

FOFA: REFORMING THE REFORMS

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OVERVIEW

1. The latest changes
2. Client paid exemption
3. Best interests duty and scoped advice

1. THE LATEST CHANGES

Background to the new reforms

- On 20 December 2013 the Assistant Treasurer, Senator the Hon. Arthur Sinodinos announced proposed amendments to the FOFA legislation.
- On Wednesday 29 January 2014, Treasury released exposure drafts of the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 and the Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014, to amend the FOFA provisions contained in Part 7.7A of the Corporations Act and regulations.

ASIC'S RESPONSE TO THE NEW REFORMS

- ASIC has confirmed in its media release of 20 December 2013 that it will take a 'no action' position in relation to those matters that are the subject of legislative amendment.
- ASIC has also confirmed that until mid-2014 it will take a facilitative approach to the new reforms and that its focus during the facilitative period will continue to be on education and assistance.

2014: Superannuation. Beyond the Fringe

TIMING



OPT-IN REQUIREMENT

- Advisers no longer need to seek their client's agreement every two years. An 'opt-out' system will apply so that any ongoing fee arrangement continues to exist unless the arrangement is terminated by either the client or the adviser.

ANNUAL FEE DISCLOSURE

- Advisers will not need to provide fee disclosure statements to clients who entered into a fee arrangement before the mandatory 1 July 2013 commencement date of FOFA. That is, the retrospective application of the fee disclosure requirement has been removed.

CONFLICTED REMUNERATION

- Benefits relating to the provision of general advice will be exempted from the ban on conflicted remuneration.
- Removal of 'solely' in relation to life risk insurance exemption – wording is now “the benefit is given to the licensee or representative in relation to a life risk insurance product other than:
 - a life risk insurance product for MySuper members; or
 - a life risk insurance product for the benefit of a person, either as a member of a superannuation entity or one of a class of members of a superannuation entity, in relation to which that person has not been given personal advice.”

TRAINING EXEMPTION

- The existing training exemption (s 963C(c)) is broadened and applies where the benefit:
 - has a genuine education or training purpose; and
 - is relevant to the carrying on of a financial services business.

BASIC BANKING EXEMPTION

- Section 963D will be amended to exempt a benefit from the ban on conflicted remuneration where it relates to a basic banking product, and the agent or employee does not, at the time of providing advice on the basic banking product, provide financial product advice on any other financial product except a general insurance product or a consumer credit insurance product (or a combination of them).

EXECUTION-ONLY EXEMPTION

- Introduces a causal link into the exemption so that benefits are permitted where no advice has been provided to the client by the individual or licensee receiving the benefit (as opposed to the licensee or authorised representative more broadly) in the previous 12 months.

PERFORMANCE BONUSES BASED ON VOLUME

7.7A.12EB

- The new regulation 7.7A.12EB exempts monetary benefits provided to employees paid under a ‘balanced scorecard arrangement’ if certain specified criteria are met.
- The benefit must be *low in proportion to the employee’s total remuneration*.
- EM provides that a benefit is likely to be “low” if it comprises less than 10% of the employee’s total remuneration.

VOLUME-BASED SHELF-SPACE FEES

- Ban now clarifies that incentive payments between funds managers and platform operators for preferential treatment of certain products on the platform “shelf” are banned.
- The current provisions are amended to provide that a volume-based shelf-space fee is a benefit that, because of the nature of the benefit, or the circumstances in which it is given, could reasonably be expected to influence the platform operator to:
 - increase the total number or value of the funds manager’s financial products which the platform operator is prepared to provide under the custodial arrangement; or
 - give *preferential treatment* to the funds manager’s financial products in providing the custodial arrangement.

GRANDFATHERING

- Amendment of the existing grandfathering provisions to:
 - clarify that when a business is sold the rights to the grandfathered benefits are transferred to the purchaser, who can then receive the ongoing benefit.
 - to provide that when a retail client elects to switch from the growth phase to the pension phase within the same superannuation interest, this will not be treated as the acquisition of a new financial product.
 - allow advisers to move between licensees and to continue to access grandfathered benefits in certain circumstances. (“Hotel California provision”).

OTHER AMENDMENTS

- Other amendments will be made to address technical issues including:
 - in relation to the stamping and brokerage fee exemption
 - ensuring that the wholesale and retail client distinction that currently applies in other parts of the Act also applies in respect of the FOFA provisions
 - clarifying the operation of the mixed benefits provisions
 - a note clarifying the term ‘intra-fund advice’ has been included in legislation.
- Are the FOFA reforms only technical amendments?

2. CLIENT PAID EXEMPTION (CPE)

- The relevant exemptions for consideration under the Corporations Act are:
 - **Section 963B(1)(d)**, where a benefit is given to the licensee or representative by the client in relation to either the issue/sale of a financial product or financial product advice given by the licensee or representative to the client; and
 - **Regulation 7.7A.12E**, where the benefit is given to the provider by the client in relation to the provider dealing in a financial product on behalf of the client.

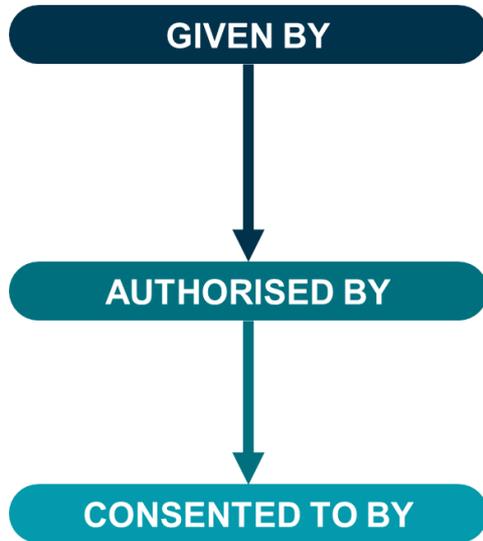
PROPOSED CHANGE TO CPE

- A clarificatory note has been added that a reference to ‘giving a benefit’ includes a reference to causing or authorising it to be given.
- The draft EM provides that the benefit may be paid directly by the client or by another party where the benefit is given at the direction of the client with the client’s clear consent.
- A change to the legislation may have been more appropriate.

SCOPE OF CPE

- How do we get from 'given by the client' to authorised by the client?
 - the pivotal provision is s 52
 - can s 52 be used in an enabling sense so that causation or authorisation by a person is tantamount to action by the person?
 - or was s 52 only intended to be invoked for liability purposes?

HIERARCHY OF INTERPRETATION



- reflects words in Act
- reflects s 52 and note in legislation
- reflects EM

INTERACTION OF CPE WITH 7.7A.12HA

- Benefits calculated by reference to another benefit that is not conflicted remuneration

“A benefit is not conflicted remuneration if the amount or value of the benefit is calculated by reference to another benefit:

(a) that is not conflicted remuneration; or

(b) to which Division 4 of Part 7.7A of the Act does not apply.”

Does this expand the operation of the CPE?

3. AMENDED BEST INTERESTS DUTY AND SCOPED ADVICE

- The catch-all provision will be removed so that advisers can be certain they have satisfied their obligations under the best interests duty by complying with each safe harbour step.
- Clients and advisers will be permitted to agree on the scope of any scaled advice to be provided.