

# **EXPLANATORY STATEMENT**

## **Select Legislative Instrument 2013 No. 115**

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

*Corporations Act 2001*

*Corporations Regulations 2001*

*Corporations Amendment Regulation 2013 (No. 4)*

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. 4)* (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. These bans were 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 between licensees in relation to the dealing on behalf of the retail clients, where those trades are requested by the client through online ‘white-label’ trading services and where clients do not receive personal advice.

The exemptions provided 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 Future of Financial Advice (FOFA) exemptions relating to stockbroking activities. Regulatory amendments are not required to undertake this review.

A draft of the Regulation was published on the FOFA website for public consultation over the period 7 May 2013 to 17 May 2013.

A total of seven formal submissions were received, including submissions from the Stockbrokers Association of Australia, the Australian Bankers Association, the Association of Financial Advisers, the Financial Services Council, the Australian Investment Exchange Limited and the Australian Financial Markets Association. One confidential submission was also received. In addition to the formal consultation process, targeted consultation was also undertaken.

Several changes were made to the draft Regulation in response to stakeholder feedback. For example, changes were made to the draft Regulation to ensure that the exemption adequately defined the parties that are considered to ‘provide’ the service and also to allow for the provision of the service by telephone, in limited circumstances.

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.

## **Details of the Corporations Amendment Regulation 2013 (No. 4)**

### **Section 1 – Name of Regulation**

This section specifies the name of the Regulation as the *Corporations Amendment Regulation 2013 (No. 4)*.

### **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 provides a better description of 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 between a trading participant licensee and a non-trading participant licensee, in relation to dealing requested by a retail client on a ‘specified service’; and
- the trades requested by the retail client are executed by the trading participant; and
- the fee is a portion of the brokerage fee paid by the client to either the trading participant or non-trading licensee and is not paid to any other person.

The purpose of the provision is to provide that a portion of the brokerage fee paid by a retail client for the execution of trades, that is subsequently paid between the trading participant and the non-trading licensee, is not subject to the ban on conflicted remuneration under Division 4 of Part 7.7A of the Act, in circumstances where that fee relates to the client’s request for trades through a ‘specified service’.

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

Item 3 inserts a note which states that regulations 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 defined term clarifies the type of service to which the exemption provided in subregulation 7.7A.12D(1A) applies. The defined term specifies that a ‘specified service’ is a service provided for retail clients which:

- is provided under the name, or brand name, of either the non-trading licensee or both the non-trading licensee and the 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 either through direct electronic access (online) or both online and by telephone in limited circumstances (that is, for a temporary period or where clients have expressed a preference to access the service via telephone) and where clients do not receive any financial product advice via the telephone service; and
- is provided under circumstances where clients do not receive personal advice from the trading participant or the non-trading licensee in relation to the client's trading on the specified service.

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

The extension of the exemption to phone services is to enable service providers to manage issues such as ensuring business continuity needs and to meet the needs of a relatively small contingent of clients that, having been made aware of the availability of online services, have expressed a preference to access these services via the telephone. It is not intended that clients preferring to access the service by telephone would be required to reaffirm this preference on an ongoing basis.

Items 1 through 4 provide an exemption that is intended to provide 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*, the fees paid between trading participants and non-trading licensees, which would otherwise be expected to only have a remote influence on advice, will not be considered conflicted remuneration.

The exemption is intended to provide certainty in the specific circumstance described above, it is not intended to limit the consideration of the scope of influence criteria with respect to other types of broking fee sharing arrangements.

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 fees.

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

The regulations refer to the definition of 'brokerage fee' currently provided in subregulation 7.7A.12D(2).

Division 5 of Part 7.7A 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 as defined in subregulation 7.7A.12D(2).

The effect of these 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. 4)

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. 4)* (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 online broking services, under circumstances where clients are not provided with personal financial 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.