

EXPOSURE DRAFT

2010-2011

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT

If you have any comments on this exposure draft, they should be sent to:

The General Manager
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: futureofadvice@treasury.gov.au

By Wednesday, 19 October 2011.

Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011

No. , 2011

(Treasury)

**A Bill for an Act to amend the law in relation to
financial products, and for related purposes**

EXPOSURE DRAFT

Contents

1	Short title	1
2	Commencement	1
3	Schedule(s)	2
Schedule 1—Amendments related to conflicted remuneration and anti-avoidance		3
	<i>Corporations Act 2001</i>	3

EXPOSURE DRAFT

1 **A Bill for an Act to amend the law in relation to**
2 **financial products, and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Corporations Amendment (Further*
6 *Future of Financial Advice Measures) Act 2011.*

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, in accordance with
10 column 2 of the table. Any other statement in column 2 has effect
11 according to its terms.
12

EXPOSURE DRAFT

Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	Immediately after the commencement of Schedule 1 to the <i>Corporations Amendment (Future of Financial Advice) Act 2011</i> .	1 July 2012

1 Note: This table relates only to the provisions of this Act as originally
2 enacted. It will not be amended to deal with any later amendments of
3 this Act.

4 (2) Any information in column 3 of the table is not part of this Act.
5 Information may be inserted in this column, or information in it
6 may be edited, in any published version of this Act.

7 **3 Schedule(s)**

8 Each Act that is specified in a Schedule to this Act is amended or
9 repealed as set out in the applicable items in the Schedule
10 concerned, and any other item in a Schedule to this Act has effect
11 according to its terms.
12

EXPOSURE DRAFT

Amendments related to conflicted remuneration and anti-avoidance **Schedule 1**

1 **Schedule 1—Amendments related to**
2 **conflicted remuneration and**
3 **anti-avoidance**
4

5 *Corporations Act 2001*

6 **1 Section 760B (table item 7A)**

7 Repeal the item, substitute:

7A 7.7A best interests obligations
charging ongoing fees to clients
ban on conflicted remuneration and other remuneration

8 **2 Section 761A**

9 Insert:

10 *asset based fee* has the meaning given by section 964H.

11 **3 Section 761A**

12 Insert:

13 *conflicted remuneration* has the meaning given by section 963, as
14 affected by sections 963A, 963B and 963C.

15 **4 Section 761A**

16 Insert:

17 *custodian*, in relation to a registrable superannuation entity, has the
18 same meaning as in the *Superannuation Industry (Supervision) Act*
19 *1993*.

20 **5 Section 761A**

21 Insert:

22 *geared funds* has the meaning given by subsection 964J(1).

23 **6 Section 761A**

24 Insert:

EXPOSURE DRAFT

Schedule 1 Amendments related to conflicted remuneration and anti-avoidance

1 *group life policy for members of a superannuation entity* has the
2 meaning given by subsection 963A(2).

3 **7 Section 761A**

4 Insert:

5 *life policy for a member of a default superannuation fund* has the
6 meaning given by subsection 963A(3).

7 **8 Section 761A**

8 Insert:

9 *registrable superannuation entity* has the same meaning as in the
10 *Superannuation Industry (Supervision) Act 1993*.

11 **9 Section 761A**

12 Insert:

13 *RSE licensee* has the same meaning as in the *Superannuation*
14 *Industry (Supervision) Act 1993*.

15 **10 Section 761A**

16 Insert:

17 *volume-based shelf-space fee* has the meaning given by
18 section 964B.

19 **11 At the end of Part 7.7A**

20 Add:

21 **Division 4—Conflicted remuneration**

22 **Subdivision A—What is conflicted remuneration?**

23 **963 Conflicted remuneration**

24 (1) *Conflicted remuneration* means any benefit, whether monetary or
25 non-monetary, given to a financial services licensee, or a
26 representative of a financial services licensee, who provides
27 financial product advice to persons as retail clients that, because of
28 the nature of the benefit or the circumstances in which it is given:

EXPOSURE DRAFT

Amendments related to conflicted remuneration and anti-avoidance **Schedule 1**

- 1 (a) might influence the choice of financial product recommended
2 by the licensee or representative to retail clients; or
3 (b) might otherwise influence the financial product advice given
4 to retail clients by the licensee or representative.
- 5 (2) Without limiting subsection (1), each of the following is ***conflicted***
6 ***remuneration***:
7 (a) a benefit access to which, or the value of which, is dependent
8 on the total value of financial products of a particular kind, or
9 particular kinds, recommended by the licensee or
10 representative to retail clients, or a class of retail clients;
11 (b) a benefit access to which, or the value of which, is dependent
12 on the number of financial products of a particular kind, or
13 particular kinds, recommended by the licensee or
14 representative to retail clients, or a class of retail clients;
15 (c) a benefit access to which, or the value of which, is dependent
16 on the total value of investments of a particular kind, or
17 particular kinds, made by retail clients, or a class of retail
18 clients, to whom the licensee or representative provides
19 financial product advice.

20 **963A Monetary benefit given in certain circumstances not *conflicted*** 21 ***remuneration***

- 22 (1) Despite section 963, a monetary benefit given to a financial
23 services licensee, or a representative of a financial services
24 licensee, who provides financial product advice to persons as retail
25 clients is not ***conflicted remuneration*** in the circumstances set out
26 in any of the following paragraphs:
27 (a) the benefit is given to the licensee or representative by a
28 general insurer (within the meaning of the *Insurance Act*
29 *1973*) and is given in relation to a general insurance product;
30 (b) the benefit is given to the licensee or representative by a
31 company registered under section 21 of the *Life Insurance*
32 *Act 1995* and is given in relation to a life risk insurance
33 product, other than:
34 (i) a group life policy for members of a superannuation
35 entity (see subsection (2)); or
36 (ii) a life policy for a member of a default superannuation
37 fund (see subsection (3));

EXPOSURE DRAFT

Schedule 1 Amendments related to conflicted remuneration and anti-avoidance

- 1 (c) each of the following is satisfied:
- 2 (i) the benefit is given to the licensee or representative in
- 3 relation to the issue or sale of a financial product to a
- 4 person;
- 5 (ii) financial product advice in relation to the product, or
- 6 products of that class, has not been given to the person
- 7 as a retail client by the licensee, the representative or an
- 8 associate of the licensee or the representative;
- 9 (d) the benefit is given to the licensee or representative by a
- 10 retail client in relation to:
- 11 (i) the issue or sale of a financial product by the licensee or
- 12 representative to the client; or
- 13 (ii) financial product advice given by the licensee or
- 14 representative to the client;
- 15 (e) the benefit is a prescribed benefit or is given in prescribed
- 16 circumstances.
- 17 (2) A life risk insurance product is a ***group life policy for members of***
- 18 ***a superannuation entity*** if the product is issued to an RSE licensee
- 19 of a registrable superannuation entity, or a custodian in relation to a
- 20 registrable superannuation entity, for the benefit of a class of
- 21 members of the entity.
- 22 (3) A life risk insurance product is a ***life policy for a member of a***
- 23 ***default superannuation fund*** if:
- 24 (a) the product is issued to an RSE licensee of a registrable
- 25 superannuation entity, or a custodian in relation to a
- 26 registrable superannuation entity, for the benefit of a person
- 27 who is a member of the entity; and
- 28 (b) the person has not given written notice to an employer of the
- 29 person that the fund is the person's chosen fund, but the
- 30 employer of the person makes contributions to the fund for
- 31 the benefit of the person.
- 32 Note: Superannuation guarantee surcharge is imposed on an employer unless
- 33 the employer makes contributions to a superannuation fund for the
- 34 benefit of its employees. If an employee does not notify the employer
- 35 of the employee's chosen fund, the employer is still able to satisfy its
- 36 obligations by making contributions to certain funds (see the
- 37 *Superannuation Guarantee (Administration) Act 1992*).

EXPOSURE DRAFT

Amendments related to conflicted remuneration and anti-avoidance **Schedule 1**

1 **963B Non-monetary benefit given in certain circumstances not**
2 ***conflicted remuneration***

3 Despite section 963, a non-monetary benefit given to a financial
4 services licensee, or a representative of a financial services
5 licensee, who provides financial product advice to persons as retail
6 clients is not ***conflicted remuneration*** in the circumstances set out
7 in any of the following paragraphs:

- 8 (a) the benefit is given to the licensee or representative by a
9 general insurer (within the meaning of the *Insurance Act*
10 *1973*) and is given in relation to a general insurance product;
- 11 (b) each of the following is satisfied:
12 (i) the benefit is of less than an amount prescribed;
13 (ii) identical or similar benefits are not provided on a
14 frequent or regular basis;
- 15 (c) the benefit satisfies each of the following:
16 (i) the benefit has a genuine education or training purpose;
17 (ii) the benefit is relevant to the provision of financial
18 product advice to persons as retail clients;
19 (iii) the benefit complies with regulations made for the
20 purposes of this subparagraph;
- 21 (d) the benefit satisfies each of the following:
22 (i) the benefit is the provision of information technology
23 software or support;
24 (ii) the benefit is related to the provision of financial
25 product advice to persons as retail clients in relation to
26 the financial products issued or sold by the benefit
27 provider;
28 (iii) the benefit complies with regulations made for the
29 purposes of this subparagraph;
- 30 (e) the benefit is given to the licensee or representative by a
31 retail client in relation to:
32 (i) the issue or sale of a financial product by the licensee or
33 representative to the client; or
34 (ii) financial product advice given by the licensee or
35 representative to the client;
- 36 (f) the benefit is a prescribed benefit or is given in prescribed
37 circumstances.

EXPOSURE DRAFT

Schedule 1 Amendments related to conflicted remuneration and anti-avoidance

1 **963C Certain benefits given by an employer to an employee not** 2 ***conflicted remuneration***

3 Despite section 963, a monetary or non-monetary benefit given to a
4 financial services licensee, or a representative of a financial
5 services licensee, by the employer of the licensee or representative
6 is not ***conflicted remuneration*** if:

7 (a) the benefit:

8 (i) is remuneration for work carried out, or to be carried
9 out, by the licensee or representative as an employee of
10 that employer; and

11 (ii) is not of a kind mentioned in subsection 963(2) (volume
12 based benefits); or

13 (b) the benefit is remuneration for work carried out, or to be
14 carried out, by the licensee or representative as an employee
15 of that employer and:

16 (i) the employer is an Australian ADI; and

17 (ii) access to the benefit, or the amount of the benefit, is
18 dependent on the licensee or representative
19 recommending a basic banking product; and

20 (iii) the licensee or representative does not, in the course of
21 recommending that basic banking product, give other
22 financial product advice that does not relate to a basic
23 banking product.

24 **Subdivision B—Ban on conflicted remuneration**

25 **963D Licensee must not accept conflicted remuneration**

26 (1) A financial services licensee must not accept conflicted
27 remuneration.

28 Note: This subsection is a civil penalty provision (see section 1317E).

29 (2) A financial services licensee contravenes this section if:

30 (a) a representative, other than an authorised representative, of
31 the licensee accepts conflicted remuneration; and

32 (b) the licensee is the, or a, responsible licensee in relation to the
33 contravention.

34 Note: This subsection is a civil penalty provision (see section 1317E).

EXPOSURE DRAFT

Amendments related to conflicted remuneration and anti-avoidance **Schedule 1**

- 1 (3) For the purposes of this section, the, or a, *responsible licensee*, in
2 relation to a contravention of this section, is:
- 3 (a) if the person who accepts the conflicted remuneration is a
4 representative of only one financial services licensee—the
5 financial services licensee; or
- 6 (b) if the person who accepts the conflicted remuneration is a
7 representative of more than one financial services licensee:
- 8 (i) if, under the rules in section 917C, one of those
9 licensees is responsible for the person's conduct—that
10 licensee; or
- 11 (ii) if, under the rules in section 917C, 2 or more of those
12 licensees are jointly and severally responsible for the
13 person's conduct—each of those licensees.

14 **963E Licensee must ensure compliance**

15 A financial services licensee must take reasonable steps to ensure
16 that representatives of the licensee do not accept conflicted
17 remuneration.

18 Note: This subsection is a civil penalty provision (see section 1317E).

19 **963F Authorised representative must not accept conflicted** 20 **remuneration**

- 21 (1) An authorised representative of a financial services licensee must
22 not accept conflicted remuneration.

23 Note: This section is a civil penalty provision (see section 1317E).

- 24 (2) Subsection (1) does not apply if:
- 25 (a) the licensee had provided the authorised representative with
26 information about the nature of the benefit to be accepted by
27 the authorised representative; and
- 28 (b) at the time the authorised representative accepted the benefit,
29 the representative was not aware that the benefit was
30 conflicted remuneration because the representative was
31 acting in reliance on that information; and
- 32 (c) the representative's reliance on that information was
33 reasonable.

EXPOSURE DRAFT

Schedule 1 Amendments related to conflicted remuneration and anti-avoidance

1 **963G Other representatives must not accept conflicted**
2 **remuneration**

3 A representative, other than an authorised representative, of a
4 financial services licensee must not accept conflicted remuneration
5 unless it is in circumstances for which an employer of the licensee
6 or representative is liable under section 963H.

7 Note: A representative who contravenes this section may be subject to a
8 banning order (see section 920A).

9 **963H Employer must not pay employees conflicted remuneration**

10 An employer of a financial services licensee, or a representative of
11 a financial services licensee, must not give the licensee or
12 representative conflicted remuneration for work carried out, or to
13 be carried out, by the licensee or representative as an employee of
14 the employer.

15 Note: This section is a civil penalty provision (see section 1317E).

16 **Division 5—Other banned remuneration**

17 **Subdivision A—Benefits from financial product issuers**

18 **964 Product issuer must not give monetary or non-monetary benefit**
19 **to financial services licensee or representative**

- 20 (1) An issuer or seller of a financial product must not give any
21 monetary or non-monetary benefit to a financial services licensee,
22 or a representative of a financial services licensee, who provides
23 financial product advice to retail clients.

24 Note: This section is a civil penalty provision (see section 1317E).

- 25 (2) Subsection (1) does not apply to a monetary or non-monetary
26 benefit given to a financial services licensee, or a representative of
27 a financial services licensee, who provides financial product advice
28 to persons as retail clients in the circumstances set out in any of the
29 following paragraphs:

- 30 (a) the benefit is a fee for service and the fee reasonably
31 represents the market value of the service;
32 (b) the benefit is the purchase price for property and the benefit
33 reasonably represents the market value of the property;
-

EXPOSURE DRAFT

Amendments related to conflicted remuneration and anti-avoidance **Schedule 1**

- 1 (c) the benefit is given to the licensee or representative by a
2 general insurer (within the meaning of the *Insurance Act*
3 *1973*) and is given in relation to a general insurance product;
4 (d) the benefit is given to the licensee or representative by a
5 company registered under section 21 of the *Life Insurance*
6 *Act 1995* and is given in relation to a life risk insurance
7 product, other than:
8 (i) a group life policy for members of a superannuation
9 entity; or
10 (ii) a life policy for a member of a default superannuation
11 fund;
12 (e) the benefit satisfies each of the following:
13 (i) the benefit has a genuine education or training purpose;
14 (ii) the benefit is relevant to the provision of financial
15 product advice to persons as retail clients;
16 (iii) the benefit complies with regulations made for the
17 purposes of this subparagraph;
18 (f) the benefit satisfies each of the following:
19 (i) the benefit is the provision of information technology
20 software or support;
21 (ii) the benefit is related to the provision of financial
22 product advice to persons as retail clients in relation to
23 the financial products of the benefit provider;
24 (iii) the benefit complies with regulations made for the
25 purposes of this subparagraph;
26 (g) the benefit is a prescribed benefit or is given in prescribed
27 circumstances.

28 **Subdivision B—Volume-based shelf-space fees**

29 **964A Application**

- 30 (1) This Subdivision applies if:
31 (a) a monetary or non-monetary benefit is given by a financial
32 services licensee or an RSE licensee (the *funds manager*) to
33 a financial services licensee or an RSE licensee (the *platform*
34 *operator*); and
35 (b) the platform operator offers:

EXPOSURE DRAFT

Schedule 1 Amendments related to conflicted remuneration and anti-avoidance

- 1 (i) a facility through which financial services licensees and
2 their representatives can obtain information about
3 financial products; or
4 (ii) a facility through which financial products are issued;
5 and
6 (c) either:
7 (i) that facility includes information about financial
8 products in which the funds manager deals (the *funds*
9 *manager's financial products*); or
10 (ii) financial products in which the funds manager deals
11 (also the *funds manager's financial products*) are
12 issued through that facility.

13 **964B What is a *volume-based shelf-space fee*?**

- 14 (1) The benefit is a *volume-based shelf-space fee* if:
15 (a) access to the benefit, or the value of benefit, is dependent on
16 the total number or value of the funds manager's financial
17 products of a particular kind, or particular kinds, about which
18 information is included on the facility or which are issued
19 through the facility; and
20 (b) the benefit is not a discount on an amount payable, or a
21 rebate of an amount paid, by the platform operator to the
22 funds manager for services provided by the funds manager to
23 the platform operator (see subsection (2)).
24 (2) The benefit is also a *volume-based shelf-space fee* if:
25 (a) the benefit is a discount on an amount payable, or a rebate of
26 an amount paid, by the platform operator to the funds
27 manager for services provided by the funds manager to the
28 platform operator; and
29 (b) the value of the benefit exceeds the reasonable value of scale
30 efficiencies obtained by the funds manager because of the
31 number or value of financial products in relation to which the
32 funds manager provides those services.

33 **964C Financial services licensees must not accept volume-based** 34 **shelf-space fees**

- 35 A financial services licensee must not accept a volume-based
36 shelf-space fee.
-

EXPOSURE DRAFT

Amendments related to conflicted remuneration and anti-avoidance **Schedule 1**

1 Note: This section is a civil penalty provision (see section 1317E).

2 **964D RSE licensees must not accept volume-based shelf-space fees**

3 An RSE licensee must not accept a volume-based shelf-space fee.

4 Note: This section is a civil penalty provision (see section 1317E).

5 **Subdivision C—Ban on asset based fees on geared funds**

6 **964E Application**

7 This Subdivision applies where a financial services licensee, or a
8 representative of a financial services licensee, provides financial
9 product advice (the *advice*) to a person (the *client*) as a retail client.

10 **964F Financial services licensees must not charge asset based fees on** 11 **geared funds**

12 (1) The financial services licensee must not charge an asset based fee
13 on geared funds used or to be used to acquire financial products by
14 or on behalf of the client to which the advice relates.

15 Note: This section is a civil penalty provision (see section 1317E).

16 *Exceptions*

17 (2) Subsection (1) does not apply if it is not reasonably apparent that
18 the funds used or to be used to acquire financial products by or on
19 behalf of the client are geared funds.

20 (3) The regulations may provide that subsection (1) does not apply in
21 prescribed circumstances.

22 *Duty to make reasonable inquiries*

23 (4) Nothing in this section affects the duty of the financial services
24 licensee, or the representative of the financial service licensee,
25 under section 961C to make reasonable inquiries to obtain
26 complete and accurate information (see paragraph 961C(2)(c)).

EXPOSURE DRAFT

Schedule 1 Amendments related to conflicted remuneration and anti-avoidance

1 **964G Authorised representatives must not charge asset based fees**
2 **on geared funds**

- 3 (1) The authorised representative of the financial services licensee
4 must not charge an asset based fee on geared funds used or to be
5 used to acquire financial products by or on behalf of the client to
6 which the advice relates.

7 Note: This section is a civil penalty provision (see section 1317E).

8 *Exceptions*

- 9 (2) Subsection (1) does not apply if it is not reasonably apparent that
10 the funds used or to be used to acquire financial products by or on
11 behalf of the client are geared funds.
- 12 (3) The regulations may provide that subsection (1) does not apply in
13 prescribed circumstances.

14 *Duty to make reasonable inquiries*

- 15 (4) Nothing in this section affects the duty of the authorised
16 representative, under section 961C to make reasonable inquiries to
17 obtain complete and accurate information (see paragraph
18 961C(2)(c)).

19 **964H What is an asset based fee?**

20 An *asset based fee* is a fee that is dependent upon the amount of
21 funds used or to be used to acquire financial products by or on
22 behalf of the client.

23 **964J What are geared funds?**

- 24 (1) Borrowed funds are *geared funds*. However, borrowed funds are
25 not geared funds to the extent that the borrowed funds have been
26 repaid.
- 27 (2) *Borrowed* means borrowed in any form, whether secured or
28 unsecured, including the raising of funds through:
29 (a) a credit facility within the meaning of the regulations; and
30 (b) a margin lending facility.

EXPOSURE DRAFT

Schedule 1 Amendments related to conflicted remuneration and anti-avoidance

- 1 (jaal) sections 964C and 964D (financial services licensees and
2 RSE licensees must not accept volume-based shelf-space
3 fees);
4 (jaam) sections 964F and 964G (financial services licensees and
5 authorised representatives must not charge asset based fees
6 on geared funds);
7 (jaan) section 965 (anti-avoidance of Part 7.7A provisions);

13 At the end of paragraph 1317G(1E)(b)

- 8 Add:
9
10 ; (v) subsections 963D(1) and (2) (financial services licensee
11 must not accept conflicted remuneration);
12 (vi) section 963E (financial services licensee must ensure
13 representatives do not accept conflicted remuneration);
14 (vii) section 963F (authorised representative must not accept
15 conflicted remuneration);
16 (viii) section 963H (employer must not pay employees
17 conflicted remuneration);
18 (ix) section 964 (financial product issuer must not give
19 benefit to financial services licensee or representative);
20 (x) sections 964C and 964D (financial services licensees
21 and RSE licensees must not accept volume-based
22 shelf-space fees);
23 (xi) sections 964F and 964G (financial services licensees
24 and authorised representatives must not charge asset
25 based fees on geared funds);
26 (xii) section 965 (anti-avoidance of Part 7.7A provisions).

14 Subsection 1317G(1F)

- 27
28 Omit “subparagraph (1E)(b)(i), (ii) or (iii)”, substitute
29 “paragraph (1E)(b) (except a provision mentioned in
30 subparagraph (1E)(b)(iv))”.