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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CORPORATIONS AMENDMENT (FURTHER FUTURE OF FINANCIAL ADVICE
MEASURES) BILL 2012

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

(Circulated by the authority of the Minister for Financial Services
and Superannuation, the Hon Bill Shorten MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
Act	<i>Corporations Act 2001</i>
ASIC	Australian Securities and Investments Commissions
Bill	Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012
FOFA	Future of Financial Advice
Licence	Australian Financial Services Licence

General outline and financial impact

Outline of amendments

On 24 November 2011, the Australian Government introduced the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 ('the Bill'). Together with the Corporations Amendment (Future of Financial Advice) Bill 2012, the Bill implements the Government's Future of Financial Advice ('FOFA') reforms.

The amendments to the Bill make a number of changes to the application arrangements for the reforms. Under the revised arrangements, compliance with the FOFA reforms will be voluntary from 1 July 2012 and mandatory from 1 July 2013.

Date of effect: The amendments to the Bill commence at the same time as the remainder of the Bill on 1 July 2012.

Proposal announced: The Government announced details of the revised application arrangements on 15 March 2012.

Financial impact: This Bill has no significant financial impact on Commonwealth expenditure or revenue.

Human rights implications: The amendments to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 do not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.1 to 2.6.

Chapter 1

Explanation of amendments

Outline of chapter

1.1 These amendments modify the application of the measures contained in Schedule 1 to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (the Bill).

1.2 Under the revised application arrangements, compliance with the requirements relating to the best interests obligation and the ban on conflicted remuneration will be voluntary from 1 July 2012 (but mandatory for those who elect to comply with FOFA during the transition period), and mandatory from 1 July 2013 for the remainder of the industry.

1.3 A person can voluntarily elect to comply with the reforms from 1 July 2012 by lodging a notice with ASIC. Once a notice is lodged, all the prohibitions and obligations under Part 7.7A will apply to the licensee and all of the licensee's representatives. It is not possible for a licensee to elect to apply only a subset of Part 7.7A or only have Part 7.7A apply to a subset of its representatives.

Application of the best interests obligation

1.4 The Bill proposes a new Division 2 in Part 7.7A of the *Corporations Act 2001* ('the Act'), introducing an obligation on providers of personal financial advice to retail clients to act in the best interests of the client in relation to the advice.

1.5 The amendments propose changes to the application of the best interests obligation so that the requirements are mandatory for those who elect to comply with FOFA during the transition period and then mandatory from 1 July 2013 for the remainder of the industry.

1.6 The amendments omit proposed section 1527 in the Bill and substitute a new section 1527 stating that when personal advice is provided to a retail client on or after the application day, proposed Division 2 of Part 7.7A will apply and the current Subdivision B of Division 3 of Part 7.7 of the Act (sections 945A and 945B) will not apply. This means that Division 3 of Part 7.7 will continue to apply until Division 2 of Part 7.7A comes into effect. The application day is defined

as either (a) the day specified in a notice lodged with ASIC by a financial services licensee under subsection 967(1), or (b) if no notice is lodged, 1 July 2013.

Application of the ban on conflicted remuneration

1.7 The Bill proposes a new Division 4 in Part 7.7A of the Act, introducing a ban on the payment and receipt of conflicted remuneration which has the potential to influence the advice financial services licensees provide to retail clients.

1.8 The amendments propose changes to the application of the ban on conflicted remuneration so that the requirements are mandatory for those who elect to comply with FOFA during the transition period and then mandatory from 1 July 2013 for the remainder of the industry.

1.9 The amendments modify proposed section 1528 in the Bill by omitting ‘the day on which that item commences’ and substituting ‘the application day’. The application day is defined as either (a) the day specified in a notice lodged with ASIC by a financial services licensee under subsection 967(1), or (b) if no notice is lodged, 1 July 2013.

1.10 For any other person who would be subject to the ban on conflicted remuneration but would not be subject to the requirements as a licensee or a representative of the licensee, the application day is either (i) the day specified in a notice lodged with ASIC by the person under subsection 967(3), or (ii) if no notice is lodged, 1 July 2013.

1.11 An example of a person who would be subject to the ban on conflicted remuneration but does not hold a license is a product issuer or seller. In certain circumstances, these parties may be exempt from holding a licence and, therefore, would not be subject to Division 4 as a licensee. This may occur in the circumstances where the issuer or seller enters into an arrangement (an intermediary authorisation) with a licensee, and the arrangement allows the licensee or a representative of the licensee to approach clients to offer to arrange for the issuer or seller to issue or sell the financial product, on the basis that the issuer or seller will do so if the offers are accepted. Whilst these parties are exempt from holding a licence, they would still be subject to the requirements under, for example, proposed section 963K.

1.12 A situation may arise where one party (the electing party) to a proposed transaction during the transition period wishes to elect to comply with FOFA, and the other party (the non-electing party) does not. In these circumstances, it is up to the electing party to avoid entering into any

subsequent arrangements (including with non-electing parties) that would result in them breaching their FOFA obligations. Broadly, the FOFA rules apply prospectively, so that arrangements already in place before an election was made are unaffected.

Application of the ban on volume-based shelf-space fees and asset-based fees on borrowed amounts

1.13 The Bill proposes a new Division 5 in Part 7.7A of the Act, introducing a ban on the receipt of volume-based shelf-space fees by a platform operator and the receipt of asset-based fees on borrowed amounts by a financial services licensee.

1.14 The amendments propose changes to the application of the ban on volume-based shelf-space fees and the ban on asset-based fees on borrowed amounts to make these requirements mandatory for those who elect to comply with FOFA during the transition period and then mandatory from 1 July 2013 for the remainder of the industry.

1.15 The amendments modify:

- (i) proposed section 1529 in the Bill by omitting ‘the day on which that item commences’ and substituting ‘the application day’. The application day is defined as either (a) the day specified in a notice lodged with ASIC by a financial services licensee under subsection 967(1), or (b) if no notice is lodged, 1 July 2013. For any other person who would be subject to the ban on volume-based shelf-space fees, the application day is either (i) the day specified in a notice lodged with ASIC by the person under subsection 967(3), or (ii) if no notice is lodged, 1 July 2013; and
- (ii) proposed section 1531 in the Bill by omitting ‘the day on which that item commences’ and substituting ‘the application day’. The application day is defined as either (a) the day specified in a notice lodged with ASIC by a financial services licensee under subsection 967(1), or (b) if no notice is lodged, 1 July 2013.

1.16 As noted with the ban on conflicted remuneration above, a situation may arise where one party to a proposed transaction during the transition period wishes to elect to comply with FOFA, and the other party does not. In these circumstances, it is up to the electing party to avoid entering into any subsequent arrangements (including with non-electing parties) that would result in them breaching their FOFA obligations.

Broadly, the FOFA rules apply prospectively, so that arrangements already in place before an election was made are unaffected.

Lodging notice with ASIC

1.17 The amendments to the Bill propose a new Division 7 to Part 7.7A of the Act, introducing additional arrangements during the transition period.

1.18 These amendments modify proposed subsection 968(4) by omitting the subsection and substituting with a new subsection 968(4) to define the ‘notice day’ for the purposes of paragraph 968(2)(b). The notice day is earliest of the days where the licensee (or representative of the licensee) has obligations to the client flowing from Part 7.7A. Obligations can flow to the client as a result of the provision of personal advice, the need to provide a fee disclosure statement or the charging of an asset-based fee. For a client that satisfies more than one of the circumstances listed in subsection 968(4) during the transition period, the notice day for the client is the one that occurs the earliest.

1.19 If a person elects to lodge a notice with ASIC, all the prohibitions and obligations under Part 7.7A will apply. It is not possible for a person to elect to apply only a subset of Part 7.7A.

Chapter 2

Statement of Compatibility with Human Rights

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

Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012

2.1 The amendments to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 (the Bill) are 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

2.2 The amendments to the Bill make a number of changes to the application arrangements for the Bill. Under the revised arrangements, compliance with proposed Part 7.7A of the *Corporations Act* will be voluntary from 1 July 2012 and mandatory from 1 July 2013.

2.3 From 1 July 2012, a person can voluntarily elect to comply with proposed Part 7.7A by lodging a notice with ASIC.

2.4 Those who elect to comply from 1 July 2012 will be required to notify certain clients of this election. Those who do not elect to comply will be subject to Part 7.7A from 1 July 2013.

Human rights implications

2.5 The amendments to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 do not engage any of the applicable rights or freedoms.

Conclusion

2.6 The amendments to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2012 are compatible with human rights as they do not raise any human rights issues.

The Hon Bill Shorten MP, Minister for Financial Services and Superannuation