

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 234

Issued by authority of the Minister for Financial Services and Superannuation

Corporations Act 2001

Corporations Amendment Regulation 2012 (No. 8)

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 2012 (No. 8)* (the Regulation) amends the *Corporations Regulations 2001* (the Principal Regulations). The amendment is 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 amendment to the Principal Regulations provides for the 'grandfathering' of conflicted remuneration given by platform operators.

Details of the Regulation are set out in [Attachment A](#).

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 Government consulted relevant stakeholders before developing this Regulation. It announced its intentions with respect to the grandfathering of payments made by platform operators on 29 August 2011. The Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012, introduced to the House of Representatives on 24 November 2011, included provisions relating to grandfathering, and the Explanatory Memorandum to the Bill foreshadowed the making of these Regulations. The Government has noted the submissions of stakeholders, on this aspect of the legislation, made both to the Government in response to the consultation draft Bill, and to the Parliamentary Joint Committee on Corporations and Financial Services in its inquiry into the Bill. It has conducted targeted consultations with key stakeholders in the financial services industry.

The Regulation commences on the day after it is registered.

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. 8)

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 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.

Conclusion

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

Details of the Corporations Amendment Regulation 2012 (No. 8)

Section 1 – Name of Regulation

Section 1 provides that the name of the Regulation is the *Corporations Amendment Regulation 2012 (No. 8)*.

Section 2 – Commencement

Section 2 provides that the Regulation commences on the day after it is registered.

Section 3 – Amendment of *Corporations Regulations 2001*

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

Schedule 1 – Amendment

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*, 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 application day; 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.16 into the Principal Regulations for the purposes of subsection 1528(2) of the Act.

Regulation 7.7A.16

Regulation 7.7A.16 sets out a circumstance in which a benefit will be ‘grandfathered’ with respect to the ban on conflicted remuneration (that is, a circumstance in which Division 4 of Part 7.7A of the Act does not apply to a benefit).

Subregulation 7.7A.16(2) provides that Division 4 of Part 7.7A does not apply to a benefit given by a platform operator under an arrangement entered into before the application day. This means that payments made by platform operators under arrangements entered into before the application day may continue to be paid after that day, even if the payment is conflicted remuneration. In other words, benefits given by a platform operator under existing arrangements are ‘grandfathered’.

In this regulation, ‘application day’ has the meaning given by subsection 1528(4) of the Act. That subsection provides that the application day is the earlier of 1 July 2013 or the day specified in a notice lodged with the Australian Securities and Investments Commission indicating that the obligations and prohibitions imposed under Part 7.7A of the Act are to apply to a person. This reflects the transitional arrangements for the Future of Financial Advice reforms, under which compliance becomes mandatory on 1 July 2013, but persons can formally elect to comply with the measures at an earlier date. The effect of the regulation is that benefits given under an arrangement entered into before a person is bound by the ban on conflicted remuneration are grandfathered with respect to that ban.

In this regulation, ‘platform operator’ has the meaning given by section 1526 of the Act. A platform operator is defined in that section as a financial services licensee or ‘RSE licensee’ (as defined in the *Superannuation Industry (Supervision) Act 1993* (‘SIS Act’)) that offers to be the provider of a custodial arrangement. ‘Custodial arrangement’ is defined in the existing section 1012IA of the Corporations Act; broadly, it is an arrangement where the client may instruct the platform to acquire certain financial products, and the products are then either held on trust for the client, or the client retains some interest in the product. Under this definition, it is taken to include arrangements where the client may direct the platform to follow an investment strategy of the kind mentioned in the SIS Act.

Regulation 7.7A.16 implements the same grandfathering arrangements for benefits given by a platform operator as are already in place for benefits given by persons other than platform operators under section 1528 of the Act. This means that benefits given by any person, including a platform operator, under any arrangement entered into before the application day will not be subject to the ban on conflicted remuneration. All benefits given under any arrangement entered into on or after the application day will be subject to the ban.