

## **DRAFT EXPLANATORY STATEMENT**

### **Issued by authority of the Minister for Financial Services and Superannuation**

*Corporations Act 2001*  
*Corporations Regulations 2001*

The *Corporations Act 2001* (the Act) provides for the regulation of corporations, financial markets, and products and services, including in relation to licensing, conduct, financial product advice and disclosure.

Subsection 1364(1) of 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 *Corporations Amendment Regulation 2013 (No. N)* (the Regulation) makes a number of amendments to the *Corporations Regulations 2001*. The amendments are in respect of the treatment of stockbroking-related activities in relation to the bans on conflicted remuneration and asset-based fees on borrowed amounts introduced by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*.

The Regulation extends the scope of existing stockbroking-related exemptions to provide that:

- brokerage fees are exempt from the ban on asset-based fees on borrowed amounts; and
- fees can be paid by licensees that execute trades on behalf of the retail clients of other licensees, where those trades are requested by the client through the non-executing licensee's online trading service, under circumstances where clients do not receive personal advice.

The exemptions identified in the Regulation will be subject to a two year review to ensure that they are working as intended. The review will be undertaken by the Australian Securities and Investments Commission and will also encompass the existing FOFA exemptions relating to stockbroking activities. Regulatory amendments are not required to perform this review.

Details of the Regulation are set out in [Attachment A](#). A statement of the Regulation's compatibility with human rights is set out in [Attachment B](#).

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

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

The Regulation commences the day after it is registered.

**DRAFT ONLY**

**Details of the proposed Corporations Amendment Regulation 2013 (No. N)**

**Section 1 – Name of Regulation**

This section specifies the name of the Regulation as the *Corporations Amendment Regulation 2013 (No. N)*.

**Section 2 – Commencement**

This section specifies that the Regulation commences the day after it is registered.

**Section 3 – Authority**

This section provides that the authority for making the Regulation is the *Corporations Act 2001* (the Act).

**Section 4 – Schedule(s)**

This section provides that Schedule 1 amends the *Corporations Regulations 2001*.

**Schedule 1 – Amendments**

**Item 1** amends the title of regulation 7.7A.12D to omit “given to representatives”. This amendment better describes the application of the regulation.

**Item 2** inserts new subregulation 7.7A.12D(1A) which provides that a monetary benefit is not conflicted remuneration in circumstances where:

- the benefit is a fee paid by a trading participant licensee to a non-trading participant licensee, in respect of trades executed by the trading participant on behalf of the retail client of the non-trading participant; and
- the fee relates to trades requested by clients through a service provided by the non-trading participant (a ‘specified service’); and
- the fee is a portion of the brokerage fee paid by the client to the trading participant licensee.

The purpose of the provision is to provide that a portion of the brokerage fee paid by a retail client to a trading participant for the execution of trades, that is subsequently paid to a non-trading participant, is not subject to the ban on conflicted remuneration under Subdivision C of Part 7.7A of the Act, in circumstances where that fee relates to the client’s request for trades through the non-trading participant’s ‘specified service’.

A definition of ‘brokerage fee’ is currently provided in subregulation 7.7A.12D(2).

**Item 3** inserts a note which notes that subregulations 7.7A.17 and 7.7A.18 provide exemptions in respect of the ban on the charging of asset-based fees on borrowed amounts in relation to brokerage fees.

**Item 4** inserts a definition of the term ‘specified service’ in subregulation 7.7A.12D(2).

The provision clarifies the type of service to which the proposed exemption provided in subregulation 7.7A.12D(1A) applies. The provision specifies that a

‘specified service’ is a service provided for the retail clients of a non-trading participant licensee which:

- is white-labelled by (provided under the name or brand name) the non-trading participant; and
- is provided so that trades can be undertaken on behalf of retail clients in financial products traded on prescribed foreign or domestic financial markets; and
- is only made available through direct electronic access (online); and
- is provided under circumstances where clients do not receive personal advice from the licensees or authorised representatives related to the client’s trading through the specified service.

The purpose of the provision is to clarify that the exemption from the ban on conflicted remuneration provided under the proposed subregulation 7.7A.12D(1A) only applies in the specific circumstances where non-trading participant licensees provide an online trading service to retail clients that is essentially identical to the online trading services provided by trading-participant licensees.

The provision provides certainty that, in circumstances such as those described in Example 1.1 of the Revised Explanatory Memorandum to the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012*, fees paid by trading participants to non-trading participants, which would otherwise be expected to only have a remote influence on advice, will not be considered conflicted remuneration.

Item 5 inserts subdivision 3, ‘Asset-based fees on borrowed amounts’, which inserts two new regulations.

Regulation 7.7A.17 provides that the ban on financial services licensees charging asset-based fees does not apply in respect of brokerage.

Regulation 7.7A.18 provides that the ban on authorised representatives charging asset-based fees does not apply in respect of brokerage.

Subsections 964D(1) and 964E(1) of the Act currently prescribe that licensees and their authorised representatives are prohibited from charging asset-based fees on borrowed amounts. These provisions include the charging of brokerage fees.

The effect of the regulations is to provide that licensees and their authorised representatives can charge brokerage fees in circumstances where trades are made using borrowed amounts (including margin loans).

## ATTACHMENT B

### Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

#### Corporations Amendment Regulation 2013 (No. N)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Legislative Instrument

The *Corporations Amendment Regulation 2013 (No. N)* (the Regulation) amends the *Corporations Regulations 2001*.

The Regulation extends the scope of existing stockbroking-related exemptions to provide that:

- brokerage fees are exempt from the ban on asset-based fees on borrowed amounts; and
- fees can be paid by licensees that execute trades on behalf of the retail clients of other licensees, where those trades are requested by the client through the non-executing licensee's online trading service, under circumstances where clients do not receive personal advice.

#### Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.