23 March 2012

Manager
Financial Services Unit
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email to: instalmentwarrantcorpregs@treasury.gov.au

Dear Sir/Madam

Exposure Draft – Corporations Amendment Regulations 2012 (No.) – Limited Recourse Borrowings by Superannuation Funds (Instalment Warrants)

The Small Independent Superannuation Funds Association (SISFA) welcomes the opportunity to make this submission in relation to the Exposure Draft of the above regulations.

SISFA is Australia's original self managed superannuation funds (SMSF) advocacy body and is now in its thirteenth year of successfully representing the SMSF industry. SISFA has a strong national presence through its board of directors and State Chapter forums, and through its members it represents directly and indirectly the interests of in excess of 10,000 SMSFs.

While SISFA supports the general policy intent of the proposed regulations, we are of the view that in their current form they are ambiguous and potentially have unintended consequences.

Specifically, we make the following comments and observations.

We support the inclusion of limited recourse borrowing arrangements (LRBAs) under sections 67A and 67B of the SIS Act as financial products.

We consider that the proposed meaning of "issued" and "issuer" in relation to LRBAs is confusing and has the potential to be unworkable in practice. This is perhaps best demonstrated by way of an example.

A typical LRBA in the context of SMSFs will be in relation to the acquisition by an SMSF of real property. Under section 67A of the SIS Act, the parties to such an arrangement would be the lender, the trustee of the SMSF, and the trustee of the trust under which the acquirable asset is required to be held ("the custodian trustee").

Under the proposed regulations, it appears to be the case that each one of these parties would be an "issuer" of the financial product (being the LRBA). If that is the case, the potential arises for each of the parties to need an Australian Financial Services Licence and/or issue a Product Disclosure Statement.

Presumably however, it is the intended effect of proposed subregulation 7.1.06(2A) to exempt a lender from these requirements.

If that is the case, then the custodian trustee or the SMSF trustee would be the issuer. However, the custodian trustee may be exempt under proposed subregulation 7.1.04J(2), although we consider further clarification is needed in this regard.

If the SMSF trustee remains the issuer, then the AFSL and PDS requirements must be considered. Current section 1010B of the Corporations Act 2001 could operate to exempt an SMSF from the need to issue a PDS. Similarly, paragraph 911A(2)(j) may apply to exclude the need for an AFSL for an SMSF. This position would be welcomed by SISFA, however, greater clarity would be desirable in this regard.

Subject to the above matters of interpretation and practical application, SISFA supports the notion to include LRBAs as financial products. In a practical sense, the proposed measure should only operate to ensure that a third party can only recommend an LRBA if they hold an AFSL (or are an authorised representative thereof).

If our interpretation above is incorrect, then anything more than that means that LRBAs are practically unworkable, which is surely inconsistent with Government policy.

Finally, proposed regulation 7.6.01AB has the potential unintended effect of allowing an AFSL to cover LRBAs under its securities and/or derivatives authorisations without the need for a superannuation authority. Clearly this is at odds with the policy intention.

Yours faithfully

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