

DRAFT EXPLANATORY STATEMENT

Issued by authority of the Minister for Financial Services and Superannuation

Corporations Act 2001

Corporations Amendment Regulations 2012 (No.)

The *Corporations Act 2001* (the Act) provides for the regulation of corporations, financial markets, 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 Regulations 2012 (No.)* (the Regulations) make amendments to the *Corporations Regulations 2001* (the Principal Regulations). The amendments are in respect of the provisions in Part 10.18 of the Act, which govern the application of the ban on conflicted remuneration in Division 4 of Part 7.7A of the Act.

Specifically, the amendments to the Principal Regulations clarify that the grandfathering of any conflicted remuneration does not extend to benefits given in relation to new clients or new financial products.

Details of the Regulations are set out in Attachment A.

A statement of the Regulations' compatibility with human rights is set out in Attachment B.

The Regulations are 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 Regulations may be exercised.

The Regulations commence immediately after the commencement of Schedule 1 to the *Corporations Amendment (Future of Financial Advice) Act 2012*.

Details of the proposed Corporations Amendment Regulations 2012 (No.)

Regulation 1 – Name of Regulations

Regulation 1 provides that the name of the Regulations is the *Corporations Amendment Regulations 2012 (No.)*.

Regulation 2 – Commencement

Regulation 2 provides that the Regulations commence immediately after the commencement of Schedule 1 to the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*.

Regulation 3 – Amendment of *Corporations Regulations 2001*

Regulation 3 provides that the *Corporations Regulations 2001* (the Principal Regulations) are amended as provided for in Schedule 1 to the Regulations.

Schedule 1 – Amendments

Item [1]

Division 4 of Part 7.7A of the *Corporations Act 2001* (the Act) provides for a ban on conflicted remuneration.

Conflicted remuneration is defined by section 963A of the Act as any benefit given to a financial services licensee (or a representative of a licensee) that, because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the choice of financial product recommended, or the financial product advice given, to retail clients by the licensee or representative. There are certain exclusions from the definition of conflicted remuneration, which are set out in sections 963B to 963D. Subdivision C of Division 4 provides that licensees and representatives must not accept conflicted remuneration, and employers and product issuers must not give it. Chapter 2 of the Revised Explanatory Memorandum to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 provides an explanation of the conflicted remuneration provisions.

Part 10.18 of the Act includes transitional provisions relating to the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012* (the Amending Act), which is the Act which introduces the ban on conflicted remuneration. Subsection 1528(1) of the Act provides that, subject to subsection 1528(2), the obligations in Division 4 of Part 7.7A do not apply to benefits given to a licensee or representative if:

- the benefit is given under an arrangement entered into before the day of commencement; and
- the benefit is not given by a platform operator.

Subsection 1528(2) provides that regulations may prescribe circumstances in which the ban on conflicted remuneration applies, or does not apply, to a benefit given to a licensee or representative.

Item [1] inserts regulation 7.7A.4.16 into the Principal Regulations for the purposes of subsection 1528(2) of the Act.

Regulation 7.7A.4.16

Regulation 7.7A.4.16 clarifies the circumstances in which a benefit will not be ‘grandfathered’ with respect to the ban on conflicted remuneration. That is, it identifies a situation in which Division 4 of Part 7.7A of the Act applies to a benefit given by someone other than a platform operator.

Section 1528 of the Act has the effect of grandfathering all payments under an arrangement entered into before the application day. An ‘arrangement’ for the purposes of Chapter 7 of the *Corporations Act 2001* is defined in section 761A and has a potentially broad meaning. It may encompass contracts, agreements, understandings, schemes or other arrangements.

In addition to the relationship between a financial adviser and a retail client there are often a range of other related arrangements entered into by financial advisers and other parties. It is possible that conflicted remuneration may flow as payments between parties to these other arrangements. A particular focus of the ban on conflicted remuneration in Division 4 of Part 7.7A is commissions paid under an arrangement between a product issuer and a financial adviser with respect to a retail client’s investment in the issuer’s financial product. In this scenario, the commission is paid under an arrangement between a product issuer and a financial adviser or dealer group; it is not paid under an arrangement to which the retail client is party.

The intention of the grandfathering arrangements is to preserve any existing contractual rights to receive ongoing product commissions, but not to allow commissions on ‘new’ financial products acquired on or after the application day. A contractual right to a commission is not typically created until the party receiving the commission (the licensed financial adviser) does what is necessary to become entitled to it. That is, there can be no existing contractual right to commissions based on financial products that may be acquired in the future. Any such commissions are not intended to be excluded from the application of Division 4 by the operation of section 1528.

To clarify this, subregulation 7.7A.4.16(2) explicitly applies the ban on conflicted remuneration to a benefit given by someone other than a platform operator, under an arrangement that was entered into before the application day, in relation to an investment in a new financial product. A ‘new financial product’ is defined by subregulation 7.7A.4.16(3) as a financial product acquired on or after the application day.

For example, if a financial adviser has an arrangement with a product issuer under which payments are made to the adviser when the adviser’s clients invest in the issuer’s financial product, and after the application day a new or existing client of the adviser invests in that financial product (not having invested in that product before the

application day), any payments made under the arrangement with respect to that investment will be subject to the ban on conflicted remuneration.

With this regulation in place, section 1528 of the Act continues to grandfather benefits based on investments in financial products acquired before the application day. Further, benefits based on additional investments in financial products acquired before the application day, including the reinvestment of returns on investments in such financial products, will also not be subject to the ban on conflicted remuneration. Subregulation 7.7A.4.16(2) only excludes from the grandfathering benefits based on investments in financial products acquired on or after the application day.

In this regulation, ‘application day’ has the meaning given by section 1528(4) of the Act. It is the earlier of the day on which a person elects to be bound by the obligations and prohibitions imposed under Part 7.7A, or 1 July 2013. This reflects the flexible approach to adopting the measures implemented by the Amending Act. Because the application day is likely to vary between different persons, it will be a matter for each person making or receiving a payment to determine whether the payment can be made or received without breaching Division 4, depending on the date on which the person elects to be (or becomes) bound and the capacity in which the person makes or receives the payment.

Statement of Compatibility with Human Rights

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

Corporations Amendment Regulation 2012 (No.)

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 purpose of the Legislative Instrument is to support the measures introduced by the *Corporations Amendment (Future of Financial Advice) Act 2012* and the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*, specifically the grandfathering of certain contractual rights with respect to the ban on conflicted remuneration.

Human rights implications

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