

## **EXPLANATORY STATEMENT**

### **SELECT LEGISLATIVE INSTRUMENT NO. 208, 2014**

#### **Issued by authority of the Treasurer**

##### *Corporations Act 2001*

##### *Corporations Amendment (Revising Future of Financial Advice) Regulation 2014*

Subsection 1364(1) of the *Corporations Act 2001* (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 (Revising Future of Financial Advice) Regulation 2014* (the Regulation) makes a number of amendments to the *Corporations Regulations 2001* (the Principal Regulations). The amendments relate to Part 7.7A of the Act: the Future of Financial Advice (FOFA) provisions.

As part of its 2013 election campaign, the Government committed to reduce compliance costs for small businesses, financial advisers, and the broader financial services industry, whilst maintaining the quality of advice for consumers who access financial advice.

The Government implemented its key reforms through the *Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014* (the previous Regulation), which commenced on 1 July 2014. However, the previous Regulation was disallowed by the Senate on 19 November 2014; the previous Regulation ceased to have effect from the time of the disallowance.

The Government has agreed with the Opposition that the Regulation should be made to progress the broadly supported elements of the FOFA reforms; the provisions of the Regulation are identical to various items in the previous Regulation.

The Senate's permission to rescind the 19 November 2014 disallowance resolution is required by paragraph 48(1)(a) of the *Legislative Instruments Act 2003* to make the Regulation as the Regulation is the same in substance as parts of the previous Regulation. The Senate agreed to rescind the disallowance resolution on 27 November 2014.

The Regulation makes the following changes:

- amends the grandfathering arrangements for the ban on conflicted remuneration (that is, when certain benefits are not subject to the ban) to:
  - allow advisers to change the financial services licensee under which they are authorised whilst retaining their rights to receive grandfathered conflicted remuneration (that is, remuneration that is not subject to the ban and is permitted to be paid despite otherwise being conflicted remuneration);

- extend the dates at which grandfathering ceases for benefits paid under employee arrangements; and
- other minor amendments to clarify the intended operation of the grandfathering provisions;
- specifies additional benefits that are permitted under the ban on conflicted remuneration and clarifies the operation of existing provisions, including:
  - broadening the circumstances when benefits may be paid in relation to the stockbroker-related activities and clarifying the operation of existing provisions where uncertainty currently exists;
  - broadening the existing education and training provisions to provide that benefits in relation to education and training that relate to conducting a financial services business are not conflicted remuneration; and
- ensures that the existing provisions which extend the renewal period for accountants' certificates from six months to two years that currently apply other parts of the Act also apply in respect of the FOFA provisions.

Details of the Regulation are set out in the Attachment.

As the amendments in the Regulation replicate the relevant amendments in the previous Regulation, and as consultation was undertaken on the previous Regulation, consultation is taken to have occurred on the Regulation. A draft of the previous Regulation was published on the Future of Financial Advice website on 29 January 2014 for a three-week consultation period. A total of 57 formal submissions (including 8 confidential submissions) were received from a wide range of stakeholders.

Further targeted consultation was undertaken following the referral of the Corporations Amendment (Streamlining Future of Financial Advice) Bill 2014 to the Senate Economics Committee.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The *Corporations Act 2001* does not specify any conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation commences on the day after registration.

## ATTACHMENT

### Details of the Corporations Amendment (Revising Future of Financial Advice) Regulation 2014

#### Section 1 – Name of Regulation

This section provides that the name of the Regulation is the *Corporations Amendment (Revising Future of Financial Advice) Regulation 2014* (the Regulation).

#### Section 2 – Commencement

The Regulation commences on the day after it is registered.

#### Section 3 – Authority

The Regulation is made under the *Corporations Act 2001* (the Act).

#### Section 4 – Schedule(s)

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

### **Schedule 1—Amendments**

#### ***Accountants' certificate renewal period provision***

Item 1 amends the current regulation 7.6.02AF so that the extended two year renewal period for accountants' certificates also applies to Part 7.7A of the Act.

Where a person elects to be treated as a wholesale client rather than a retail client, paragraph 761G(7)(c) of the Act enables the person to acquire an accountant's certificate that certifies that the person's assets or income are large enough to qualify them as a wholesale client.

Paragraph 761G(7)(c) of the Act requires that the accountant's certificate be renewed at least every six months. However, regulation 7.6.02AF extends the renewal period for accountants' certificates from six months to two years. Regulation 7.6.02AF currently applies to Parts 7.6, 7.7, 7.8 and 7.9 of the Act but not Part 7.7A.

#### ***Stamping fee provision***

Item 2 repeals the existing stamping fee provision under regulation 7.7A.12B and substitutes a new regulation that:

- clarifies the application of the stamping fee provision to remuneration arrangements relating to capital raising activities; and
- broadens the stamping fee provision to include investment entities.

This amendment addresses concerns that the current regulation 7.7A.12B is unclear, and has unintentionally captured transactions that were not meant to be captured by FOFA.

This amendment also addresses concerns that the current regulation creates an inappropriate, market-distorting distinction between the types of entities that are otherwise legitimately permitted to raise capital from retail investors. The current regulation prevents investment entities (that is, entities whose primary purpose is to provide a financial investment) from accessing the stamping fee provision.

This amendment clarifies that, where stamping fees are paid to facilitate capital raising activities involving certain approved financial products, these fees are not captured by the ban on conflicted remuneration—including where these fees relate to capital raising activities undertaken by investment entities.

The new regulation defines a ‘stamping fee’ as:

- a fee (or part of a fee) that a person, including an issuer of a financial product, or a person acting on behalf of the issuer, pays, either directly or indirectly, to a licensee or representative in connection with an offer to issue (or an invitation for an application to issue) the financial product; or
- a similar fee paid in relation to an offer to sell (or an invitation for an application to sell) a financial product.

Under the new regulation, an ‘approved capital raising’ is defined as:

- an offer to issue an approved financial product; or
- an offer to sell an approved financial product;

where the purpose of the offer is to raise funds for the person issuing or selling the approved financial product.

Under the new regulation, the existing definition of ‘approved financial product’ is amended to clarify the application of the provision to certain types of financial products. Specifically, under the new regulation, an approved financial product is defined as:

- debentures, stocks or bonds that are, or are proposed to be, issued by a government;
- shares in, or debentures of, a body that are, or are proposed to be, quoted on a prescribed financial market;
- interests in a managed investment scheme that are, or are proposed to be, quoted on a prescribed financial market; or
- a right to acquire, by way of issue, shares, debentures or interests mentioned above.

### ***Stockbroking-related provisions***

Items 3 to 8 extend the brokerage-related provisions to products traded on the ASX24.

ASX24 (the financial market formerly known as the Sydney Futures Exchange that is operated by Australian Securities Exchange Limited) is not currently included in the

definition of a 'prescribed financial market'. However, the trading that occurs on the ASX24 was never intended to be captured by FOFA; brokerage fees charged for trading on the ASX24 were also not intended to be caught.

Items 3, 5 and 7 amend regulation 7.7A.12D so the brokerage fee provision is extended to products traded on the ASX24.

Items 4, 6 and 8 are associated amendments to regulation 7.7A.12D that clarify that the ASX24 is the financial market formerly known as the Sydney Futures Exchange that is operated by Australian Securities Exchange Limited.

### ***Education and training in conducting a financial services business***

Item 9 inserts regulation 7.7A.15A to prescribe circumstances in which a non-monetary benefit given to a financial services licensee, or a representative of a licensee, who provides financial product advice to persons as retail clients is not conflicted remuneration.

Paragraph 963C(c) of the Act currently provides that a non-monetary benefit that has a genuine education or training purpose relevant to the provision of financial product advice to retail clients is not conflicted remuneration.

The item specifies that a non-monetary benefit is not conflicted remuneration if the benefit:

- has a genuine education or training purpose; and
- is relevant to the carrying on of a financial services business; and
- complies with any regulations made for the purposes of subparagraph 963C(c)(iii) of the Act (currently, regulations 7.7A.14 and 7.7A.15 are made for the purposes of subparagraph 963C(c)(iii) of the Act).

This regulation will allow education and training on a broader range of topics to be provided under the ban on conflicted remuneration.

### ***Grandfathering arrangements for the ban on conflicted remuneration***

Items 10 to 16 make amendments to the grandfathering arrangements for the ban on conflicted remuneration.

The grandfathering arrangements provide that certain benefits that:

- are given under arrangements (typically between product issuers and licensees) entered into prior to the application day (as described in subsection 1528(4) of the Act) of the ban on conflicted remuneration; and
- relate to clients who had an interest in the relevant platform or product prior to 1 July 2014;

are not subject to Division 4 of Part 7.7A of the Act.

Separate grandfathering arrangements are provided for benefits given under an employee agreement:

- benefits given under an enterprise agreement are grandfathered up until six months after the nominal expiry date (NED) of the agreement (or grandfathered up until 1 July 2014 for those agreements which passed their NED before 1 July 2013); and
- benefits given under an individual employee agreement are grandfathered up until 1 July 2014.

In summary, if a benefit is characterised as being grandfathered (that is, it is a benefit of the kind described above), the benefit is not subject to Division 4 of Part 7.7A of the Act. Accordingly, the requirement to not accept conflicted remuneration (as mandated by sections 963E, 963G and 963H of the Act), and the requirement not to give conflicted remuneration (as mandated by sections 963J and 963K of the Act), will not apply in relation to that benefit.

Even though the grandfathering arrangements do not make specific reference to the party receiving the benefit, the grandfathering regulations operate so that once a benefit is 'grandfathered', it may be both given and/or received.

Items 10 and 11 insert a new regulation 7.7A.15B and subregulation 7.7A.16(2) to provide that a benefit ('a redirected benefit') will be grandfathered (and not subject to Division 4 of Part 7.7A of the Act) even if it has been redirected under one or more later arrangements.

For a redirected benefit to continue to be grandfathered, the benefit must be one that, when given under the pre-application day arrangement, was not a benefit to which regulation 7.7A.16A, 7.7A.16B or 7.7A.16C applied (that is, was subject to Division 4 of Part 7.7A of the Act because of one of these regulations).

The key objective of items 10 and 11 is to facilitate an authorised representative to continue to receive benefits that would have been grandfathered had the authorised representative not moved licensee. Items 10 and 11 also allow an authorised representative to move licensees more than once and still receive redirected benefits.

For example, items 10 and 11 will allow grandfathering to continue when an authorised representative moves licensees with its client book, and the grandfathered benefits paid to the previous licensee are redirected to the new licensee under an arrangement that was entered into either before, or after, the application day. The new licensee may then pass some, or all, of the benefits onto the authorised representative under regulation 7.7A.16F. Items 10 and 11 will also permit grandfathering to continue even if a party becomes a licensee after the application day and the licensee enters into a post-application day arrangement that provides for the giving of a redirected benefit.

It should be noted that a redirected benefit will *not* fall within regulations 7.7A.15B or 7.7A.16 if it is given on materially different terms to the previous arrangement. As such, the benefit must be given for the same purpose (that is, the benefit must relate to

clients who held an interest in the relevant platform or product prior to 1 July 2014), and the benefit must not exceed the benefit given under the previous arrangement.

Item 12 inserts a new regulation 7.7A.16BA to clarify that when a business is sold, the rights to grandfathered benefits are transferred to the purchaser, who can then receive the ongoing benefit. The purchaser may therefore acquire the same rights to the grandfathered benefits that the seller held prior to the sale taking place. Even though subsection 1528(3) of the Act operates to ensure that rights to grandfathered benefits could be transferred upon the sale of a business, this regulation is required to ensure that businesses have clarity that such benefits can be transferred.

Items 13 to 15 amend the existing regulation 7.7A.16C which provides the grandfathering arrangements for benefits paid under an employee agreement. The amendments extend, by 12 months, the dates at which grandfathering ceases for benefits paid under an employee agreement.

Existing paragraph 7.7A.16F(b) provides that grandfathered benefits may be passed-through to a party that is not subject to the arrangement which gave rise to the grandfathered benefit as long as the benefit is also passed-on under an arrangement entered into prior to the application day.

Item 16 amends existing paragraph 7.7A.16F(2) to provide that a grandfathered benefit may be passed-through to another party if the benefit, as passed-through, was given under an arrangement:

- that was entered into before the application day; or
- by which an authorised representative of one licensee becomes an authorised representative of another licensee after the application day of the ban on conflicted remuneration; or
- a representative (for example, an employee) of a financial services licensee or an employee of an authorised representative of a licensee, became an authorised representative of the same licensee or a related body corporate of the licensee.

The amendment will, for example, allow an authorised representative to change which licensee they are authorised under whilst retaining access to the pass-through of grandfathered benefits. However, the pass-through to the authorised representative can only occur if the new licensee is first given a benefit that is grandfathered because of subsection 1528(1) or a regulation made for subsection 1528(2), noting amendments made by items 10 and 11.

## **Statement of Compatibility with Human Rights**

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

### **Corporations Amendment (Revising Future of Financial Advice) Regulation 2014**

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 (Revising Future of Financial Advice) Regulation 2014* (the Regulation) makes a number of amendments to the *Corporations Regulations 2001*. The amendments relate to the Future of Financial Advice (FOFA) provisions in Part 7.7A of the *Corporations Act 2001*:

- broadening the exemption for training and education that relates to operating a financial services business;
- broadening the circumstances when the grandfathering arrangements for the ban on conflicted remuneration apply;
- amendments to the accountants' certificate renewal period to provide that the extended two year renewal period also applies in relation to FOFA;
- clarifying the application of the stamping fee exemption to capital raising activities and broadening its application to include investment entities; and
- amending the application of the existing brokerage fee exemptions to include brokerage fees paid in relation to financial products traded on the ASX24.

#### **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.