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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS AMENDMENT (FURTHER FUTURE OF FINANCIAL ADVICE
MEASURES) BILL 2011

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments 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>
Bill	Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011
FOFA	Future of Financial Advice
PJC	Parliamentary Joint Committee on Corporations and Financial Services

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 2011 ('the Bill'). Together with the Corporations Amendment (Future of Financial Advice) Bill 2011, the Bill implements the Government's Future of Financial Advice ('FOFA') reforms.

On the same day, the Bill was referred to the Parliamentary Joint Committee on Corporations and Financial Services ('the PJC') for inquiry and report. The PJC reported on both the FOFA Bills on 29 February 2012, and made a number of recommendations to improve the implementation of the reforms.

The amendments to the Bill address concerns that were raised during the course of the PJC's consultation process. Specifically, these amendments:

- clarify the timing of one aspect of the best interests obligation;
- explain clearly the relationship between the best interests obligation and the provision of scaled advice;
- clarify the 'execution-only' exception to the definition of conflicted remuneration; and
- make a number of mechanical amendments to the grandfathering arrangements.

Date of effect: The amendments to the Bill commence at the same time as the remainder of the Bill; on 1 July 2012. In some circumstances, under grandfathering arrangements included in the Bill, the proposed provisions in Divisions 4 and 5 of Part 7.7A banning certain kinds of remuneration do not apply to remuneration provided after commencement under arrangements entered into before commencement. Regulations may prescribe circumstances in which the provisions do apply to such remuneration and do not apply to other kinds of remuneration.

Proposal announced: On 26 April 2010, the then Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP,

announced the Future of Financial Advice (FOFA) reforms. On 28 April 2011, further detail on the operation of the FOFA reforms was announced by the Assistant Treasurer and Minister for Financial Services and Superannuation, the Hon Bill Shorten MP.

Human rights implications: The amendments to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 do not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.1 to 2.4.

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

Chapter 1

Explanation of amendments

Outline of chapter

1.1 The amendments are intended to clarify the operation of certain measures in the Bill, to ensure that the FOFA reforms can be implemented in a sensible and cost-effective manner.

1.2 There are four elements in the amendments:

- clarifying the timing of one aspect of the best interests obligation;
- explaining the relationship between the best interests obligation and the provision of scaled advice;
- clarifying the ‘execution-only’ exception to the definition of conflicted remuneration; and
- making mechanical amendments to the grandfathering arrangements.

Best interests obligation

1.3 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.

1.4 Proposed subsection 961B(2) of the Act sets out a number of steps that providers may prove they have taken to demonstrate that they have acted in the best interests of the client. The final step, in proposed paragraph 961B(2)(g), is that the provider has:

taken any other step that would reasonably be regarded as being in the best interests of the client, given the client’s relevant circumstances.

1.5 Proposed section 961E provides further detail on what would reasonably be regarded as in the best interests of the client.

1.6 The amendment proposes to change the step in proposed paragraph 961B(2)(g) so that it is clear that it is at the time at which the advice is provided that the reasonableness of taking a step is to be assessed. That is, to satisfy proposed paragraph (g), a provider will have to take any other step that, *at the time the advice is provided*, would reasonably be regarded as being in the best interests of the client.

Scaled advice

1.7 A key element of the FOFA reforms is the facilitation of limited or ‘scaled’ advice, as well as more comprehensive forms of financial advice. As the original Explanatory Memorandum to the Bill noted, at paragraph 1.34, the design of the best interests obligation is intended to:

accommodate the provision of limited advice (also referred to as ‘scaled advice’) that only looks at a specific issue (for example, single issue advice on retirement planning) and ‘holistic’ advice that looks at all the financial circumstances of the client. In some situations, the client might prefer to receive more targeted advice on a matter that is particularly concerning them rather than comprehensive advice. As long as the provider acts reasonably in this process and bases the decision to narrow the subject matter of the advice on the interests of the client, the provider will not be in breach of their obligation to act in the client’s best interests. The scaling of advice by the provider must itself be in the client’s best interests, especially since the client’s instructions may at times be unclear or not appropriate for his or her circumstances.

1.8 The proposed amendments include a new explanatory note at the end of proposed subsection 961B(2), clarifying how the best interests obligation is expected to facilitate the provision of scaled advice. The note observes that a client may seek scaled advice, and that the inquiries to be made by the financial adviser into the client’s relevant circumstances will be tailored to the advice sought.

Execution-only services

1.9 The Bill proposes a new Division 4 in Part 7.7A of the Act, introducing bans on paying and receiving conflicted remuneration. Conflicted remuneration is defined in proposed section 963A of the Act, and proposed 963B sets out a number of benefits given in certain circumstances which are *not* conflicted remuneration.

1.10 Proposed paragraph 963B(1)(c) provides for an ‘execution-only’ exception to the definition of conflicted remuneration. Any benefit given

to a licensee or representative in relation to the issue or sale of a financial product to a person will not be considered conflicted remuneration where financial product advice in relation to the product, or products of that class, has not been given to the person as a retail client by the licensee or representative.

1.11 The amendment proposes to clarify that the advice referred to in paragraph 963B(1)(c) must not have been provided in the 12 months immediately before the benefit is given. This is proposed to avoid a situation where a licensee or representative can never receive remuneration of an execution-only type if it has *ever* provided financial product advice to the retail client. Where the financial product advice is remote with respect to the issue or sale of the financial product — that is, it took place over 12 months before the issue or sale — it will not deny the licensee or representative the benefit of paragraph 963B(c).

Grandfathering

1.12 The Bill proposes to ‘grandfather’ a range of matters that take place before the commencement of the reforms, by providing that the new measures do or do not apply in certain circumstances. Specifically, the Bill proposes a new section 1528 of the Act which would provide that the ban on conflicted remuneration does not apply to a benefit given to a licensee or representative if:

- the benefit is given under an arrangement entered into before the day on which the ban commences; and
- the benefit is not given by a platform operator.

1.13 Proposed section 1528 would also allow for regulations to be made, prescribing circumstances in which the ban does or does not apply.

1.14 The proposed amendments are intended to ensure that these grandfathering arrangements can be given full effect. They would clarify that regulations can be made for proposed section 1528 for any circumstances (and are not, for example, limited by the exclusion of benefits given by platform operators in proposed subsection 1528(1)).

1.15 The proposed amendments would also clarify that the provisions of proposed Division 4 do not apply to the extent that the operation of the Division would result in an acquisition of property from a person otherwise than on just terms (within the meaning of paragraph 51(xxxi) of the Constitution).

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 2011

2.1 The amendments to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 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 are intended to clarify the operation of certain measures in the Bill, to ensure that the FOFA reforms can be implemented in a sensible and cost-effective manner.

2.3 There are four elements in the amendments:

- clarifying the timing of one aspect of the best interests obligation;
- explaining the relationship between the best interests obligation and the provision of scaled advice;
- clarifying the ‘execution-only’ exception to the definition of conflicted remuneration; and
- making mechanical amendments to the grandfathering arrangements.

Human rights implications

2.4 The amendments to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 do not engage any of the applicable rights or freedoms.

Conclusion

2.5 The amendments to the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 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