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EXPLANATORY STATEMENT
Select Legislative Instrument 2008 No

Issued by the authority of the Assistant Treasurer and Minister for Competition Policy
and Consumer Affairs

Corporations Act 2001

Corporations Amendment Regulations 2008 (No.)

Section 1364 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, 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.

Section 912CA provides that the Regulations may require a financial services licensee to provide the Australian Securities and Investment Commission with specified information about the financial services it provides or the financial services business it carries on.

Section 949B provides that the Regulations may impose disclosure requirements or additional disclosure requirements in certain situations, including where a financial service is provided to a person as a wholesale client.

The Regulations relate to the regulation of discretionary mutual funds (DMFs) and direct offshore foreign insurers (DOFIs) and are subsequent to the *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Act 2007* (the DMF/DOFI Act).

The DMF/DOFI Act requires DOFIs operating in the Australian general insurance market to be authorised insurers and subject to Australia's prudential regime. From 1 July 2008, it will be an offence for a DOFI to carry on insurance business in Australia without being authorised and for an Australian Financial Services Licence (AFSL) holder to deal in general insurance products that are not issued by an authorised insurer or a Lloyd's underwriter, unless an exemption applies.

The DMF/DOFI Act introduces a limited exemption mechanism to enable insurance business that cannot be appropriately placed in Australia to be supplied by a DOFI.

The purpose of the Regulations is to extend consumer protection measures to wholesale clients of DMFs and DOFIs and provide for the collection of data from AFSL holders on the use of DMFs and DOFIs under the exemptions.

The proposed Regulations have been the subject of extensive consultation with a range of stakeholders. In 2003, the *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers* (the Potts Review) was conducted. After further consultation, a Treasury discussion paper was released in 2005 seeking stakeholders' views on how to implement the review's recommendations. Treasury conducted ongoing consultation with industry in the development of the DMF/DOFI Act.

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The Regulations specify that AFSL holders are required to provide:

- data to the Australian Securities and Investment Commission on the use of DMFs and business that is placed with a DOFI under the exemptions (set out in *Insurance Regulations 2002*);
- wholesale clients with a notice about the risks of using an offshore insurer where business is placed under the atypical and customised exemptions (Regulation 4D and 4E *Insurance Regulations 2002*); and
- a Product Disclosure Statement to wholesale clients of a DMF.

Details of the Regulations are set out in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on 1 July 2008, to coincide with the commencement of Schedule 2 of the DMF/DOFI Act.

Authority: Section 1364 of the
Corporations Act 2001

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Details of the proposed *Corporations Amendment Regulations 2008* (No.)

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Corporations Amendment Regulations 2008* (No.)

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on 1 July 2008, to coincide with the commencement of Schedule 2 of the *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Act 2007*.

Regulation 3 – Amendment of *Corporations Regulations 2001*

This regulation provides that the *Corporations Regulations 2001* (the Principal Regulations) are amended as set out in the Schedule.

Schedule – Amendments

Items [1] – Regulations 7.8.26 and 7.8.27

These regulations set out the information that Australian Financial Services Licence (AFSL) holders must provide to the Australian Securities and Investment Commission (ASIC) about business placed with unauthorised foreign insurers (UFIs) and discretionary mutual funds (DMFs). Collection of this information will provide a greater understanding of the share of the Australian insurance market supplied by DMFs and direct offshore foreign insurers (DOFIs), and will assist ASIC in undertaking its compliance activities.

Regulation 7.8.26

An AFSL holder that places business with a UFI under the exemptions set out in Part 2 of the *Insurance Regulations 2002* will need to provide information to ASIC about that business.

The AFSL holder will need to provide details of the number of policies and total premium paid by class of insurance business and exemption. This information will be provided for each UFI that business is placed with, including the name and country of domicile of the UFI.

The classes of business include the atypical risks set out in Regulation 4D of the *Insurance Regulations 2002* and the specific instructions in the *Financial Sector (Collection of Data)(reporting standard) Determination No 82 of 2006* which sets out the classes of insurance business used by the Australian Prudential Regulation Authority (APRA). The classes to be reported include:

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APRA classes

- Houseowners/householders
- Commercial motor vehicle
- Domestic motor vehicle
- Travel
- Fire and Industrial Special Risks
- Marine
- Aviation
- Mortgage (Lenders' Mortgage Insurance)
- Consumer Credit
- Other accident
- Public and product liability
- Professional indemnity
- Employers' liability
- CTP motor vehicle
- Other

Atypical Risk classes

- Nuclear
- Biological
- War
- Terrorism
- Medical clinical trials
- Space
- Aviation liability
- Shipowners P&I other than for pleasure crafts

Premium excludes amounts collected on behalf of third parties, for example government stamp duty and taxes. However, levies charged to the insured, such as fire services levies, are to be included in **premium**.

Information will be provided to ASIC in aggregate in two six-monthly returns for the periods 1 January to 30 June and 1 July to 31 December. The returns must be provided to ASIC within 20 business days of the end of the period. ASIC will determine the form in which the information is to be provided.

An AFSL holder will only be required to lodge a return when business has been placed under an exemption during the return period. If no business has been placed, the AFSL holder is not required to lodge a return.

A maximum penalty of 10 penalty units will apply where an AFSL holder is required to lodge a return but fails to do so.

Where there are two or more AFSL holders involved in a transaction, one of which is an insurance broker, the broker is required to provide the information to ASIC. Where there is more than one insurance broker involved in a transaction, the broker who dealt directly with the client is required to provide the information to ASIC.

Regulation 7.8.27

An AFSL holder that places business with a DMF will be required to provide information to ASIC about that business.

The AFSL holder will need to provide details of the DMF the business is placed with, the contributions to the DMF and the class of business the DMF provides protection for. The classes of business are set out in Form 310.3 of the *Financial Sector (Collection of Data) (reporting standard) Determination No 39 of 2007*, which is used by APRA to collect data from DMFs about the business they accept. That is:

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- Houseowners/householders
- Commercial motor vehicle
- Domestic motor vehicle
- Travel
- Fire and Industrial Special Risks
- Marine
- Aviation
- Mortgage (Lenders' Mortgage Insurance)
- Consumer Credit
- Other accident
- Public and product liability
- Professional indemnity
- Employers liability
- CTP motor vehicle
- Other

Information will be provided to ASIC in aggregate in two six-monthly returns for the periods 1 January to 30 June and 1 July to 31 December. The returns must be provided to ASIC within 20 business days of the end of the period. ASIC will determine the form in which the information is to be provided.

An AFSL holder will only be required to lodge a return when business has been placed with a DMF during the return period. If no business has been placed, the AFSL holder is not required to lodge a return.

A maximum penalty of 10 penalty units will apply where an AFSL holder is required to lodge a return but fails to do so.

Where there are two or more AFSL holders involved in a transaction, one of which is an insurance broker, the broker is required to provide the information to ASIC. Where there is more than one insurance broker involved in a transaction, the broker who dealt directly with the client is required to provide the information to ASIC.

Item [2] – Regulation 7.7.20A Extension of disclosure requirements to wholesale clients dealing with certain unauthorised insurers

This regulation requires a notice to be issued to an insured, who is a wholesale client, where a policy is placed with a UFI under the atypical or customised exemption under Regulation 4D or 4E of the *Insurance Regulations 2002*.

The notice must set out that:

- the insurer is not an authorised insurer under the *Insurance Act 1973*;
- the insurer is not subject to financial supervision in Australia; and
- the insured should consider seeking further information about the country in which the insurer is incorporated, whether there is financial supervision of insurers in that country, the paid up capital of the insurer and which country's laws will be used in disputes in relation to the policy.

This will ensure that consumers have sufficient information about the risks of using an UFI and can make informed decisions. This notice replicates the notice that must be given to retail clients under Corporations Regulation 7.9.15.

An AFSL holder must give this notice when they deal in the product or when they provide advice and would be required to give a Statement of Advice if the client was a retail client.

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Item [3] – Division 2BA Product Disclosure Statements for discretionary mutual funds

This regulation extends the obligation to provide a Product Disclosure Statement (PDS) to wholesale clients of DMFs.

The form of the PDS must be the same as the PDS that would be given to a retail client.

This will ensure that consumers have sufficient information about the risks and benefits of DMFs so as to make informed decisions. DMFs provide an insurance-like product offering 'discretionary cover'. Unlike traditional insurance the DMF does not have a contractual obligation to meet a claim if a risk eventuates. Instead, the DMF has a contractual obligation to consider the claim and a discretion as to whether it meets the costs of the claim. DMFs provide a means of risk management that is an alternative to insurance.

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