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To whom it may concern

Exposure Draft – Penalties for Promoters of Illegal Early Release Schemes

The Institute of Public Accountants (the Institute) takes this opportunity to respond to the Exposure Draft on Penalties for Promoters of Illegal Early Release Schemes. The Institute has over 22,000 members and students throughout Australia and internationally. As trusted advisers to SMSF, accountants play an important role.

The Institute supports measures which reduce the incidence of the illegal early release of superannuation, and which impose increased penalties on promoters. Illegal early access undermines the rationale for superannuation. It also provides revenue streams to criminal entities and encourages identity theft.

It is therefore important that those who are involved in promoting such schemes face prosecution. Deficiencies within the current system are evidenced by the outcomes of recent cases of illegal early release, where the penalties imposed were generally seen as inadequate.

It is also important to recognise that the Australian Taxation Office (ATO) and Australian Securities and Investments Commission (ASIC) have implemented a number of administrative changes and surveillance activity which have severely reduced the incidence of illegal early access.

The Institute therefore supports the proposed reforms contained in the ED. Further clarification of the Institute's position is set out in the attached appendix.

Please contact our Senior Policy Adviser, Reece Agland, via e-mail at reece.agland@publicaccountants.org.au should you wish to discuss the details of this submission further.

Kindest Regards



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Appendix

Promote

The Institute supports the broad definition of promote to including marketing, advising and recruiting of others as well as facilitators.

Illegal schemes usually involve a number of parties with different skills sets. All involved in the illegal access should be sanctioned, not merely those who act as lead promoter.

It is unfortunate that a number of “professionals” such as lawyers and accountants may be involved, however indirectly.

Without the co-operation of these professionals it will be more difficult for potential offenders to ensure an early and illegal release. If professional are aware of potential civil penalties and the action to be taken by their professional body in the event of conviction, there is less incentive for them to become involved.

Scheme

A broad definition of what constitutes a scheme will ensure that a number of activities are “captured”.

Likely to result

The Institute is generally reticent to support the extension of criminal penalties to situations where there is merely the likelihood of an offence. However, in the circumstances set out in the ED we believe it may well be necessary.

Regulators should not wait until money has been illegally accessed. Should there be sufficient proof of an intention and the likelihood of illegal early release; civil and criminal penalties should apply.

The application of a ‘likely to result’ test will reduce the evidentiary burden and will assist in ensuring that those who undertake such activity are prosecuted. It is also likely to reduce the incentive for people to become involved in such schemes.

Penalties

The lack of specific penalties may have contributed to the low level of penalties imposed in recent cases of early illegal access cases before courts and tribunals. These soft penalties have not acted as a deterrent. Accordingly it is believed that specifying the level of penalties will assist the courts and tribunals in understanding the importance of these cases and the penalties expected.

Penalties must serve as a deterrent. An option to have been considered is the imposition of a penalty several times the amount subject to early release. Whilst a penalty set at a multiple of 2000 units may be high in the case of a super fund with a low balance, it is less of a deterrent in cases where the funds are in the hundreds of thousands of dollars. Having a penalty set at a multiple of 2 or more times the amount released may act as a serious deterrent.

Taxing of funds released at 45%

The Institute agrees that those who have deliberately sought illegal early access should be subject to tax at a penalty rate of 45% on the amounts received.

However, the Institute is of the view that this should only occur in cases where it is clear that the person whose funds are accessed appreciated it was an illegal early access scheme.

Many people targeted by promoters have low English language skills and little understanding of the complexity of superannuation laws. It is likely that some did not fully understand the ramifications of their involvement. In such circumstances it may be a harsh penalty to impose the penalty tax rate.

Accordingly, a 45% penalty rate should be at the discretion of the regulator. This will allow for a proper analysis of the circumstances surrounding the release.