

## **EXPOSURE DRAFT EXPLANATORY MATERIALS**

### **Issued by authority of the Treasurer**

*Corporations Act 2001*

*Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration)  
Regulations 2019*

Section 1364 of the *Corporations Act 2001* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations* (the Regulations) is to amend the *Corporations Regulations 2001* to provide for a scheme by which conflicted remuneration that remains payable after 1 January 2021 will be rebated to affected retail customers or passed on in the form of a monetary benefit.

On 22 February 2019, the Government released the Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 (the Bill) for exposure draft consultation. The Bill removes grandfathering arrangements for conflicted remuneration and other banned remuneration from 1 January 2021.

The Regulations also repeal grandfathering provisions contained in the *Corporations Regulations 2001*.

The Regulations, together with the Bill, implement the Government's response to Recommendation 2.4 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services industry.

The Bill allows for regulations to be made that provide a scheme under which benefits that would otherwise have been paid as conflicted remuneration are rebated to affected retail clients.

The Regulations apply to a person covered by proposed section 963M of the Act, contained in item 9 of Schedule 1 to the Bill (a covered person). A covered person is a person who is legally obliged to pay conflicted remuneration to another person after 1 January 2021, but for the ban on conflicted remuneration in Subdivision C of Division 4 in Part 7.7A of the Act. Generally, the covered person is a product issuer and the other person is a financial adviser or licensee.

Where the conflicted remuneration can be attributed to a particular client (for example, if the financial adviser received a commission for selling a financial product to that client), the covered person must provide a cash rebate to the affected retail client on a dollar-for-dollar basis.

Where the conflicted remuneration can only be attributed to a client group, the covered person must divide that conflicted remuneration between the affected retail

clients in a just and equitable way. The covered person may provide a cash rebate, or they may provide a monetary benefit (for example, a reduction in fees). The amount of the cash rebate or monetary benefit must be an amount that is just and equitable in the circumstances.

The Regulations require financial services licensees who are covered persons to keep records of rebates in relation to conflicted remuneration that they are legally obliged to pay (disregarding the prohibition in Subdivision C of Division 4 of Part 7.7A of the Act) after 1 January 2021.

Additionally, the Regulations impose requirements on these covered persons to keep records of how and when conflicted remuneration was rebated after 1 January 2021.

The Regulations apply from 1 January 2021.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Act does not specify any conditions that need to be met before the power to make regulations may be exercised.

Further details of the Regulations are set out in the [Attachment](#).

**Details of the Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019**

**Section 1 – Name of Regulations**

This section provides that the title of the instrument is the *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Regulations 2019* (the Regulations).

**Section 2 – Commencement**

This section provides that the Regulations commence on the later of 1 January 2021 and the day after they are registered.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Corporations Act 2001* (the Act).

**Section 4 – Schedule**

This section provides that each instrument specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Instrument has effect according to its terms.

**Schedule 1 – Amendments**

**Item 1**

Item 1 in Schedule 1 to the Regulations amends the *Corporations Regulations 2001* (the Corporations Regulations) to provide for a scheme under which persons that are legally obliged to pay conflicted remuneration after 1 January 2021 (disregarding the ban on conflicted remuneration in Subdivision C of Part 7.7A of the Act) must pay amounts or provide monetary benefits based on that conflicted remuneration to affected retail clients. Those persons are persons covered by proposed section 963M of the Act (a covered person). Proposed section 963M is contained in item 9 of Schedule 1 to the draft Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 (the Bill).

Subregulation 7.7A.15AJ(1) in item 1 in Schedule 1 to the Regulations provides that the new Subdivision containing the rebate scheme (Subdivision 4A of the Corporations Regulations) is made for proposed subsection 963N(1) of the Act (contained in item 9 of Schedule 1 to the Bill).

*Rebating where an amount of conflicted remuneration can be attributed to a particular client*

A covered person must comply with regulation 7.7A.15AL if the conflicted remuneration can be attributed to a particular client (paragraph 7.7A.15AK(a), item 1, Schedule 1). This is likely to be the case where the payment of conflicted

remuneration was triggered as a result of a particular product being recommended to and acquired by a client (commonly referred to as a 'commission').

Under regulation 7.7A.15AL (item 1, Schedule 1) the covered person must pay the amount of the conflicted remuneration to the client no later than 10 business days after the day by which the covered person is legally obliged (disregarding the ban) to pay the conflicted remuneration to another person.

*Rebating where an amount of conflicted remuneration cannot be attributed to a particular client*

If the conflicted remuneration cannot be attributed to a particular client, a covered person must comply with regulation 7.7A.15AM (paragraph 7.7A.15AK(b), item 1, Schedule 1). It is likely to be the case that a payment of conflicted remuneration cannot be attributed to a particular client where the payment is related to the volume of products sold, for example, rebates related to the funds under advice invested through a product platform.

Subregulation 7.7A.15AM(2) requires the covered person to pay or provide a monetary benefit to each of the relevant clients in the affected client group.

A payment must be made no later than 10 business days after the day by which the covered person is legally obliged (disregarding the ban) to give the conflicted remuneration to another person (paragraph 7.7A.15AM(2)(a), item 1, Schedule 1).

A monetary benefit must be provided no later than 1 year after the date by which the covered person is legally obliged (disregarding the ban) to give the conflicted remuneration to another person. This 1 year limit allows a non-monetary benefit to be provided by means of a reduction in a product-based fee, which are frequently charged on an annual basis (paragraph 7.7A.15AM(2)(b), item 1, Schedule 1).

Subregulation 7.7A.15AM(3) provides that the amount paid, or the monetary benefit provided, to each of the clients under subregulation (2) must be an amount that is just and equitable in the circumstances.

The covered person must take account of certain matters in deciding whether an amount is 'just and equitable' for the purposes of subregulation (3). The matters are: (a) the amount of the conflicted remuneration; (b) the sum of the amounts invested by the clients in financial products to which the conflicted remuneration relates; (c) the amount invested by each client in financial products to which the conflicted remuneration relates; (d) the amount mentioned in paragraph (c), expressed as a proportion of paragraph (b); (e) the structure of the fees (if any) that the clients are likely to have paid in respect of financial products to which the conflicted remuneration relate; (f) the extent to which the sum of the amounts to be paid, and the amount of the monetary benefits to be provided, to the clients under subregulation (2) equals the amount of the conflicted remuneration; and (g) any other relevant matter (subregulation 7.7A.15AM(5), item 1, Schedule 1).

## **Item 2**

Item 2 of Schedule 1 to the Regulations repeals Subdivision 5 of Division 4 of Part 7.7A of the Corporations Regulations. This Subdivision makes further grandfathering arrangements entered into before the relevant application day specified in the Act, generally 1 July 2013. Repealing this Subdivision turns off the grandfathering arrangements prescribed in that Subdivision.

### **Item 3**

Item 3 of Schedule 1 to the Regulations inserts a new regulation 7.8.11B into the Corporations Regulations.

Regulation 7.8.11B requires a financial services licensee who is a covered person to keep certain records, to enable compliance with the rebating requirements in item 1 to be monitored. It is made for the purposes of paragraph 988E(g) and section 988F of the Act, which relate to the record keeping obligations of financial services licensees.

Subregulation 7.8.11B(1) requires financial services licensees who are persons covered by proposed section 963M of the Act to keep records showing particulars of: (a) all conflicted remuneration the licensee is legally obliged (disregarding Subdivision C of Division 4 of Part 7.7A of the Act) to give to another person for a financial year; (b) all amounts paid to clients by the licensee as required by regulation 7.7A.15AL for a financial year; and (c) all amounts paid and monetary benefits provided to clients by the licensee as required by regulation 7.7A.14AM for a financial year.

Subregulation 7.8.11B(2) imposes additional record keeping requirements on financial services licensees who are covered persons.

Paragraph 7.8.11B(2)(a) relates to amounts paid by the licensee under regulation 7.7A.15AL. The records the licensee must keep are: for each amount, an explanation of how the licensee ascertained that the conflicted remuneration could be attributed to the particular client, including a description of the financial products to which the conflicted remuneration relates; the date by which the licensee was required under that regulation to pay the amount; the date on which the amount was paid; and, a description of the manner in which the amount was paid.

Paragraph 7.8.11B(2)(b) relates to amounts paid or monetary benefits given under regulation 7.7A.15AM (i.e. in circumstances where the conflicted remuneration cannot be attributed to a particular client). These records are: an explanation of how the financial services licensee determined that the circumstances described in paragraph 7.7A.5AK(a) did not exist (i.e. why it was not possible to attribute the conflicted remuneration to a particular client); an explanation of how the financial services licensee ascertained the identity of each of the clients; how the licensee determined the amount that, in the circumstances, it was just and equitable to pay or provide to each of the clients, including a description of the financial products to which the conflicted remuneration relates; the date by which the licensee was required under the regulation to pay or provide the monetary benefit; the date on which the amount was paid or the monetary benefit provided; and, a description of the manner in which the amount was paid or the monetary benefit was provided.

#### **Item 4**

Item 4 of Schedule 1 to the Regulations inserts a new Part 10.33 into Chapter 10 of the Corporations Regulations.

Regulation 10.33.01 provides that the amendment made by Item 2 of Schedule 1 to the Regulations (repealing the grandfathering provisions in Subdivision 5 of Division 4 of Part 7.7A of the Corporations Regulations) applies to a benefit given on or after 1 January 2021, if the benefit is given under a previously grandfathered arrangement.

Regulation 10.33.02 provides that the amendment made by Item 3 of Schedule 1 to the Regulations (record-keeping requirements for financial services licensees who are covered by proposed section 963M of the Act) applies to financial records relating to periods ending after 1 January 2021.