

EXPLANATORY STATEMENT

SELECT LEGISLATIVE INSTRUMENT NO. 108, 2015

Issued by authority of the Assistant Treasurer

Corporations Act 2001

Corporations Amendment (Financial Advice) Regulation 2015

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 (Financial Advice) Regulation 2015* (the Regulation) makes a number of amendments to the *Corporations Regulations 2001* (the Principal Regulations). The amendments relate to the Future of Financial Advice (FOFA) provisions of the Act.

The purpose of the Regulation is to reduce compliance costs for small business, financial advisers, and the broader financial services industry, whilst maintaining the quality of advice for consumers who access financial advice.

The Regulation:

- clarifies that a provider who provides advice to an employer about default funds (the fund where the employer makes contributions for the benefit of employees that have not chosen a fund) is providing a financial service to a retail client;
- ensures that the wholesale and retail client distinction that currently applies in other Parts of the Act also applies to the FOFA provisions;
- applies the modified best interests duty to giving advice on a basic banking product and/or a general insurance product where the subject matter of the advice being sought also relates to consumer credit insurance;
- provides that a facility for making non-cash payments that is not related to a basic deposit product (such as travel money cards) is a basic deposit product for the purposes of the FOFA provisions;
- clarifies the application of the existing client-pays provision; and
- broadens the basic banking exemption from the ban on conflicted remuneration to include benefits relating to consumer credit insurance products.

Details of these amendments are set out in Attachment A.

Targeted consultation was undertaken on a draft of the Regulation with the financial services industry. Feedback from the consultation was considered in preparing the Regulation. In addition, the amendments, with the exception of the ‘default funds’ amendment, have been included in earlier consultations. These earlier consultations included:

- publishing draft regulations on the Future of Financial Advice website on 29 January 2014 (for a three-week consultation period); and
- targeted consultation when the Corporations Amendment (Streamlining Future of Financial Advice) Bill 2014 was referred to the Senate Economics Committee on 20 March 2014.

The majority of these time sensitive FOFA amendments will also be enacted in legislation. The Government has adopted this approach to provide certainty to industry as quickly as possible.

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

A statement of Compatibility with Human Rights is at [Attachment B](#).

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

The Regulation will commence on 1 July 2015.

Details of the Corporations Amendment (Financial Advice) Regulation 2015

Section 1–Name of Regulation

This section provides that the name of the Regulation is the *Corporations Amendment (Financial Advice) Regulation 2015* (the Regulation).

Section 2–Commencement

This section provides that the Regulation commences on 1 July 2015.

Section 3–Authority

This section provides that 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

Provision of financial product advice about default funds

Item 1 inserts regulation 7.1.28AA into the Principal Regulations. This amendment clarifies that, for the purposes of paragraph 766A(1)(f) of the Act, a person that provides advice to an employer about default funds (the fund where the employer makes contributions for the benefit of employees that have not chosen a fund) is providing a financial service. The effect of this amendment is that the person providing the employer with financial advice in these circumstances must treat the employer as a retail client and as a result is subject to the FOFA provisions in relation to that advice.

Regulation 7.1.28AA does not alter the categories of financial services in subsection 766A(1) of the Act, as regulation 7.1.28AA is a form of financial product advice also covered by subsection 766A(1) of the Act. It should also be noted that regulation 7.1.28AA does not override the operation of paragraph 761G(6)(b) of the Act.

Meaning of retail client, wholesale client, and professional investor

Items 2, 3, 4 and 5 extend the effect of a number of regulations to Part 7.7A of the Act (the FOFA provisions).

Item 2 applies regulation 7.6.02AB to the FOFA provisions. Regulation 7.6.02AB inserts paragraph 761G(7)(ca) into section 761G of the Act. The effect of this amendment is that, for the purposes of the FOFA provisions, a person that meets the

net assets test, or the income test (both specified in the Principal Regulations) is not treated as a retail client where they acquire a product or service for a company or trust that they control.

Item 3 applies regulation 7.6.02AC to the FOFA provisions. Regulation 7.6.02AC inserts subsections 761G(7A) and 761G(7B) into section 761G of the Act. The effect of this amendment is that, for the purposes of the FOFA provisions, the net assets and gross income of a company, or trust that a person controls, can be included in determining the persons net assets or income for the purpose of qualifying to be treated as a wholesale client under paragraph 761G(7)(c) of the Act.

Item 4 applies regulation 7.6.02AD to the FOFA provisions. Regulation 7.6.02AD inserts subsection 761G(4A) into section 761G of the Act. The effect of this amendment is that, for the purposes of the FOFA provisions, where a financial product or service is acquired by a body corporate as a wholesale client, related bodies corporate of the client are also considered to be wholesale clients.

Item 5 applies regulation 7.6.02AE to the FOFA provisions. Regulation 7.6.02AE modifies the definition of professional investor. The effect of this amendment is that, for the purposes of the FOFA provisions, a person is considered to be a professional investor if the person has, or is in control of, gross assets of at least \$10 million, including any assets held by an associate or under a trust that the person manages.

Modified best interests duty

Items 6, 7 and 8 relate to the repeal, and replacement of existing regulation 7.7A.1.

Item 6 amends the note in Part 7.7A of the Act to acknowledge that certain regulations (regulations 7.7A.01 – 7.7A.04) remain reserved for future use.

Item 7 repeals the heading '*Subdivision 1 – Duty to act in the client's best interests*' of Subdivision 1 of Division 2 of Part 7.7A of the Act.

Item 8 repeals existing regulation 7.7A.1 and replaces it with regulations 7.7A.05, 7.7A.06 and 7.7A.07.

Subsection 961B(1) of the Act provides that a provider must act in the best interests of the client when providing advice. Subsection 961B(2) of the Act sets out the steps (summarised below) that a provider must satisfy to act in the best interests of the client:

- identify the objectives, financial situation and needs of the client (paragraph 961B(1)(a));
- identify the subject matter of the advice being sought by the client, and the objectives, financial situation and needs of the client that would reasonably be considered as relevant to the advice sought on that subject matter (paragraph 961B(2)(b));

- where it is reasonably apparent that information relating to the client’s relevant circumstances is incomplete or inaccurate, make reasonable inquiries to obtain complete and accurate information (paragraph 961B(2)(c));
- assess whether they (the provider) have the expertise required to provide the client with advice on the subject matter sought and, if not, decline to provide the advice (paragraph 961B(2)(d));
- conduct a reasonable investigation into the financial products that might achieve the objectives and needs of the client and assess the information obtained (paragraph 961B(2)(e));
- base all judgements in advising the client on the client’s relevant circumstances (paragraph 961B(2)(f)); and
- take any other steps that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances (paragraph 961B(2)(g)).

Subsection 961B(3) of the Act currently provides that an employee or agent of an ADI, or a provider acting by arrangement with an ADI under the name of the ADI, is required to only satisfy the steps in paragraphs 961B(2)(a) to (c) (known as the modified best interests duty) when the subject matter of the advice sought by the client is solely in relation to a basic banking product.

In addition, existing sub-regulations 7.7A.1(1) and 7.7A.1(2) provide that an employee or agent of an ADI, or a provider acting by arrangement with an ADI under the name of the ADI, need not satisfy the steps in paragraphs 961B(2)(d) to (g) of the Act when the only advice provided is in relation to a basic banking product and/or a general insurance product.

Subsection 961B(4) of the Act provides that a provider is required to only satisfy the steps in paragraphs 961B(2)(a) to (c) if the subject matter of the advice *solely* relates to a general insurance product. In addition, existing sub-regulation 7.7A.1(3) provides that a person does not need to satisfy the steps set out in paragraphs 961B(2)(d) to (g) of the Act to the extent that the subject matter of the advice is sought by the client is a general insurance product.

Regulation 7.7A.05 provides that an employee or agent of an ADI, or a provider acting by arrangement with an ADI under the name of the ADI, does not need to satisfy the steps set out in paragraphs 961B(2)(d) to (g) of the Act when providing advice on a basic banking product and/or a general insurance product where the subject matter sought by the client relates to a basic banking product, general insurance product, consumer credit insurance product, or a combination of these products.

Regulation 7.7A.05 does not extend the modified best interests duty to the provision of advice on consumer credit insurance products. The purpose of this amendment is to apply the modified best interests duty to the circumstances where advice is provided on a consumer credit insurance product at the same time as providing advice on a basic banking product and/or general insurance product. In order to access the

modified best interests duty, the provider cannot provide advice on any other financial product.

The provision of advice on a consumer credit insurance product will still require all the steps in subsection 961B(2) of the Act to be satisfied, whether it is provided at the same time as advice on a basic banking product and/or a general insurance product or not.

Regulation 7.7A.06 provides that a person does not need to satisfy the steps set out in paragraphs 961B(2)(d) to (g) of the Act when providing advice on a general insurance product.

As noted earlier, providers currently have access to the modified best interests duty when providing advice on a general insurance product through existing sub-regulation 7.7A.1(3) in the Principal Regulations. Item 8, by repealing existing sub-regulation 7.7A.1(3) and re-inserting regulation 7.7A.06, maintains the existing access providers have to the modified best interests duty for advice on general insurance products.

Regulation 7.7A.07 provides that a facility for making non-cash payments that is not related to a basic deposit product is a basic deposit product for the purposes of section 961F of the Act. Section 961F of the Act provides a list of products, including basic deposit products, which are considered to be basic banking products for the purposes of the FOFA provisions.

This amendment means that a facility for making non-cash payments (such as travel money cards) will be considered to be a basic banking product for the purposes of the FOFA provisions. One consequence of this amendment is the extension of the application of the modified best interests duty in regulation 7.7A.05 to advice on a facility for making non-cash payments.

Client-pays provision

Items 9 and 10 clarify the operation of the client-pays provision by inserting notes that explain its operation.

Paragraph 963B(1)(d) of the Act currently provides that benefits given by a retail client to a licensee or representative in relation to the issue or sale of a financial product or financial product advice are permitted.

Section 52 of the Act currently provides that ‘a reference to doing an act or thing includes a reference to causing or authorising the act or thing to be done’. As paragraph 963B(1)(d) of the Act exempts a benefit from conflicted remuneration if it is ‘given’ to a licensee or representative, applying section 52 of the Act would mean that in giving a benefit to a licensee or representative, a retail client is also causing or authorising the benefit to be given.

Item 10 inserts note 2 at the end of regulation 7.7A.12. Note 2 clarifies that for the purpose of the conflicted remuneration provisions of Division 4 of Part 7.7A of the

Act, giving a benefit includes a reference to causing or authoring a benefit to be given as provided in section 52 of the Act.

Item 10 also inserts note 3 at the end of regulation 7.7A.12. Note 3 clarifies that the client-pays provision can be used to permit payments made from a superannuation fund member's balance. The note specifically indicates that the client-pays exemption operates with respect to advice paid from a superannuation fund member's fund balance. This principle also applies to other investments of the client, such as a managed investment scheme.

The trustee of the superannuation fund must still consider whether payments out of the client's superannuation fund is appropriate given the trustee's other obligations, such as the sole purpose test under section 62 of the *Superannuation Industry (Supervision) Act 1993*.

Where the benefit is given by another party it must be given with the client's clear consent. A client would not be considered to have given clear consent if the consent was not clearly and expressly sought; for example, where consent has been sought as part of a broad range of terms and conditions agreed by the client in aggregate, clear consent would not have been provided. Rather, a client's consent could be expressly sought in a separate and distinct section of the terms and conditions agreed by the client. Similarly, if a client has given consent for a specified period of time, this consent does not cause or authorise the benefit to be given beyond that specified period of time.

Benefits given by another party at a client's direction are not given by the client if the benefits are borne out of the other party's funds.

Broadening the basic banking provision

Section 963D of the Act currently provides that benefits are not conflicted if they relate to a basic banking product as long as the agent or employee of an ADI, or a provider acting by arrangement with an ADI under the name of the ADI—at the time of providing advice on the basic banking product—does not provide financial product advice on any other financial product. Further, existing regulation 7.7A.12H allows access to the exemption where the agent or employee of an ADI also provides financial product advice on a general insurance product.

Item 11 amends subparagraph 7.7A.12H(a)(iii) of the Principal Regulations to enable the benefit given to the agent or employee of an ADI, or a provider acting by arrangement with an ADI under the name of the ADI, to also relate to a consumer credit insurance product. Further, the amendment allows the agent or employee of an ADI to provide financial product advice on a consumer credit insurance product at the same time as providing advice on a basic banking product and/or general insurance product. In order to benefit from the exemption, the agent or employee of an ADI cannot provide advice, at the same time, on any other financial product.

Statement of Compatibility with Human Rights

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

Corporations Amendment (Financial Advice) Regulation 2015

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 (Financial Advice) Regulation 2015* (the Regulation) makes a number of amendments to the *Corporations Regulations 2001*. The amendments relate to Part 7.7A of the Act: the Future of Financial Advice (FOFA) provisions.

The purpose of the Regulation is to reduce compliance costs for small business, financial advisers, and the broader financial services industry, whilst maintaining the quality of advice for consumers who access financial advice.

The Regulation:

- clarifies that a person that provides advice to an employer about default funds (the fund where the employer makes contributions for the benefit of employees that have not chosen a fund) is providing a financial service to a retail client;
- ensures that the wholesale and retail client distinction that currently applies in other Parts of the Act also applies to the FOFA provisions;
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- provides that a facility for making non-cash payments that is not related to a basic deposit product (such as travel money cards) is a basic deposit product for the purposes of the FOFA provisions;
- clarifies the application of the existing client-pays provision; and
- broadens the basic banking exemption from the ban on conflicted remuneration to include benefits relating to consumer credit insurance products.

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.