

Corporations Amendment Regulations 2003 (No. 11) 2003 No. 369

EXPLANATORY STATEMENT

Statutory Rules 2003 No 369

Issued by the Parliamentary Secretary to the Treasurer

Corporations Act 2001

Corporations Amendment Regulations 2003 (No. 11)

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 by regulations or necessary or convenient to be prescribed by such regulations for carrying out or giving effect to the Act.

The *Financial Services Reform Act 2001* (FSRA) commenced on 11 March 2002. It amended the Act to introduce a uniform licensing, conduct and disclosure regime for financial service providers. Under the FSRA, a two-year transition period was established to allow time for existing industry participants to enter the new regime.

To facilitate the transition of industry to the new FSRA licensing regime, the *Financial Services Reform Amendment Act 2003* (FSR Amendment Act) was passed by the Parliament on 5 December 2003 and will have received the Royal Assent prior to consideration of the accompanying Minute. The Act makes technical amendments to the FSRA, to promote certainty, clarifying, where necessary, various provisions under the regime. Amongst other things, the FSR Amendment Act allows further regulations to be made for the purposes of the FSRA. A number of regulations are now to be made to give effect to provisions introduced by the FSR Amendment Act.

The purpose of the Regulations is to therefore support the reforms to the regulation of the financial services industry which were implemented in the FSRA, the FSR Amendment Act and associated legislation.

The Regulations include amendments that:

- list legislation which, if breached by a financial services licensee, must be reported to the Australian Securities and Investments Commission;
- specify documents which must contain the licensee's licence number; and
- remove certain references to repealed regulations and make amendments to terminology consequential to the FSR Amendment Act.

Details of the Regulations are set out in the [Attachment](#).

Regulations 1 to 3 and Schedule 1 commence on gazettal and Schedule 2 commences upon the commencement of Schedule 1 to the FSR Amendment Act. Schedule 1 to the FSR Amendment Act is expressed to commence on the 28th day after that Act receives the Royal Assent. The deferred commencement of Schedule 2 allows associated and replacement provisions in the FSR Amendment Act to commence operation.

ATTACHMENT

DETAILS OF THE CORPORATIONS *AMENDMENT REGULATIONS 2003 (NO. 11)*

Regulation 1 provides that the name of the Regulations is the *Corporations Amendment Regulations 2003 (No. 11)*.

Regulation 2 provides that regulations 1 to 3 and Schedule 1 commence on gazettal and that Schedule 2 commences upon the commencement of Schedule 1 of the *Financial Services Reform Amendment Act 2003* (FSR Amendment Act).

Regulation 3 provides that Schedules 1 and 2 amend the *Corporations Regulations 2001*.

Schedule 1- Amendments commencing on gazettal

Item 1 Obligation to cite licence number in documents - new regulation 7.6.01C

The FSR Amendment Act inserts a regulation-making power into section 912F of the *Corporations Act 2001* (the Act) to specify the documents which must include a licensee's Australian Financial Services Licence (AFSL) number. This is intended to provide certainty over which documents this obligation applies to, whilst maintaining the intent of the provision to properly identify FSR licensees when they are providing financial services.

The regulation specifies those FSR-related documents on which the AFSL must be included. It does not require the AFSL number to be included on periodic statements until the beginning of the 2004/05 financial year in order to allow existing stocks of stationery to be depleted.

Item 2 Obligation to notify ASIC of certain matters - new regulation 7.6.02A

Subsection 912D(1) of the Act requires a financial services licensee to notify ASIC where it has breached, or is likely to breach, various obligations, including the obligation to comply with certain *financial services laws* (defined in section 761A) that are specified in regulations. Regulation 7.6.02A specifies certain Commonwealth legislation for this purpose.

Item 3 Exemption to notification of authorised representatives in respect of certain financial products - new regulation 7.6.04A

Under subsection 916F(1AA) of the Act, the appointment of an authorised representative does not have to be notified to ASIC if the conditions set out in that subsection are met. One of those conditions is that the representative is only authorised to provide general advice that relates to, and/or deal in, financial products specified in the regulations. Regulation 7.6.04A specifies a general insurance product, a basic deposit product, and a facility for making non-cash payments that is related to a basic deposit product, for the purposes of paragraph 916F(1AA)(d) of the Act.

Items 4 and 5 Record of advice given by financial services licensee or authorised representative - substituted regulations 7.7.05 and 7.7.08

These items amend regulations 7.7.05 and 7.7.08 respectively. The effect of the amendments is to remove references to regulations (7.8.09 and 7.8.10) that were repealed in 2002.

Item 6 Combined Financial Services Guide and Product Disclosure Statement - new regulation 7.7.08A

This regulation lists the circumstances and details under which a Product Disclosure Statement (PDS) and a Financial Services Guide (FSG) can be provided as a single document under section 942DA of the Act. The existing content and presentational requirements that relate to a FSG and PDS apply, including the requirement for clear, concise and effective presentation.

The regulation distinguishes between situations where the entity providing the financial service and the product issuer are the same and where the providing entity is a representative or a related body corporate of the product issuer. In the latter case, combining the documents would only occur if the product being issued is a basic deposit product, a non-cash payment facility related to a basic deposit product, a general insurance product or a life risk insurance product.

Subregulation (4) states that cross-referencing is allowed between the two parts of the document so long as this does not result in the document becoming misleading or deceptive.

Items 7 to 9 Situations in which Statement of Advice is not required: record of further market-related advice - amendment to regulation 7.7.09

These items amend regulation 7.7.09 to reflect amendments to section 946B of the Act made by the FSR Amendment Act. Those amendments replaced references to 'execution-related telephone advice' in section 946B and other provisions of the Act with the expression 'further market-related advice'.

Items 7 and 8 make consequential changes to the heading of regulation 7.7.09 and to subregulation 7.7.09(1). Item 9 amends subregulation 7.7.09(3) to remove references to regulations 7.8.09 and 7.8.10 that were repealed in 2002.

Item 10 Amendment to the General Advice Warning - new regulation 7.7.14

The amendment improves the practical operation of the general advice warning under section 949A. It removes the Product Disclosure Statement (PDS) component of the warning when no PDS is in fact available.

The general advice warning under section 949A must be given when a person provides general advice. The warning includes a requirement to consider the contents of a PDS. However, the FSR Act provides several exemptions from having to provide a PDS, such as:

- general advice is provided in relation to any security (other than a warrant); or
- where the client becomes a wholesale client before the PDS is required to be given; or
- the general advice is in relation to an acquisition to which sections 1012D or 1012E of the Act apply; or
- the acquisition is made outside Australia.

Item 11 Exception from providing the general advice warning - new regulation 7.7.20

General advice must be accompanied by the general advice warning found in section 949A (such as that the advice has not taken the recipient's personal circumstances into account). The FSR Amendment Act includes a regulation-making power in subsection 949A to specify situations in which, even though general advice has been provided, the general advice warning will not have to be given.

The amendment results in the general advice warning obligation not applying in the circumstances specified in subregulation 7.7.02(5A). This provides a limited exemption from providing a Financial Services Guide (FSG) when advertising in the media or on billboards. This subregulation recognises the practical difficulties posed in providing required disclosures in lieu of a FSG in advertising delivered to a wide audience through mass media.

Item 12 Disclosure during hawking of certain financial products - new regulation 7.8.22A

The information required to be disclosure under regulation 7.8.22A is consistent with the information required to be given under section 992A of the Act and the required disclosures under subsection 1012G(3) of the Act and associated regulations.

Further, consistent with amendments to section 1012G under the FSR Amendment Act, the amendments provide the regulated person with the ability to tailor the giving of information, to that requested by the client rather than to provide a 'block' reading of the information contained within a PDS.

Item 13 Repeal of the exemption for trustees of self-managed superannuation funds lodging an 'in use' notice - omission of regulation 7.9.02C

Regulation 7.9.02C was made on 30 July 2003 as a temporary measure to exempt trustees of self-managed superannuation funds from the requirement to lodge a notice with ASIC stating that a Product Disclosure Statement is 'in use' (section 1015D of the Act refers).

The effect of the regulation has been incorporated as an amendment to the Act as part of the FSR Amendment Act and hence it is no longer required.

Items 14, 16 and 19 to 23 Ongoing disclosure of material changes and significant events - Division 4B, regulation 10.2.81 and amendments to Schedule 10A, clause 10.1

The amended regulations are consequential to amendments to section 1017B made by the FSR Amendment Act.

- Division 4B maintains the circumstances to which section 1017B applies;
- Regulation 10.2.81 provides transitional arrangements for product issuers subject to Division 4B; and
- The amendments to Schedule 10A reflect the amendments to section 1017B imposing obligations on the product issuer rather than the responsible person.

Item 15 References to responsible person - omission of Part 7.9 Division 10

The amendment omits Division 10, Part 7.9 as its operation is made redundant by amendments to section 1017C made by the FSR Amendment Act which imposes obligations on the product issuer rather than the responsible person.

Item 17 Part 10.2, heading

Item 17 substitutes the heading to Part 10.2 of the regulations with a new heading that better describes the contents of that Part.

Item 18 Further market-related advice - new regulation 10.2.214

Item 18 inserts a new regulation 10.2.214 setting out transitional arrangements in relation to the amendments to section 946B of the Act made by the FSR Amendment Act.

Those amendments made changes to the requirements relating to the provision of Statements of Advice in 'live' market situations. One of the conditions that applies to the operation of the amended section 946B is that the providing entity (ie. a licensee or authorised representative providing personal advice to a retail client in the circumstances set out in section 946B) must previously have given the client a Statement of Advice. If the client's relevant personal circumstances (as defined in section 761A) and the basis on which the advice contained in that 'initial' Statement of Advice do not significantly change, the providing entity does not thereafter have to give the client Statements of Advice for subsequent advice which meets the definition of 'further market-related advice'.

The purpose of regulation 10.2.214 is to deal with existing clients of providing entities to whom section 946B applies. An existing client is defined in paragraph 10.2.214(1)(b), as a client that had a relationship with the providing entity at the time:

- if the providing entity is a licensee - when it obtained its Australian Financial Services Licence (AFSL);
- if the providing entity is an authorised representative of a licensee - when the licensee on whose behalf the representative gives further market-related advice obtained its AFSL;
- when the amendments to section 946B contained in the FSR Amendment Act took effect;

whichever is the latest.

The regulation provides that it will not be a prerequisite to the operation of section 946B that existing clients receive a Statement of Advice, provided that such clients have been given 'personal securities recommendations' under section 851 of the Act in force prior to the changes made by the FSR Act (the old Corporations Act), and the following conditions are met:

- first, such personal securities recommendations must have been given since the commencement of the FSR Act on 11 March 2002 and before the time identified in subparagraph 10.2.214(1)(b);
- second, consistent with the criteria contained in the amended section 946B, the client's investment objectives, financial situation and particular needs that were taken into account by the providing entity in giving the personal securities recommendations under section 851 of the old Corporations Act must not be significantly different to the client's relevant personal circumstances (which is defined in similar fashion in section 761A to include a person's objectives, financial situation or needs) at the time further market-related advice is given to the client; and
- third, so far as the basis on which the advice relates to other matters (that is, matters other than the client's relevant personal circumstances), the basis on which the last of the personal securities recommendations was given is not significantly different from the basis on which the further market-related advice is provided.

If any of these conditions is not met, the providing entity would be required to give the existing client a Statement of Advice for any further market-related advice.

Schedule 2 - Amendments commencing on the commencement of Schedule 1 of the *Financial Services Reform Amendment Act 2003*

Item 1 Off market offers for financial products - omission of regulation 7.1.33C

Schedule 1 of the FSR Amendment Act introduced new provisions to regulate unsolicited offers to purchase financial products off-market. The introduction of this legislation results in Regulation 7.1.33C (which introduced disclosure obligations for unsolicited off-market offers) no longer being required.

To coordinate the omission of this regulation with the introduction of Schedule 1 of the FSR Amendment Act, the omission will not occur until that Schedule commences.

Item 2 Unsolicited offers to purchase financial products off-market - new Division 13 and new regulation 7.9.96.

Where a person offers to purchase financial products off-market, Schedule 1 of the FSR Amendment Act requires disclosure of the market value of that financial product, in the offer document.

Section 1019J of the FSR Amendment Act requires additional disclosure from off-market dealers, where the actual market value of the product under offer varies from the disclosed market value, by a percentage greater than that specified in the regulations.

Regulation 7.9.96 specifies 50 per cent for the purpose of paragraph 1019J(1)(c) as the trigger for the additional disclosure obligations to apply.