes.

Where the programmes are not consistent and uniform, an intermediary will likely engage in a process of box checking, complying with the various requirements with no real holistic awareness of the aim of improving customer outcomes. Or worse, they may choose to use the products or services of the institution with the least onerous fair conduct programme rather

than comply with the more stringent programmes that are more likely to provide better outcomes for the consumer.

The FSF is mindful that there is a great deal of variety of financial institution and diversity in their customer base and consequently what looks like a good customer outcome will likely differ between financial institutions. Therefore, effort needs to be made to ensure that an intermediary is realistically capable of complying with the various fair conduct programmes.

Incentives regulations

As any changes to the way that incentives are permitted or prohibited are to be dealt with in regulations that are yet to be drafted, it is difficult for the FSF to comment on this matter. Nonetheless, the FSF does in fact largely support incentives being dealt with in regulations as secondary legislation, as this will allow for a degree of flexibility and adaptation in everchanging circumstances, as opposed to the laborious process of amending an Act of Parliament.

In MBIE's Regulatory Impact Assessment, it was noted that the Ministry did not recommend the most intensive regulatory options, such as completely banning or capping commissions, as this would result in a significant risk that access to financial advice and financial products and services by consumers will be reduced. The FSF agrees that a balance needs to be struck in regard to incentives, and there needs to be recognition that in some circumstances, incentives may help to improve customer outcomes. Therefore, the FSF submits that there ought not to be any more regulation surrounding incentives than is reasonably necessary to support the principle of fair conduct.

The FSF suggests that one potential way in which the regulation of commissions and incentives could be managed, to avoid the potential conflict of interest that can arise from them, could be by way of requiring their disclosure. Commissions and incentives are commonplace in New Zealand business practices for a wide range of sectors for compensating people in sales roles. It is commonly accepted that salespeople may be compensated for the volume of their service. Comparably, many laws permit the charging of disclosed fees; Kiwisaver management fees are one such example. By disclosing what commissions and incentives are provided, and by, and to whom; financial institutions could be held to account by both customers and competitors, whilst allowing the institutions to exert control over their business practices and emphasise the aim of improving customer outcomes.

Protecting persons who report

The FSF strongly supports the inclusion in the Bill of protection for persons who report contraventions or failures to comply with the conduct legislation and regulations. This will allow for an increase in transparency and will help to address issues where they arise and to improve the culture and reputation of the financial services industry. However, the FSF submits that the legislative protection for reportage contained in the proposed section 446T is simply a good

start to encouraging a change in behaviour. Whether it will, in practice, have the effect of establishing a shift in attitude towards what is commonly referred to as “whistleblowing”, is likely to be a matter requiring businesses to make internal changes.

The FSF considers that the protection from civil, criminal, or disciplinary proceedings, and the protection from termination that is offered by the Bill is insufficient. The FSF therefore submits that additional efforts ought to be made to ensure anonymity and confidentiality of the person making the report, alongside provisions for procedures to be put in place that prevent the persons who report going on to suffer hardship in the workplace.

Thank you again for the opportunity to provide the FSF’s views on the Financial Markets (Conduct of Institutions) Bill. Please do not hesitate to contact me if you require anything further.



Lyn McMorran
EXECUTIVE DIRECTOR

FSF Membership List as at 1 February 2020

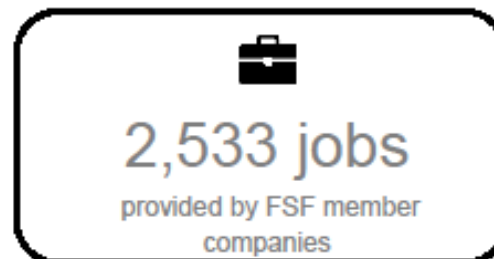
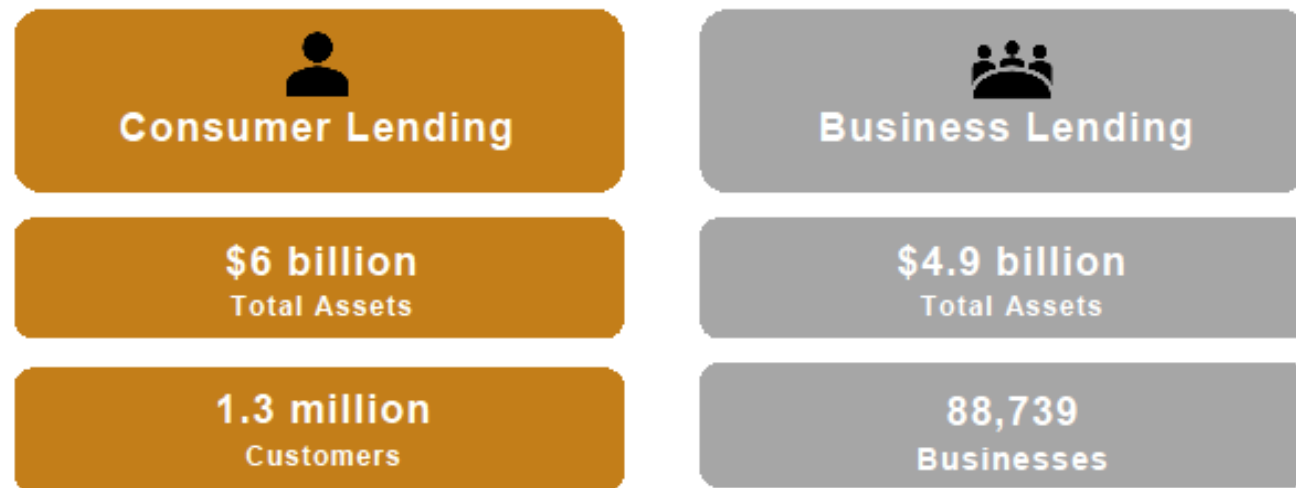
Appendix A

Non-Bank Deposit Takers (NBDTs)	Vehicle Lenders	Finance Company Diversified Lenders	Finance Company Diversified Lenders	Credit-Related Insurance	Affiliate Members
<p><u>Rated</u> Asset Finance (B)</p> <p><u>Non-Rated</u> Gold Band Finance ➤ Loan Co Mutual Credit Finance</p>	<p>AA Finance Limited</p> <p>BMW Financial Services ➤ Mini ➤ Alphaera Financial Services</p> <p>Community Financial Services</p> <p>European Financial Services</p> <p>Go Car Finance Ltd</p> <p>Honda Financial Services</p> <p>Mercedes-Benz Financial</p> <p>Motor Trade Finance</p> <p>Nissan Financial Services NZ Ltd ➤ Mitsubishi Motors Financial Services ➤ Skyline Car Finance</p> <p>Onyx Finance Limited</p> <p>Toyota Finance NZ</p> <p>Yamaha Motor Finance</p> <p><u>Leasing Providers</u> Custom Fleet</p> <p>Fleet Partners NZ Ltd</p> <p>Lease Plan</p> <p>ORIX NZ</p> <p>SG Fleet</p>	<p>L & F Ltd ➤ Speirs Finance ➤ YooGo</p> <p>Avanti Finance ➤ Branded Financial</p> <p>Caterpillar Financial Services NZ Ltd</p> <p>CentraCorp Finance 2000</p> <p>Finance Now ➤ The Warehouse Financial Services</p> <p>FlexiGroup (NZ) Limited</p> <p>Future Finance</p> <p>Geneva Finance</p> <p>Home Direct</p> <p>Instant Finance ➤ Fair City ➤ My Finance</p> <p>John Deere Financial</p> <p>Latitude Financial</p> <p>Metro Finance</p> <p>Pepper NZ Limited</p> <p>Personal Loan Corporation</p> <p>Pioneer Finance</p>	<p>Prosopa NZ Ltd</p> <p>South Pacific Loans</p> <p>Thorn Group Financial Services Ltd</p> <p>Turners Automotive Group</p> <p><u>Credit Reporting and Debt Collection Agencies</u></p> <p>Baycorp (NZ)</p> <p>Centrix</p> <p>Equifax (prev. Veda)</p> <p>Illion (prev. Dun & Bradstreet (NZ) Limited)</p> <p>Intercoll</p> <p>Receivables Management</p>	<p>Autosure</p> <p>Protecta Insurance</p> <p>Provident Insurance Corporation Ltd</p> <p>Southsure Assurance</p>	<p>Buddle Findlay</p> <p>Chapman Tripp</p> <p>Experian</p> <p>EY</p> <p>FinTech NZ</p> <p>Happy Prime Consultancy Limited</p> <p>HPD Software Ltd</p> <p>KPMG</p> <p>PWC</p> <p>Simpson Western</p> <p>Total : 60 members</p>



FINANCIAL SERVICES FEDERATION

The Financial Services Federation (FSF) is the association for responsible finance and leasing companies operating in New Zealand. This infographic is a snapshot of our 61 members, the membership list can be found at our website: www.fsf.org.nz



FSF lending members data survey period as at 31 July 2019 . Data collected and aggregated by KPMG