

CONSULTATION NOTE – EXPOSURE DRAFT: CORPORATIONS AMENDMENT (REGISTER OF RELEVANT PROVIDERS) REGULATION 2014

INTRODUCTION/BACKGROUND

1. On 17 July 2014, the Minister for Finance and Acting Assistant Treasurer, Senator the Hon Mathias Cormann, announced that the Government would create a working group to enable consultation with stakeholders to establish an enhanced public register of financial advisers (the register).¹
2. The working group advised the Government on a number of implementation issues concerning the register, including:
 - 2.1. its scope and content;
 - 2.2. whether reporting obligations are placed on licensees and/or financial advisers;
 - 2.3. who is responsible for providing information and input of data; and
 - 2.4. potential privacy issues.
3. The Government gave careful consideration to the working group's report and on 24 October 2014, the Minister announced implementation details and content of the register.²
4. Amendments to the *Corporations Regulations 2001* (the Principal Regulations) are required to allow the Australian Securities and Investments Commission (ASIC) to establish and maintain a public register of financial advisers and for Australian Financial Service (AFS) licensees to collect and provide information to ASIC concerning financial advisers that operate under their licence.
 - 4.1. Section 926B of the *Corporations Act 2001* (the Act) enables the Principal Regulations to omit, modify or vary a provision in Part 7.6 of the Act.
5. The Exposure Draft Regulation – Corporations Amendment (Register of Relevant Providers) Regulation 2014 (the Regulation) is provided at Attachment A and a draft Explanatory Statement is provided at Attachment B.

PURPOSE

6. The purpose of this Consultation Note is to invite feedback from stakeholders on the key drafting issues in relation to the Regulation, to ensure that the Regulation will implement the Government's policy intent.

¹ Media release: *Establishing an enhanced public register of financial advisers* (17 July 2014), available at: <http://mhc.ministers.treasury.gov.au/media-release/031-2014/>.

² Media release: *An Enhanced Public Register of Financial Advisers* (24 October 2014), available at: <http://mhc.ministers.treasury.gov.au/media-release/031-2014/>.

7. This Consultation Note also includes: information on timing, to enable the Register to be implemented by March 2015; and detail on the form lodgement fee increases necessary to fund the register.

Key issues for consultation

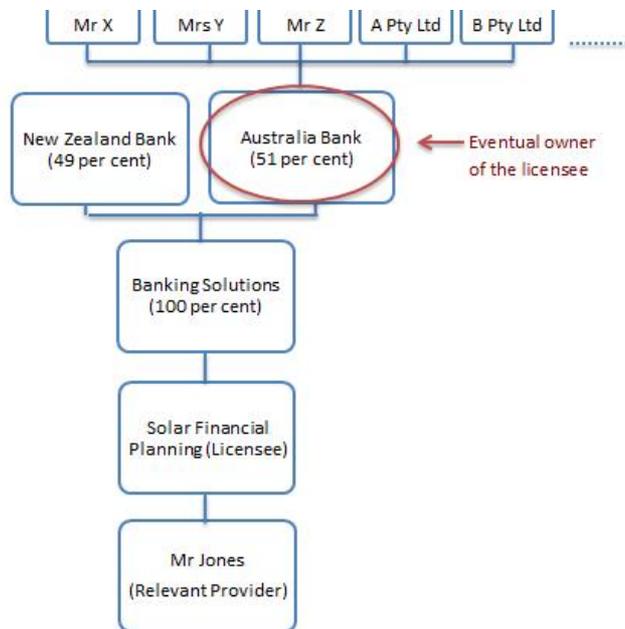
Key Issue A: Eventual owner

Policy Intent

8. To provide more transparency in the industry, the register will provide information concerning the eventual owner of the licensee that each relevant provider operates under.
9. In order for the register to be consumer-friendly and valuable to users, it is the Government's intention for only a single corporate entity to be listed, rather than for example, multiple controllers of a licensee being listed.
 - 9.1. 'Control' in relation to an AFS licensee is defined in paragraph 7.6.04(2)(b) of the Principle Regulations, and outlines the various ways in which a person may obtain control of a licensee.
10. It is also important that the eventual owner, however defined, is not subject to frequent change over time, which would increase compliance costs for licensees.

Proposal in the Regulation

11. Taking into account the Government's policy intent, the proposed new section @922C of the Regulation defines the meaning of 'eventual owner' for the purposes of the Register.
12. The definition would require licensees to identify the body corporate that directly or indirectly holds more than 50 per cent of the issued share capital of the licensee firm, if no other body corporate directly or indirectly holds more than 50 per cent of that body corporate.
 - 12.1. The definition draws upon one aspect of the definition of control in paragraph 7.6.04(2)(b) of the Principle Regulations.
 - 12.2. The definition only concerns itself with share capital which allows for voting rights.
13. The definition would require in some instances, licensees to look beyond the licensee's immediate owner, to the owner of its owner etc., or in other terms, the 'eventual owner'. See the example below:



14. It is recognised that the definition would mean that in some instances there would be no ‘eventual owner’ listed on the register, and in these instances, licensees would not be required to lodge any ownership information with ASIC.

14.1. For example:

14.1.1. A trust, partnership or individual may hold more than 50 per cent of the share capital in a licensee. This licensee would have no eventual owner under the proposal.

14.1.2. Similarly, multiple, unrelated body corporates may own fewer than 50 per cent of the share capital of a licensee. In this instance, the licensee would have no eventual owner.

Question 1: Does the definition of ‘eventual owner’ in section @922C achieve the Government’s policy intent?

Key Issue B: Authorisation of Relevant Providers

Policy intent

15. The register will contain information on all natural persons who provide personal advice to retail clients on more complex financial products (labelled ‘relevant financial products’ in the Regulation).

16. To enable this scope to be captured, section @922C of the Regulation seeks to label and define a ‘relevant provider’.

17. In order to define this concept, the verb ‘authorise’ is used to capture all types of individuals that are allowed or permitted, under the AFS licensing regime, to provide advice.

17.1. At present, the Act uses multiple terms to describe the various ways an individual may provide advice under the AFS licensing regime.

Natural person licensees and authorised representatives of a licensee

18. Under the Act, ASIC may ‘authorise’ a natural person to provide financial services by granting a licence (section 913B).

- 18.1. Various terms are used in the Act and the Principal Regulations to describe natural person licensees who provide financial services:
- 18.1.1. a person who ‘carries on a financial services business...’ (section 911A of the Act);
 - 18.1.2. ‘the licensee is authorised to provide...’ (section 914A(6) of the Act)³
 - 18.1.3. ‘if the licensee’s financial services licence authorises the licensee to...’ (regulation 7.6.02AA of the Principal Regulations); and
 - 18.1.4. ‘the licensee is licensed to provide...’ (regulation 7.6.04(3) of the Principal Regulations).
19. Additionally, a licensee may authorise a person or body corporate to provide financial services on its behalf (section 916A of the Act). These individuals are referred to as ‘authorised representatives’.
20. As a result, in practice, the term ‘authorisation’ is used both to refer to instances where ASIC authorises an individual or entity to provide financial services by granting that individual or entity a licence, and where licensees authorise individuals or entities to provide financial services on the licensee’s behalf.
21. For the purposes of defining a ‘relevant provider’ in the Regulation, there is a question whether it is suitable to use the term ‘authorise’ to encapsulate both instances where authorisation is provided by ASIC (to licensees) and by licensees themselves (to authorised representatives).

Employees and directors of licensees

22. Employees or directors of an AFS licensee and employees or directors of related body corporates of AFS licensees are not required to hold their own AFS licence (section 911B of the Act).
23. These individuals, by virtue of their employment or directorship, are effectively ‘authorised’ by their licensee to provide financial services on the licensee’s behalf.
- 23.1. In Division 5 the verb ‘authorise’ is only used to refer to authorised representatives (which does not include employees and directors of licensees).
 - 23.2. In contrast, Division 6 of Part 7.6 of the Act refers to employees and directors of a licensee or a related body corporate of a licensee as ‘acting within authority’. Division 6 also refers to these representatives having an ‘authorising licensee’.

Proposal in the Regulation

24. It is proposed in the Regulation that the verb ‘authorise’ be used to not only describe instances where a natural person is licenced as an AFS licensee, or a representative but also where employee and directors of the licensee and related body corporations are able to provide financial product advice under an AFS licence.

³ See also ASIC form FS01 – sample AFS licence application which uses the word ‘authorise’, available at: https://dv8nx270cl59a.cloudfront.net/media/1337228/eLicensing_sample%20application_20130701.pdf

Question 2: Is 'authorisation' the most suitable term to describe instances where an individual, either as a:

- natural person AFS licensee;
- authorised representative of a licensee;
- any employee or director of the licensee; or
- an employee or director of a related body corporate;

is able to provide personal advice on more complex products to retail clients, or is there an alternative more appropriate descriptor (such as 'permitted' or 'allowed to'?)

Implementation Timeframes

25. The Government has announced that the register will be up and running by March 2015.⁴
26. ASIC is currently building the IT infrastructure required to establish and maintain the register. This includes constructing the required IT portal for licensees to lodge information concerning their relevant providers.

Late December 2014 – January 2015: The Government to finalise details in the Regulation

27. The Minister will carefully consider feedback received as part of the stakeholder consultation period and will make any amendments to the Regulation as appropriate.
28. The Government intends to settle the version of the Regulation which it will take to the Governor General by late December 2014 – January 2015.
29. Following finalisation of the Regulation, it is intended that the Government will inform the industry of any changes made to the exposure draft Regulation, so that licensees (and certain authorised representatives) are provided with certainty as to the information they will be required to collect in relation to their relevant providers and when it must be provided to ASIC.

January – mid March 2015: The industry to collect and collate information concerning relevant providers

30. Licensees (and certain authorised representatives) will be able to collect and collate information on their relevant providers following the Government finalising the form of the Regulation.

Mid-February 2015: Executive Council consideration of the Regulation

31. The Government intends to submit the Regulation for the Governor General's consideration at Executive Council's first meeting in 2015, on 12 February 2015. The Regulation will commence shortly thereafter.

⁴ Media release: An Enhanced Public Register of Financial Advisers (24 October 2014), available at: [http://mhc.ministers.treasury.gov.au/media release/031 2014/](http://mhc.ministers.treasury.gov.au/media%20release/031%202014/).

Mid-March 2015: Lodging information with ASIC

32. In accordance with ASIC's IT build plan, licensees (and certain authorised representatives) will have from between 9 March and 30 March 2015 to lodge information about their existing relevant providers with ASIC.
33. ASIC have advised that they will be unable to collect information:
 - 33.1. prior to this date, as the online portal will not be completed for lodgement of information concerning relevant providers; and

End of March 2015: ASIC to establish register

34. It is anticipated that the register will be launched on 31 March 2015.

Transitional arrangements

Transitional arrangements for individuals who are currently relevant providers

35. Currently, the Regulation only provides for the lodgement of information concerning individuals who *become* relevant providers, and not existing individuals who currently meet the definition of relevant provider. The lodgement of information concerning existing relevant providers will be dealt with via transitional regulations.
36. These transitional regulations will be included in the Regulation prior to its consideration at the Executive Council meeting.

Initial lodgement period to establish the register

37. The initial licensee upload lodgement period (9 to 30 March) will need to be specified in the final form of the Regulation.
 - 37.1. This initial lodgement period will vary from the normal requirement for licensees to update information on the register that becomes out of date, or add any new relevant providers to the register, within 30 business days of the change (subsection @922I(2) of the Regulation).

Recent advising history

38. Licensees (and certain authorised representatives) will be required to lodge information about whom their relevant providers provided advice on behalf of, for the previous five years.
 - 38.1. See section @922G for the meaning of 'recent advising history', and sections @922E and @922F for the obligations on lodgers.
39. However, five years from the register's commencement date, this information request will be superfluous, as ASIC will have this five year history on the register.
40. Currently, under sections @922E and @922F, licensees (and certain authorised representatives) will be required to lodge this information indefinitely, however subsection @922F(2) would seek to limit this information request so that, after five years, this information will already be on the register and would not be required to be lodged.
41. An alternative option to this drafting approach would be to place the requirement to lodge recent advising history in transitional regulations, and for these transitional regulations to only apply for five years.

Form lodgement fees

42. The Government has announced that the register will be funded by increasing the current form lodgement fee for AFS licensees by \$5.⁵ The lodgement fee will apply to each relevant adviser. This will mean that the cost of establishing and maintaining the register will be recovered from licensees based on the number of relevant providers operating under the licence.
- 42.1. However, licensees will not be charged on a per relevant provider basis for informing ASIC of its eventual owner, and for updating eventual owner information on the register.
43. To implement this fee increase, amendments to the *Corporations (Fees) Regulations 2001* (Fees Regulations) will be required. These amendments will be submitted for the Executive Council's consideration at the same time as the Regulation.
44. This increase will apply to various forms relating to licensees placing relevant providers on the register (from \$38 to \$43 per provider), and going forward, updating information or ceasing and revoking relevant providers that are on the register (from \$24 to \$29 per provider).
- 44.1. There will also be a \$1 increase from CPI indexing of the base amount from 1 July 2015. CPI indexing applies to all Fees Regulations fees.
45. The Regulation also allows for certain authorised representatives to lodge information relating to a relevant provider (subsection @922L(3)).

Any views on the proposed implementation timeframes, transitional arrangements and form lodgement fees are welcomed.

⁵ Media release: An Enhanced Public Register of Financial Advisers (24 October 2014), available at: [http://mhc.ministers.treasury.gov.au/media release/031 2014/](http://mhc.ministers.treasury.gov.au/media%20release/031%202014/).

ATTACHMENT A – EXPOSURE DRAFT: CORPORATIONS AMENDMENT (REGISTER OF RELEVANT PROVIDERS) REGULATION 2014

**ATTACHMENT B – DRAFT EXPLANATORY STATEMENT TO ACCOMPANY EXPOSURE
DRAFT: CORPORATIONS AMENDMENT (REGISTER OF RELEVANT PROVIDERS)
REGULATION 2014**