

EXPLANATORY STATEMENT

Select Legislative Instrument No. 134, 2014

Issued by authority of the Treasurer

Corporations Act 2001

Corporations Amendment (Statements of Advice) Regulation 2014

Subsection 1364(1) of the *Corporations Act 2001* (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 (Statements of Advice) Regulation 2014* (Regulation) makes a number of amendments to the *Corporations Regulations 2001* (Principal Regulations). The amendments relate to Part 7.7 of the Act: the financial disclosure requirements provisions. In particular, the amendments alter some of the provisions regarding the Statement of Advice, a disclosure document which generally must be provided to retail clients receiving personal financial advice.

The Government announced on 15 July 2014 that it would implement additional improvements to the Statement of Advice requirements to increase transparency in the services that clients are receiving, ensuring they are aware of their rights and their adviser's obligations. These changes were negotiated with the Palmer United Party and the Australian Motoring Enthusiasts Party in light of their support for the Government's reforms to the Future of Financial Advice (FOFA) provisions.

The changes include additional disclosure requirements in the Statement of Advice, requiring an adviser to disclose existing obligations in the Act. Further, the amendments also provide requirements for the adviser and the client to sign the Statement of Advice, as well as any instructions from clients for further or varied advice.

The Regulation makes the following changes:

- requiring that a Statement of Advice must be signed by the adviser, as well as signed by the client to acknowledge receipt;
- requiring that if a client, after receiving the Statement of Advice, requests further or varied advice (this may be necessary, for example, if the client's relevant circumstances change), the providing entity must ensure that instructions from the client are: documented in writing; signed by the client; and acknowledged by the providing entity, or an individual acting on behalf of the providing entity;

- requiring that advisers include the following statements and information in the Statement of Advice to ensure clients are aware of their existing rights and their adviser's obligations under the Act:
 - that the adviser is required to act in the best interests of their client and prioritise their client's interests ahead of their own, consistent with the requirements in sections 961B and 961J of the Act;
 - that any fees must be disclosed and that the adviser will provide a fee disclosure statement annually if the client enters into an ongoing fee arrangement to which Division 3 of Part 7.7A of the Act applies (which will generally be those entered into on or after 1 July 2013);
 - that a client may have the right to return financial products under a 14-day cooling-off period in accordance with the arrangements under Division 5 of Part 7.9 of the Act;
 - that the adviser genuinely believes that the advice he or she is providing to the client is in the client's best interests given the client's relevant circumstances; and
 - that the client has the right to seek further or varied advice from their adviser at any time, for example, if they experience a change in their circumstances.

Details of these changes in the Regulation are set out in Attachment A.

The Regulation provides no limitation on the period for which these changes will have effect. However, it is intended that the changes in this Regulation will be repealed once the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (FOFA Bill) passes the Australian Parliament and receives the Royal Assent.

Targeted consultation was undertaken on a draft of the Regulation with the financial services industry. The Government considered their views in preparing the Regulation. Changes were made to the draft Regulation following the targeted consultation. For example, to ensure flexibility as to who can sign a Statement of Advice or acknowledge a client's instructions on behalf of the providing entity, the draft Regulation was expanded to include an individual acting on behalf of the providing entity.

A Statement of Compatibility with Human Rights is at Attachment B.

This Regulation commences on 1 January 2015.

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

Attachment A

Details of the Corporations Amendment (Statements of Advice) Regulation 2014

Section 1 — Name of Regulation

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

Section 2 — Commencement

This Regulation commences on the 1 January 2015.

Section 3 — Authority

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

Section 4 — Schedule(s)

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

Schedule 1—Amendments

Items 1, 2 and 4 make amendments to the Statement of Advice (SoA) requirements of the Act.

Item 1 inserts a new regulation 7.7.08D, requiring that:

- the SoA must be signed by the providing entity, or an individual acting on behalf of the providing entity; and
- the client must acknowledge receipt of the SoA by signing the SoA as soon as practicable after receiving the SoA.

A signature can include a written signature or an electronic signature (as defined by section 10 of the *Electronic Transactions Act 1999*).

The significance of the client's signature on the SoA is to acknowledge receipt of the SoA. In signing the SoA, the client is not agreeing or accepting the SoA, and the client is not signing that they wish the advice to be executed.

Section 944A of the Act defines 'providing entity'; the individual that can sign on behalf of the providing entity is a matter to be determined by the providing entity.

While it is a requirement that both the adviser and the client sign the SoA, the client does not commit an offence if he or she does not sign the SoA.

The providing entity does not fail to give a SoA to the client in accordance with Subdivision D of Division 3 of Part 7.7 merely because the client does not acknowledge the SoA.

Item 1 confirms that a client who is given a SoA may seek further or varied advice. For example, if a client's financial situation changes, the client may seek further advice.

The new Regulation provides that, if further or varied advice is sought by the client, the providing entity must ensure that instructions from the client are: documented in writing; signed by the client; and acknowledged by the providing entity, or an individual acting on behalf of the providing entity.

The Regulation provides that the instructions for further or varied advice can be documented in writing and signed by the client either before or after the advice is given. This allows flexibility in time-critical situations. For example, if the stock market crashes and a client seeks time-critical further advice that they subsequently want actioned immediately, the instructions for further or varied advice can be documented in writing and signed by the client after the advice has been given.

The Regulation provides that the providing entity does not commit an offence if the client does not sign a written copy of the instructions for that further or varied advice. Also, the fact that the client does not sign a written copy of the instructions for that further or varied advice is not evidence that the instructions have not been given. As such, the providing entity is able to proceed with providing further or varied advice—particularly time critical advice—even if the client has not yet signed.

The requirement to confirm instructions in writing and obtain the signature of the client does not alter any other existing requirements around the provision of personal advice for example the obligation to provide a SoA when required.

Regulation 7.7.08D applies to SoAs given on or after the commencement of this Regulation, and to further instructions given on or after the commencement of this Regulation.

The amendments in items 2 and 4 insert new Regulations 7.7.09AAA and 7.7.09BAA.

Items 2 and 4 require that financial services licensees and authorised representatives must provide certain information and statements in the SoA.

Item 2 covers financial services licensees.

Item 4 covers authorised representatives.

The Regulation provides that the following must be included in a SoA given to a client:

- a statement that the provider of the advice is required to provide the advice in accordance with the best interests duty (as required under section 961B of the Act);
- a statement that the provider of the advice genuinely believes that the advice given is in the best interests of the client, given the client's relevant circumstances; the term 'relevant circumstances' is given meaning by section 961B of the Act;
- a statement that, where there is a conflict of interests, the provider of the advice is required to give priority to the client's interests (as required under section 961J of the Act);
- information regarding fees that have been, or may be charged to the client in relation to the advice;
 - This includes fees charged by the providing entity, an employer of the providing entity, the authorising licensee, or any of the authorising licensees, an employee or director of the authorising licensee, or any of the authorising licensees or an associate of any of these.
- if the client enters into an ongoing fee arrangement with the providing entity, a statement whether the client would be entitled to receive a fee disclosure statement (within Division 3 of Part 7.7A of the Act), and if so, a statement indicating that the providing entity must give the client a fee disclosure statement each year in relation to the ongoing fee arrangement;
- if the providing entity recommends that the client acquire a financial product, a statement advising the client that they may have the right to return the product under Division 5 of Part 7.9 within a cooling-off period; and
- a statement that the client may seek further or varied advice from the providing entity at any time.

Fees are intended to include those in relation to providing the advice, but are not intended to include product fees.

The information regarding fees that have been, or may be, charged to the client in relation to the advice is intended to be stated in amounts as dollars; however, this may not always be possible. As such, the Regulation provides the Australian Securities and Investments Commission (ASIC) with the power to provide that other formats may be allowed — this, in effect, provides that the existing dollar disclosure provisions apply. As such, fees should be stated as amounts in dollars unless ASIC grants relief (for example, through a Class Order). If ASIC determines that is not reasonably practicable to provide the amount in dollar terms, the fee may be disclosed as a percentage or as a description with a worked example (for more information on the dollar disclosure provisions, see *ASIC Regulatory Guide 182: Dollar Disclosure*).

As per Division 5 of Part 7.9 (cooling-off periods), a client has a right, for certain financial products, to return the product to the responsible person and get their money back, within a certain period of time.

Regulations 7.7.09AAA and 7.7.09BAA apply in relation to SoAs given on or after the commencement of this Regulation.

Items 3 and 5 are consequential amendments.

Attachment B

Statement of Compatibility with Human Rights

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

Corporations Amendment (Statements of 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 purpose of the Legislative Instrument is to:

- require that a Statement of Advice must be signed by the adviser and the client;
- require that if a client, after receiving the Statement of Advice, requests further or varied advice, the providing entity must ensure that instructions from the client are: documented in writing; are signed by the client; and acknowledged by the providing entity, or an individual acting on behalf of the providing entity; and
- require that advisers include the following statements and information in the Statement of Advice to ensure clients are aware of their existing rights and the adviser's obligations in the Act:
 - that the adviser is required to act in the best interests of their client and prioritise their client's interests ahead of their own, consistent with the requirements in sections 961B and 961J of the Act;
 - that any fees must be disclosed and that the adviser will provide a fee disclosure statement annually, if the client enters into an ongoing fee arrangement to which Division 3 of Part 7.7A of the Act applies (which will generally be those entered into on or after 1 July 2013);
 - that a client has the right to return financial products under a 14-day cooling-off period in accordance with the arrangements under Division 5 of Part 7.9 of the Act;
 - information that the adviser genuinely believes that the advice he or she is providing to the client is in the client's best interests, given the client's relevant circumstances; the term 'relevant circumstances' is given meaning by section 961B of the Act; and
 - that the client has the right to seek further or varied advice from their adviser at any time, for example, if they experience a change in their circumstances.

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.