

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 268

Issued by authority of the Minister for Financial Services and Superannuation

Corporations Act 2001

Corporations Amendment Regulation 2012 (No. 10)

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. 10)* 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 obligation when providing personal advice on a combination of certain products;
- allow a provider of personal advice to take advantage of a reduced best interests obligation for personal advice on general insurance;
- prescribe that monetary benefits relating to certain life insurance products are not conflicted remuneration;
- prescribe that stamping fees (fees paid by or on behalf of an entity to a financial services licensee or representative for raising capital or debt on behalf of the entity) are not conflicted remuneration;
- repeal regulation 7.7A.12 which provides an exemption from the ban on conflicted remuneration for time-sharing schemes and replace it with words to the same effect (for the purpose of rearranging the Principal Regulations);

- prescribe that the payment of brokerage fees (transaction fees paid by clients to market participants for dealing in listed products on their behalf) to representatives is not conflicted remuneration;
- prescribe that a monetary benefit given by a retail client to a licensee or representative for the licensee or representative dealing in financial products on their behalf is not conflicted remuneration;
- prescribe that monetary or non-monetary benefits relating to general insurance are 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 and general insurance product are not conflicted remuneration; and
- clarify that when an exempt benefit also relates to other activities, the benefit will still be exempt to the extent that the part of the benefit that relates to other activities would not be conflicted remuneration.

In addition, a minor amendment is made to an existing regulation to replace a reference to a repealed section of the Act.

A draft of the Regulation was published on the Future of Financial Advice website on 14 June 2012 for two-week public consultation period. A total of 35 submissions were received from stakeholders, including from, for example: the Association of Financial Advisers, Australian Bankers' Association, Australian Financial Markets Authority, Australian Securities Dealers' Association, Australian Securities and Investments Commission, Financial Planning Association, Financial Services Council, Insurance Council of Australia and the Stockbrokers Association of Australia.

Most issues raised in the submissions related to the scope of the exemptions from the ban on conflicted remuneration and the circumstances in which an advice provider may take advantage of a reduced best interests duty. A number of changes were made to the regulations in response to stakeholder feedback. For example, several stakeholders made a number of suggestions relating to the exemption from the ban on conflicted remuneration for stamping fees. In response, the list of financial products to which a stamping fee may relate to in order to be exempt from the ban on conflicted remuneration was expanded.

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.

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 Regulation may be exercised.

Schedule 2 to the Regulation commences on 1 July 2013. The remainder of the Regulation commences the day after it is registered.

Details of the Corporations Amendment Regulation 2012 (No. 10)

Section 1 – Name of Regulation

This section specifies the name of the Regulation as the *Corporations Amendment Regulation 2012 (No. 10)*.

Section 2– Commencement

This section specifies that Schedule 2 to the Regulation commences on 1 July 2013 and the remainder of the Regulation commences the day after it is registered.

Section 3 – Amendment of the Corporations Regulations 2001

This section provides that Schedules 1 and 2 amend the *Corporations Regulations 2001* (the Principal Regulations).

Schedule 1 – Amendments that commence the day after registration

Item 1 amends subregulation 7.7.09B(1) to replace a reference to a section of the *Corporations Act 2001* (the Act) which will be repealed.

Subregulation 7.7.09B(1) provides that a providing entity (that is, a licensee or authorised representative who provides personal advice to retail clients) can incorporate certain information required to be included in a Statement of Advice by reference, except statements or information required by sections 945B and 947D of the Act. Section 945B requires the providing entity to include a warning in a Statement of Advice if the advice provided is based on inaccurate or incomplete information. Section 947D requires additional information to be provided when the advice contains a recommendation to replace one financial product with another.

Section 945B of the Act ceases to apply to a financial services licensee or a representative of a financial services licensee on the day the licensee lodges a notice under subsection 967(1) of the Act or 1 July 2013, whichever comes first. On that date section 961H of the Act, which requires the same warnings as s945B, will apply instead.

As such, item 1 amends subregulation 7.7.09B(1) by omitting the words ‘except a statement or information that is required by sections 945B and 947D of the Act’.

Item 2 amends subregulation 7.7.09B by inserting new subsections (6), (7) and (8).

Subsection 7.7.09B(6) states that the exemption in subsection (1) does not apply to a statement or information required by section 947D of the Act.

Subsection 7.7.09B(7) states that the exemption in subsection (1) does not apply to a statement or information required by section 945B of the Act.

Subregulation 7.7.09B(8) states that if a licensee lodges a notice under subsection 967(1) of the Act, subregulation 7.7.09B(7) does not apply and the exemption in subregulation 7.7.09B(1) does not apply to a statement or information required by section 961H of the Act.

Item 3 inserts a new Division 2 into Part 7.7A of the Principal Regulations, which relates to the best interests obligation provisions in Division 2 of Part 7.7A of the Act.

Division 2 contains regulation 7.7A.1 which prescribes, for paragraph 961B(5)(b) of the Act, 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. In these circumstances, a provider can satisfy the best interests duty by only taking the steps in paragraphs 961B(2)(a) to (c). This regulation introduces two circumstances for the purposes of paragraph 961B(2)(b) of the Act.

Firstly, subregulation 7.7A.1(2) provides that a provider of personal advice is not required to prove it has taken the steps mentioned in paragraphs 961B(2)(d) to (g) of the Act, if:

- the provider is an agent or an employee of an Australian Authorised Deposit-taking Institution (ADI), or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; and
- the only personal advice provided to the retail client relates to a basic banking product or a general insurance product, or a combination of those products.

‘Personal advice’ is defined in subsection 766B(3) of the Act. General advice and advice about products that are not financial products (such as a credit card or a mortgage) are not personal advice.

This means a provider is not required to prove it has taken the steps mentioned in paragraphs 961B(2)(d) to (g) when providing personal advice on general insurance and basic banking products, even if it provides general advice about other financial products or advice about non-financial products at the same time.

Secondly, subregulation 7.7A.1(3) provides that a provider of personal advice is not required to prove it has taken the steps mentioned in paragraphs 961B(2)(d) to (g) of the Act in relation to advice about a general insurance product, even if the provider provides other advice at the same time.

This subregulation only applies to the extent that the personal advice provided relates to a general insurance product. Any other personal advice provided to the retail client at the same time, is required to fully satisfy the duty in subsection 961B(1). This can be achieved by satisfying all the steps in subsection 961B(2).

Item 4 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. It replaces regulation 7.7A.12 with two new subdivisions.

Subdivision 1 contains regulations 7.7A.12 to 7.7A.12E.

Regulation 7.7A.12 explains that Subdivision 1 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 Subdivision 1, the financial services licensee or representative to whom the benefit is given is referred to as ‘the provider’ of financial product advice.

Regulation 7.7A.12A provides that a monetary benefit is not conflicted remuneration if the benefit is given in relation to 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.

If a monetary benefit is given in relation to a financial product that consists of both general insurance and life risk insurance, the benefit is to be treated as relating to a general insurance product and a life risk insurance product and will not be conflicted remuneration as a result of regulations 7.7A.12A and 7.7A.12H. This would apply, for example, to consumer credit insurance which typically includes elements of general insurance and life risk insurance.

Regulation 7.7A.4.12B prescribes the circumstances in which stamping fees (fees paid by or on behalf of an entity to a financial services licensee or representative for raising capital or debt on behalf of the entity) are not conflicted remuneration.

Paragraph 7.7A.12B(1)(a) provides that a monetary benefit will not be conflicted remuneration if the benefit is given to a provider by or on behalf of an entity in relation to the provider dealing in an approved financial product issued by the entity on behalf of a retail client. Paragraph 7.7A.12B(1)(b) provides that the onward payment of a benefit of this sort to a representative of the provider will also not be conflicted remuneration.

The term ‘approved financial product’ is defined in subregulation 7.7A.12B(3) as:

- debentures, stocks or bonds that are or are proposed to be issued by a government; or
- shares in, or debentures of, a body that are, or are proposed to be listed on a prescribed financial market; or
- interests in a managed investment scheme that is, or is proposed to be, listed on a prescribed financial market; or
- a right to acquire, by way of issue, shares, debentures or interests mentioned in paragraph (b) or (c).

This definition will include stapled securities and hybrid securities to the extent that they are a combination of the products listed.

Subregulation 7.7A.12B(2) provides that subregulation 7.7A.12B(1) does not apply to investment entities. This means entities that fall within the definition of ‘investment entity’ in subregulation 7.7A.12B(3) cannot benefit from the exemption and therefore cannot pay conflicted remuneration in the form of stamping fees.

The term ‘investment entity’ is defined in subregulation 7.7A.12B(3) as an entity, when taken together with any subsidiaries or other entities that are the subject of a joint venture to which the entity is a party, that provides a return to its members or shareholders mainly from either or both of the following and is not an infrastructure entity:

- investments in financial products; and
- owning real property, other than for the purpose of developing the property.

The term ‘infrastructure entity’ is defined in 7.7A.12B(3) and means any entity that provides a return to its shareholders or members mainly from owning or operating any of the infrastructure assets listed.

Subregulation 7.7A.12B(3) is intended to exclude entities with the primary purpose of providing a financial investment rather than the provision of a financial investment being incidental to the operation of a business providing goods or services. For example, it is intended to exclude entities such as listed investment companies and listed equity and property trusts.

Subregulation 7.7A.12B(3) is not intended to exclude entities whose only assets are shares or interests in subsidiaries or entities that are the subject of joint ventures as long as those entities, when taken together, would not fall within the definition of investment entity.

Regulation 7.7A.12B is only intended to exempt monetary benefits from the ban on conflicted remuneration to the extent that they would be caught by it – that is, to the extent that they could reasonably be expected to influence financial advice given to retail clients. Some fees paid by entities to financial services licensees for services relating to an issue (for example, arranging for other licensees to participate in the issue) will not influence advice provided to retail clients by the recipient.

Regulation 7.7A.12C provides that a monetary benefit given to a provider for advice that relates to an interest in a time-sharing scheme is not conflicted remuneration. Regulation 7.7A.12C has the same effect as the previous regulation 7.7A.12 which is replaced by Item 4.

Regulation 7.7A.12D prescribes the circumstance in which the payment of brokerage fees (transaction fees paid by clients to market participants for dealing in listed products on their behalf) to representatives is not conflicted remuneration.

Subregulation 7.7A.12D(1) provides that a benefit of this sort will not be conflicted remuneration if:

- the benefit consists of a percentage, of no more than 100 per cent, of a brokerage fee that is given to a provider who is a trading participant of a prescribed financial market; and
- the provider, directly or indirectly, gives the benefit to a representative of the provider.

Subregulation 7.7A.12D(2) defines the terms ‘brokerage fee’, ‘prescribed foreign financial market’ and ‘trading participant’ for the purposes of the regulation.

- ‘Brokerage fee’ is defined as a fee given by a retail client to a provider in relation to a transaction in which the provider, on behalf of the retail client, deals in a financial product that is traded on a prescribed financial market or a prescribed foreign financial market.
- A ‘prescribed foreign financial market’ is defined as a financial market that has its principal 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*.
- ‘Trading participant’ is defined as a person who is a participant of a prescribed financial market admitted under the market’s operating rules and is allowed, under the operating rules of the market, to deal in one or more of the financial products able to be traded on the market.

Regulation 7.7A.12E provides that a monetary benefit is not conflicted remuneration if the benefit is given to the provider by a retail client in relation to the provider dealing in a financial product on behalf of a retail client. This regulation is intended to exempt fees paid by clients for financial services which are not covered in paragraph 963B(1)(d) of the Act.

Subdivision 2 includes regulations 7.7A.12F to 7.7A.12I.

Regulation 7.7A.12F explains that Subdivision 2 prescribes circumstances in which 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 under paragraphs 963B(1)(e) and 963C(f) of the Act.

Regulation 7.7A.12G provides that a benefit is not conflicted remuneration if the benefit is given in relation to a general insurance product.

Regulation 7.7A.12H provides that a benefit given in the following circumstances is not conflicted remuneration:

- to the extent that the benefit is given in relation to financial product advice, it only relates to the following financial products: a basic banking product, a general insurance product, or a combination of those products;

- the provider does not, at the same time, provide advice about a financial product that is not a basic banking product or a general insurance product; and
- the provider is an agent or an employee of an Australian ADI, or otherwise acting by arrangement with an Australian ADI under the name of an Australian ADI.

This regulation ensures that an agent or employee of an Australian ADI can continue to receive remuneration for providing advice on its principal's or employer's basic financial products. It would also ensure that agents and employees can still receive these benefits even if the benefits also relate to advice or services that are not financial product advice (for example, advice about a credit facility) or advice that is not financial product advice is provided at the same time as advice about a basic banking or general insurance product.

Subregulation 7.7A.12I(1) provides that a benefit which is given in one or more of the circumstances set out in the prescribed provisions is not conflicted remuneration even if:

- the benefit also relates to other activities, but only to the extent that the part of the benefit that relates to other activities is not conflicted remuneration; or
- the provider, at the same time, provides other services (whether or not financial services).

Subregulation 7.7A.12I(2) provides that subregulation (1) does not apply if the prescribed provisions under which the benefit is given provided that:

- the benefit may only relate to particular financial products or services; or
- the provider must not receive the benefit if the provider is, at the same time, providing other specified financial services.

Subregulation 7.7A.12I(3) explains that 'prescribed provision' means:

- paragraph 963B (1) (a), (b), (c) or (d) of the Act, or a regulation made under paragraph 963B (1) (e) of the Act; or
- paragraph 963C (a), (b), (c), (d) or (e) of the Act, or a regulation made under paragraph 963C (f) of the Act.

The purpose of regulation 7.7A.12I is to make clear that, unless otherwise provided, benefits can be 'mixed'. For example, if a provider receives a monetary benefit which relates to a general insurance product, an exempt life insurance product and a mortgage facility it will not be conflicted remuneration because benefits relating to general insurance are exempt from the ban on conflicted remuneration under Regulation 7.7A.12G, benefits relating to life insurance are exempt under regulation 7.7A.12A and benefits relating to credit facilities would not fall within the definition of conflicted remuneration in section 963A of the Act because they are not financial products.

Regulation 7.7A.12I also makes clear that the provision of other services at the same time does not preclude a provider from receiving an exempt benefit, as long as the exemption does not specifically provide that other services or advice cannot be given (for example, subregulation 7.7A.12H(2)).

Schedule 2 – Amendments commencing on 1 July 2013

Item 1 repeals subregulations 7.709B(6) to (8) (as introduced by Item 1 in Schedule 1) and inserts a new subregulation (6) providing that the exemption in subregulation (1) does not apply to a statement or information that is required by section 947D or 961H of the Act.

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. 10)

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 obligation when providing personal advice on a combination of certain products;
- allow a provider of personal advice to take advantage of a reduced best interests obligation for personal advice on general insurance;
- prescribe that monetary benefits relating to certain life insurance products are not conflicted remuneration;
- prescribe that stamping fees (fees paid by or on behalf of an entity to a financial services licensee or representative for raising capital or debt on behalf of the entity) are not conflicted remuneration;
- repeal regulation 7.7A.12 which provides an exemption from the ban on conflicted remuneration for time-sharing schemes and replace it with words to the same effect (for the purpose of rearranging the Principal Regulations);
- prescribe that the payment of brokerage fees (transaction fees paid by clients to market participants for dealing in listed products on their behalf) to representatives is not conflicted remuneration;
- prescribe that a monetary benefit given by a client to a licensee or representative for the license or representative dealing in financial products on their behalf is not conflicted;
- prescribe that monetary or non-monetary benefits relating to general insurance are 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 and general insurance products are not conflicted remuneration;
- clarify that when an exempt benefit also relates to other activities, the benefit will still be exempt to the extent that the part of the benefit that relates to other activities would not be 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.