

EXPOSURE DRAFT



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Financial System Legislation Amendment (Resilience and Collateral Protection) Regulation 2016

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation.

Dated 2016

Peter Cosgrove
Governor-General

By His Excellency's Command

Kelly O'Dwyer **DRAFT ONLY—NOT FOR SIGNATURE**
Assistant Treasurer

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1 Name

This is the *Financial System Legislation Amendment (Resilience and Collateral Protection) Regulation 2016*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The later of: (a) the start of the day after this instrument is registered; and (b) immediately after the commencement of the <i>Financial System Legislation Amendment (Resilience and Collateral Protection) Act 2016</i> . However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the following Acts:

- (a) *Superannuation Industry (Supervision) Act 1993*;
(b) *Life Insurance Act 1995*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

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Schedule 1 Facilitating access to derivatives for superannuation funds and life insurance companies

Schedule 1—Facilitating access to derivatives for superannuation funds and life insurance companies

Life Insurance Regulations 1995

1 Paragraph 4.00A(1)(b)

Repeal the paragraph, substitute:

- (b) the charge complies with subregulation (1A) or (1B); and

2 After subregulation 4.00A(1)

Insert:

- (1A) A charge complies with this subregulation if it is given in order to comply with a requirement, in either of the following, that the performance of obligations in relation to the derivatives contract to be secured:
 - (a) rules governing the operation of an approved body (as defined in subregulation (2));
 - (b) a law of the Commonwealth, a State, a Territory or a foreign country (including a part of a foreign country) that applies to dealings in the derivatives contract.
- (1B) A charge complies with this subregulation if:
 - (a) the asset over which the charge is given is financial property; and
 - (b) the obligations secured by the financial property are any of the following:
 - (i) an obligation of the life company that relates to a derivatives contract;
 - (ii) an obligation of the life company to pay interest on an obligation covered by subparagraph (i);
 - (iii) an obligation of the life company to pay costs and expenses incurred in connection with enforcing a charge given in respect of an obligation covered by subparagraph (i) or (ii); and
 - (c) the financial property is transferred or otherwise dealt with so as to be in the possession or under the control of:
 - (i) the secured party; or
 - (ii) another person (who is not the life company), who acknowledges in writing that he, she or it has that possession or control of the financial property on behalf of the secured party.
- (1C) For the purposes of paragraph (1B)(c), financial property is taken not to be in the possession of a person if the financial property is in the actual or apparent possession of the grantor.
- (1D) Without limiting paragraph (1B)(c), financial property is taken to be in the possession of a person for the purposes of that paragraph if:
 - (a) if there is an issuer of the financial property—the person is registered by, or on behalf of, the issuer as the registered owner of the financial property; or

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(b) if the financial property is an intermediated security—the person is the person in whose name the intermediary maintains the account.

(1E) Without limiting paragraph (1B)(c), financial property is taken to be under the control of a person for the purposes of that paragraph if:

- (a) the financial property is an intermediated security; and
- (b) there is an agreement in force between the intermediary and one or more other persons, one of which is the secured party or the life company; and
- (c) the agreement has one or more of the following effects:
 - (i) the person in whose name the intermediary maintains the account is not able to transfer or otherwise deal with the financial property;
 - (ii) the intermediary must not comply with instructions given by the life company in relation to the financial property without seeking the consent of the secured party (or a person who has agreed to act on the instructions of the secured party);
 - (iii) the intermediary must comply, or must comply in one or more specified circumstances, with instructions (including instructions to debit the account) given by the secured party in relation to the intermediated security without seeking the consent of the life company (or any person who has agreed to act on the instructions of the life company).

(1F) Without limiting paragraph (1B)(c), the fact that a life company retains a right of a kind mentioned in column 1 of an item of the following table does not stop that paragraph from being satisfied. However, that paragraph is taken not to be satisfied if:

- (a) column 2 of the table item sets out a condition in relation to the right; and
- (b) the condition is not met.

Retention of certain rights in relation to financial property by life company

Item	Column 1 Type of right	Column 2 Condition
1	Right to receive and withdraw income in relation to the financial property	None
2	Right to receive notices in relation to the financial property	None
3	Right to vote in relation to the financial property	None
4	Right to substitute financial property	The secured party (or a person who has agreed to act on the instructions of the secured party) must have the right (however described) to consent to the exercise of that right by the life company
5	Right to withdraw excess financial property	The secured party (or a person who has agreed to act on the instructions of the secured party) must have the right (however described) to consent to the exercise of that right by the life company
6	Right to determine value of financial property	None

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Schedule 1 Facilitating access to derivatives for superannuation funds and life insurance companies

Retention of certain rights in relation to financial property by life company

Item	Column 1 Type of right	Column 2 Condition
7	Right to require release of financial property if secured party becomes insolvent	The secured party (or a person who has agreed to act on the instructions of the secured party) must have the right (however described) to consent to the exercise of that right by the life company

3 Subregulation 4.00A(2)

Insert:

Australian CS facility licence has the same meaning as in the *Corporations Act 2001*.

Australian market licence has the same meaning as in the *Corporations Act 2001*.

4 Subregulation 4.00A(2) (definition of *derivatives contract*)

Repeal the definition, substitute:

derivatives contract means any of the following:

- (a) a derivative (within the meaning of Chapter 7 of the *Corporations Act 2001*);
- (b) a foreign exchange contract (within the meaning of that Chapter).

5 Subregulation 4.00A(2)

Insert:

financial property has the same meaning as in the *Payment Systems and Netting Act 1998*.

intermediated security has the same meaning as in the *Payment Systems and Netting Act 1998*.

6 After Part 13

Insert:

Part 14—Transitional arrangements

Division 14.1—Transitional arrangements arising out of Financial System Legislation Amendment (Resilience and Collateral Protection) Regulation 2016

14.01 Arrangements

The amendments of these Regulations made by items 1 to 5 of Schedule 1 to the *Financial System Legislation Amendment (Resilience and Collateral Protection)*

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Facilitating access to derivatives for superannuation funds and life insurance companies **Schedule 1**

Regulation 2016 apply to charges given on and after the commencement of this regulation.

Superannuation Industry (Supervision) Regulations 1994

7 Paragraph 13.15A(1)(b)

Repeal the paragraph, substitute:

- (b) the charge complies with subregulation (1A) or (1B); and

8 After subregulation 13.15A(1)

Insert:

- (1A) A charge complies with this subregulation if it is given in order to comply with a requirement, in either of the following, that the performance of obligations in relation to the derivatives contract be secured:
 - (a) rules governing the operation of an approved body (as defined in subregulation (2));
 - (b) a law of the Commonwealth, a State, a Territory or a foreign country (including a part of a foreign country) that applies to dealings in the derivatives contract.
- (1B) A charge complies with this subregulation if:
 - (a) the asset over which the charge is given is financial property; and
 - (b) the obligations secured by the financial property are any of the following:
 - (i) an obligation of the trustee that relates to a derivatives contract;
 - (ii) an obligation of the trustee to pay interest on an obligation covered by subparagraph (i);
 - (iii) an obligation of the trustee to pay costs and expenses incurred in connection with enforcing a charge given in respect of an obligation covered by subparagraph (i) or (ii); and
 - (c) the financial property is transferred or otherwise dealt with so as to be in the possession or under the control of:
 - (i) the secured party; or
 - (ii) another person (who is not the trustee), who acknowledges in writing that he, she or it has that possession or control of the financial property on behalf of the secured party.
- (1C) For the purposes of paragraph (1B)(c), financial property is taken not to be in the possession of a person if the financial property is in the actual or apparent possession of the grantor.
- (1D) Without limiting paragraph (1B)(c), financial property is taken to be in the possession of a person for the purposes of that paragraph if:
 - (a) if there is an issuer of the financial property—the person is registered by, or on behalf of, the issuer as the registered owner of the financial property; or
 - (b) if the financial property is an intermediated security—the person is the person in whose name the intermediary maintains the account.

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Schedule 1 Facilitating access to derivatives for superannuation funds and life insurance companies

- (1E) Without limiting paragraph (1B)(c), financial property is taken to be under the control of a person for the purposes of that paragraph if:
- (a) the financial property is an intermediated security; and
 - (b) there is an agreement in force between the intermediary and one or more other persons, one of which is the secured party or the trustee; and
 - (c) the agreement has one or more of the following effects:
 - (i) the person in whose name the intermediary maintains the account is not able to transfer or otherwise deal with the financial property;
 - (ii) the intermediary must not comply with instructions given by the trustee in relation to the financial property without seeking the consent of the secured party (or a person who has agreed to act on the instructions of the secured party);
 - (iii) the intermediary must comply, or must comply in one or more specified circumstances, with instructions (including instructions to debit the account) given by the secured party in relation to the intermediated security without seeking the consent of the trustee (or any person who has agreed to act on the instructions of the trustee).
- (1F) Without limiting paragraph (1B)(c), the fact that a trustee retains a right of a kind mentioned in column 1 of an item of the following table does not stop that paragraph from being satisfied. However, that paragraph is taken not to be satisfied if:
- (a) column 2 of the table item sets out a condition in relation to the right; and
 - (b) the condition is not met.

Retention of certain rights in relation to financial property by trustee

Item	Column 1 Type of right	Column 2 Condition
1	Right to receive and withdraw income in relation to the financial property	None
2	Right to receive notices in relation to the financial property	None
3	Right to vote in relation to the financial property	None
4	Right to substitute financial property	The secured party (or a person who has agreed to act on the instructions of the secured party) must have the right (however described) to consent to the exercise of that right by the trustee
5	Right to withdraw excess financial property	The secured party (or a person who has agreed to act on the instructions of the secured party) must have the right (however described) to consent to the exercise of that right by the trustee
6	Right to determine value of financial property	None
7	Right to require release of financial property if secured party becomes insolvent	The secured party (or a person who has agreed to act on the instructions of the secured party) must have the right (however described) to consent to the exercise of that right by the trustee

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Facilitating access to derivatives for superannuation funds and life insurance companies **Schedule 1**

9 Subregulation 13.15A(2)

Insert:

Australian CS facility licence has the same meaning as in the *Corporations Act 2001*.

Australian market licence has the same meaning as in the *Corporations Act 2001*.

10 Subregulation 13.15A(2) (definition of *derivatives contract*)

Repeal the definition, substitute:

derivatives contract means any of the following:

- (a) a derivative (within the meaning of Chapter 7 of the *Corporations Act 2001*);
- (b) a foreign exchange contract (within the meaning of that Chapter).

11 Subregulation 13.15A(2)

Insert:

financial property has the same meaning as in the *Payment Systems and Netting Act 1998*.

intermediated security has the same meaning as in the *Payment Systems and Netting Act 1998*.

12 At the end of Part 14

Add:

Division 14.7—Transitional arrangements arising out of the Financial System Legislation Amendment (Resilience and Collateral Protection) Regulation 2016

14.08 Arrangements

The amendments of these Regulations made by items 7 to 11 of Schedule 1 to the *Financial System Legislation Amendment (Resilience and Collateral Protection) Regulation 2016* apply to charges given on and after the commencement of this regulation.