

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No.

Issued by authority of the Minister for Financial Services and Superannuation

Corporations Act 2001

Corporations Amendment Regulation 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 Regulation 2012 (No.)* makes a number of amendments to the *Corporations Regulations 2001* (the Principal Regulations). The amendments are in respect of the provisions relating to the best interests obligation and the ban on conflicted remuneration as introduced by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*.

Specifically, the amendments to the Principal Regulations clarify the intended operation of the best interests obligation and the ban on conflicted remuneration and exempt certain types of payments common to the stockbroking industry from the ban on conflicted remuneration. The amendments will:

- allow an agent or employee of an Authorised Deposit-taking Institution (ADI) to take advantage of a reduced best interests duty when a client has sought advice on a combination of certain products;
- prescribe the circumstances in which a monetary benefit given to a financial services licensee or a representative that relate to a combination of products is not conflicted remuneration;
- prescribe the circumstances in which a monetary or non-monetary benefit given to an agent or employee of an ADI with respect to a basic banking product and a general insurance product is not conflicted remuneration;
- specify that two or more monetary-benefits can be given to a financial services licensee or a representative for advice that relate to financial products; and
- exempt 'stamping fees' from the ban on conflicted remuneration – fees paid by a company to a financial services licensee or representative for raising capital or debt on behalf of the company; and

- exempt employee remuneration based on brokerage fees (transaction fees paid by clients to market participants or their authorised representatives for dealing in listed products on their behalf) from the ban on conflicted remuneration.

In addition, a minor amendment is made to an existing regulation to replace a reference to a repealed section of the Act.

Details of the proposed Regulation are set out in Attachment A.

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

This Regulation would be 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 proposed Regulation may be exercised.

The Regulation commences immediately after the commencement of the *Corporations Amendment (Future of Financial Advice) Act 2012*.

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

Section 1 – Name of Regulation

This section specifies the name of the Regulation as the *Corporations Amendment Regulation 2012 (No.)*.

Section 2 – Commencement

This section specifies that the Regulation commences immediately after the commencement of Schedule 1 to the *Corporations Amendment (Future of Financial Advice) Act 2012*.

Section 3 – Amendment of the Corporations Regulations 2001

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

Schedule 1 – Amendments

Item 1 inserts new regulations 7.7.04AA and 7.7.04AB. Regulations 7.7.04AA and 7.7.04AB provide that information about a monetary benefit that is not conflicted remuneration because it has been prescribed as such under section 963B(1)(e) as such, needs to be specifically disclosed in a Financial Services Guide given by a financial services licensee or authorised representative.

Item 2 amends subregulation 7.7.09B(1) by omitting the reference to section 945B of the *Corporations Act 2001* (the Act) and replacing it with a reference to section 961H (as introduced by the *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*).

Item 3 inserts new regulations 7.7.09BC and 7.7.09BD. Regulations 7.7.09BC and 7.7.09BD provide that information about a monetary benefit that is not conflicted remuneration because it has been prescribed as such under section 963B(1)(e) as such, needs to be specifically disclosed in a Statement of Advice given by a financial services licensee or authorised representative.

Item 4 inserts new Divisions 1 and 2 into Part 7.7A of the Principal Regulations which relate to preliminary matters and the best interests obligation provisions in Division 2 of Part 7.7A of the Act.

Regulation 7.7A.1.1 inserts a definition of *agent* of an Australian Authorised Deposit-taking Institution (ADI) for the purposes of Part 7.7A of the Principal Regulations.

Regulation 7.7A.2.1 prescribes for paragraph 961B(5)(b) of the Act, the circumstances in which a provider of personal advice is not required to prove that he or she has taken the steps mentioned in paragraphs 961B(2)(d) to (g) to satisfy the best interests obligation in subsection 961B(1) of the Act. The regulation applies to personal advice that relates to a basic banking product or a general insurance product in prescribed circumstances. Under subregulation 7.7A.2.1(2), the circumstances are:

- the subject matter of the advice sought by the client is about more than one of the following:
 - a basic banking product;
 - a general insurance product;
 - a product that is not a financial product; and
- the provider of the personal advice is an agent or employee of an Australian ADI.

This regulation clarifies the intended operation of the best interests obligation and requirements to satisfy the obligation. This regulation ensures that not all steps under subsection 961B(2) are required to be met in order to satisfy subsection 961B(1) when an agent or employee of an Australian ADI is providing personal advice to a client on both a basic banking product and a general insurance product.

The best interests obligation under subsection 961B(1) of the Act does not apply to advice on a product that is not a financial product (as defined by Division 3 of Part 7.1 of the Act). The regulation, however, clarifies that advice can also be provided on a product that is not a financial product at the same time as advice given on basic banking or general insurance without imposing a higher level of obligation under the best interests duty than established in 961B(2)(a) to (c).

Item 5 amends Division 4 of Part 7.7A of the Principal Regulations which relates to the conflicted remuneration provisions in Division 4 of Part 7.7A of the Act.

Regulation 7.7A.12 prescribes circumstances in which a monetary benefit given to a financial services licensee or a representative of a financial services licensee is not conflicted remuneration under paragraph 963B(1)(e) of the Act. In the regulation, the financial services licensee or representative to whom the benefit is given is referred to as ‘the provider’ of financial advice.

Subregulation 7.7A.4.12(2) sets out the first set of circumstances where a benefit will not be conflicted remuneration:

- a benefit is given in relation to one or more of the following:
 - a general insurance product;
 - a life risk insurance product, other than a group life policy for members of a superannuation entity or a life policy for a member of a default superannuation fund; or

- a product that is not a financial product.

Subregulation 7.7A.4.12(3) sets out the second set of circumstances:

- a benefit is given in relation to one or more of the following:
 - a general insurance product;
 - a life risk insurance product, other than a group life policy for members of a superannuation entity or a life policy for a member of a default superannuation fund; or
 - a product that is not a financial product; and
- the provider at the same time as providing advice on the above products, provides advice about other financial products.

Subregulations 7.7A.4.12(2) and (3) ensure that a benefit given to a financial services licensee, or representative of a financial services licensee, for advice that relates to a combination of products is exempt from the ban on conflicted remuneration. The exemption from the ban on conflicted remuneration will apply in such circumstances irrespective of whether the provider has provided advice on other financial products at the same time.

The products that relate to a benefit given under subregulations 7.7A.4.12(2) and (3) may be the same. Subregulation (3) covers the situation when, at the same time, advice is also provided on other financial products; subregulation (2) covers the situation when no advice is given on other financial products.

Subregulations 7.7A.4.12(2) and (3) are intended to cover circumstances in which a benefit is given in relation to one financial product and that product has elements of more than one financial product. For example, consumer credit insurance (CCI) generally includes two insurance contracts in the one CCI product – a contract that is classed as general insurance and a contract that is classed as life risk insurance. A provider that receives a benefit that relates to a CCI product, whilst not specifically prescribed for under section 963B of the Act, is still exempt from the ban on conflicted remuneration by virtue of subregulations 7.7A.4.12(2) and (3).

Subregulation 7.7A.4.12(4) provides an exemption from the ban on conflicted remuneration for ‘stamping fees’ – fees paid by a company to a financial services licensee or authorised representative for raising capital or debt on their behalf. It sets out the circumstances in which a benefit of this sort will not be conflicted remuneration:

- the benefit is given by a company to the provider for the provider, on dealing, on behalf of the retail client, in certain products issued by the company, and
- the product which is dealt with is:
 - a share in the company which is or will be admitted for quotation on a prescribed financial market;

- a right to acquire by way of issue a share in the company which is or will be admitted for quotation on a prescribed financial market; and
- a debenture of a company which is or will be admitted for quotation on a prescribed financial market.

Paragraph 7.7A.4.12(4)(b) provides that the onward payment of a benefit of this sort to a representative of the provider will also not be conflicted remuneration.

Subregulation 7.7A.4.12(5) provides that the exemption contained in subregulation 7.7A.4.12(5) does not apply if the company has the primary purpose of investing in financial products. This subregulation is intended to exclude benefits given to providers for dealing in listed investment companies from the exemption.

Subregulation 7.7A.4.12(6) provides an exemption from the ban on conflicted remuneration for employee remuneration based on brokerage fees. It sets out the circumstances in which a benefit of this sort will not be conflicted remuneration:

- the benefit consists of a percentage, of no more than 100 percent, of a brokerage fee that is given to a provider who is a participant in a licensed market or an authorised representative of a participant;
- the provider gives the benefit to a representative of the provider; and
- the provider has anti-churning arrangements in place.

Subregulation 7.7A.4.12(7) defines the terms ‘anti-churning arrangements’, ‘brokerage fee’ and ‘prescribed foreign financial market’ for the purposes of the regulation. Anti-churning arrangements are arrangements to ensure that the size or frequency of transactions entered into by a provider for a client is appropriate, having regard to the investment objectives, financial situation and needs of the client.

Brokerage fee is defined as a fee that is:

- given by a retail client to a provider for the provider, on behalf of the retail client, dealing in a financial product that is or will be admitted for quotation on a prescribed financial market or a prescribed foreign financial market; and
- based on the value of the financial product dealt with.

The definition of prescribed financial market is in regulation 1.0.02A of the principal regulations. A prescribed foreign financial market is defined in subregulation 7.7A.4.12(7) as being a financial market that has its principle place of business in a foreign country and has been authorised by an authority in that country that is a signatory to the International Organisation of Securities Commission’s Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information of May 2002.

Regulation 7.7A.4.13 prescribes for paragraphs 963B(1)(e) and 963C(f) of the Act, the circumstances when a monetary or non-monetary benefit given to a financial services licensee or a representative of a financial services licensee (the provider) is

not conflicted remuneration. In the regulation, the financial services licensee or representative to whom the benefit is given is referred to as ‘the provider’ of financial advice.

Under subregulation 7.7A.4.13(2), the circumstances are:

- a benefit is given in relation to one or more of the following:
 - a basic banking product;
 - a general insurance product;
 - a product that is not a financial product; and
- the provider does not, at the same time, give advice on a financial product that does not include:
 - a basic banking product; or
 - a general insurance product; and
- the provider is acting in their capacity as an agent or employee of an Australian ADI.

This regulation ensures that an agent or employee of an Australian ADI can continue to receive remuneration for the sale of its principal’s or employer’s basic financial products. The regulation also ensures that such a benefit can still be given to an agent or employee of an ADI that is also advising on and receiving a benefit at the same time for products that are not defined as a financial product under Division 3 of Part 7.1 of the Act.

Regulation 7.7A.4.14 prescribes for paragraph 963C(f) of the Act, the circumstances when a non-monetary benefit given to the a financial services licensee or a representative of a financial services licensee (the provider) is not conflicted remuneration. In the regulation, the financial services licensee or representative to whom the benefit is given is referred to as ‘the provider’ of financial advice.

Under subregulation 7.7A.4.14(2), ensures that a benefit that relates to more than one of the already prescribed non-monetary benefits listed in section 963C of the Act is not conflicted remuneration if combined into the one benefit given to a provider.

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 (Further Future of Financial Advice Measures) Act 2012*, specifically to:

- allow an agent or employee of an Authorised Deposit-taking Institution (ADI) to take advantage of a reduced best interests duty when a client has sought advice on a combination of certain products;
- prescribe the circumstances when a monetary benefit given to a financial services licensee or a representative that relate to a combination of products is not conflicted remuneration;
- exclude benefits given for advice relating to interests in time-sharing schemes from the ban on conflicted remuneration;
- prescribe the circumstances when a monetary or non-monetary benefit given to an agent or employee of an ADI with respect to basic banking products and general insurance products are not conflicted remuneration;
- specify that two or more monetary benefits can be given to a financial services licensee or a representative for advice that relate to financial products;
- exempt ‘stamping fees’ from the ban on conflicted remuneration – fees paid by a company to a financial services licensee or representative for raising capital or debt on behalf of the company;
- exempt employee remuneration based on brokerage fees (transaction fees paid by clients to market participants or their authorised representatives for dealing in listed products on their behalf) from the ban on conflicted remuneration; and
- replace a reference to a repealed section of the *Corporations Act 2001*.

Human rights implications

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