

## EXPOSURE DRAFT EXPLANATORY STATEMENT

### **Issued by authority of the Minister for Revenue and Financial Services, Minister for Women and Minister Assisting the Prime Minister for the Public Service**

*Corporations Act 2001*

*Corporations Amendment (Client Money Reporting Rules Enforcement Powers) Regulations 2018*

Subsection 1364(1) of the *Corporations Act 2001* (the Act) provides that the Governor-General may make regulations 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. In addition, section 981N of the Act allows regulations to be made prescribing alternatives to civil proceedings in relation to non-compliance with client money reporting rules.

In 2017 the Government strengthened the retail client money regime to better protect clients of Australian financial services licensees (licensees). Passage of the *Treasury Laws Amendment (2016 Measures No. 1) Act 2017* and making of the *Corporations Amendment (Client Money) Regulations 2017* mean that from 4 April 2018, licensees are no longer able to use retail derivative client money for a range of purposes, such as their own working capital.

As part of this reform, the Australian Securities and Investments Commission (ASIC) was authorised to make new rules that impose reporting and reconciliation requirements on licensees in respect of retail client money associated with dealings in derivatives. The *ASIC Client Money Reporting Rules 2017* also came into effect on 4 April 2018. The reporting regime established by these rules allows ASIC to effectively monitor the use of retail derivative client money and to identify instances in which licensees use client money for non-permitted purposes.

Under subsection 981K(3) of the Act, non-compliance with the ASIC rules is subject to a penalty of up to \$1 million. Compliance with the client money reporting rules is also a civil penalty provision under section 1317E of the Act.

However, Section 981N of the Act authorises regulations to be made which provide alternatives to civil proceedings. Section 981N has two notable precedents – each of which creates alternatives to civil proceedings for ASIC’s:

- Market integrity rules (see section 798K of the Act and Part 7.2A of the *Corporations Regulations 2001* (the Principal Regulations)); and
- Derivative transaction and derivative trade repository rules (see sections 901F and 903E of the Act, and Subdivisions 2.2 and 2.3 of Part 7.5A of the Principal Regulations).

The *Corporations Amendment (Client Money Reporting Rules Enforcement Powers) Regulations 2018* (these Regulations) essentially mirror the alternatives to civil proceedings set out by these two regimes, to facilitate ASIC's effective enforcement of its client money reporting rules.

All three regimes enable ASIC to use infringement notices and enforceable undertakings to promote compliance with relevant rules, and give the regulator more flexibility to respond to the specific circumstances of individual breaches.

These regulations do not affect the operation of existing regimes.

The Act does not specify any conditions that need to be satisfied before the power to make these Regulations may be exercised.

These Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The amendments commence and apply from the day after they are registered.

Details of the amendments made by this Regulation are outlined in the [Attachment](#).

**Details of the Corporations Amendment (Client Money Reporting Rules Enforcement Powers) Regulations 2018**

**Regulation 1 – Name of Regulations**

Regulation 1 provides that the name of the Regulations is the *Corporations Amendment (Client Money Reporting Rules Enforcement Powers) Regulations 2018*.

**Regulation 2 – Commencement**

Regulation 2 provides that the Regulations commence on the day after the Regulations are registered.

**Regulation 3 - Authority**

Regulation 3 provides that the authority for making the Regulations is the *Corporations Act 2001*.

**Regulation 4 – Schedules**

Regulation 4 provides that the Principal Regulations are amended as set out in Schedule 1 to the Regulations.

**Schedule 1 – Amendments**

**Main amendments**

Part 1 of Schedule 1 sets out the main amendments made by these regulations.

Item 1 inserts definitions of “client money reporting infringement notices”, “client money reporting infringement notice period”, and “recipient” into Part 1.2 – Interpretation in Chapter 1 of the Principal Regulations.

Item 2 inserts Subdivision AA into Division 2 of Part 7.8 of the Principal Regulations, to support the effective enforcement of the client money reporting rules.

The subdivision provides ASIC with alternatives to civil proceedings – namely, the use of infringement notices and enforceable undertakings. ASIC may choose to use these tools in respect of alleged non-compliance with subsection 981M(1) of the Act, which requires licensees to comply with the ASIC client money reporting rules.

***Enforceable undertakings***

Regulation 7.8.05B inserts an enforceable undertaking regime for the purposes of the ASIC rules. ASIC is able (but not required) to accept enforceable undertakings from persons alleged to have contravened a client money reporting rule, as an alternative to civil proceedings.

Such persons may undertake to perform or refrain from performing a specific action, or pay a specified amount to a specified party. These undertakings are able to be varied or withdrawn with ASIC's agreement.

If a person breaches their undertakings, ASIC is able to apply to a Court to make an order. The Court may direct the person to comply with the undertaking; pay the Commonwealth an amount not exceeding the amount of financial benefit attributed to the breach; compensate a person who has suffered loss or damage as a result of the breach; or any other order it deems appropriate.

The enforceable undertaking regime does not affect the liability of a person to civil proceedings if ASIC does not accept an undertaking in relation to the alleged contravention.

### *Infringement notices*

Regulations 7.8.05C to 7.8.05Q insert an infringement notice regime for the purposes of the client money reporting rules.

ASIC is able (but not required) to issue a *client money reporting infringement notice* (an infringement notice) to persons alleged to have contravened a client money reporting rule, as an alternative to civil proceedings. The liability of a person to civil proceedings is not affected if a notice is not given, or if a notice is withdrawn or not complied with.

ASIC can issue an infringement notice in relation to one or more alleged contraventions of one or more client money reporting rules.

Before an infringement notice can be issued, ASIC must advise the intended recipient in writing why it believes a contravention has occurred. ASIC must also give them the opportunity to attend a private hearing, give evidence and make submissions in relation to the alleged contravention. During this process the intended recipient may bring new evidence, including witnesses, before ASIC. Evidence that an intended recipient or representative of an intended recipient presents to ASIC is not admissible as evidence in any proceedings against the intended recipient, except in circumstances where the evidence is false or misleading.

The Regulations make specific requirements about what each infringement notice must contain. They are designed to ensure that every notice is clear and evidence-based.

Recipients must be given detailed information about each alleged contravention and the corresponding rule; the maximum applicable pecuniary penalty or penalties; the immediate repercussions of their conduct (penalties, remedial measures, sanctions, and/or terms of an undertaking); how to comply with ASIC's terms, and the effect of that compliance.

Recipients must also be told that the notice is not legally binding; they may apply to ASIC for the notice to be withdrawn, or for more time in which to comply; ASIC may publish details of the notice; and that ASIC may pursue civil proceedings in the event of non-compliance.

#### *Compliance with infringement notices*

A recipient is understood to have complied with an infringement notice when they have paid any specified penalty, undertaken specified remedial measures, accepted any other sanctions and entered into any undertakings within the terms specified in the infringement notice within 28 days of receiving the notice (the *client money reporting infringement notice period*).

A recipient may apply to ASIC for more time in which to comply. ASIC has 14 days to respond. If no response is provided in this time, the application is deemed to have been rejected.

If the recipient complies with their infringement notice, any liability to the Commonwealth for a contravention of the relevant rule is discharged. No civil or criminal proceedings can be brought by the Commonwealth for the conduct specified in the notice, and the recipient is not taken to have admitted guilt or liability in relation to the alleged contravention.

These protections will not apply in situations in which ASIC has been given false or misleading information, or the recipient has withheld evidence or information.

#### *Withdrawal of infringement notices*

A recipient may apply to ASIC in writing to withdraw an infringement notice. The application to withdraw must present a clear rationale for doing so. Within 14 days of receiving the application, ASIC must either withdraw the notice or refuse to do so and notify the recipient of the decision in writing.

ASIC may also withdraw an infringement notice without an application from the recipient; or after the recipient has complied with the notice (if the recipient agrees in writing to the withdrawal).

If a notice is withdrawn, ASIC is required to refund any penalties paid. Similarly, any requirements to undertake or institute remedial measures, or to accept sanctions or give an undertaking are no longer enforceable by ASIC.

The regulations allow ASIC to publish specific types of information about an infringement notice after the end of the client money reporting infringement notice period. ASIC is required to include in any publication a statement that compliance with an infringement notice is not an admission of guilt and that the recipient is not taken to have contravened the prescribed rules.

### *Application of the amendments*

The Regulations apply to contraventions of the ASIC rules alleged to have occurred from the day after the Regulations are registered.

### **Other amendments**

Part 2 of Schedule 1 sets out the other amendments made by these Regulations.

Items 4 to 13 insert headings into the Principal Regulations to assist navigation.