

Superannuation Industry (Supervision) Act exemption determination No. 1 of 2023

EXPLANATORY STATEMENT

Prepared by the Australian Prudential Regulation Authority (APRA)

Superannuation Industry (Supervision) Act 1993, section 328

Under subsection 328(1) of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act), APRA has the power to exempt, in writing, a particular person or a class of persons from compliance with any or all of the modifiable provisions of the SIS Act.

On 4 August 2023, APRA made Superannuation Industry (Supervision) Act 1993 exemption determination No 1 of 2023 which exempts a specific class of persons, namely current, former and prospective directors of a Registrable Superannuation Entity licensee (RSE licensee), from the requirement to obtain approval from APRA to hold a controlling stake in RSE licensee in certain circumstances.

The instrument commences on the day after it is registered on the Federal Register of Legislation.

1. Background

Section 29JCB of the SIS Act makes it an offence, which attracts severe penalties, to hold a controlling stake in an RSE licensee that is a body corporate without APRA's approval.

A person holds a 'controlling stake' in an RSE licensee if the person holds a stake of more than 15 per cent in the RSE licensee. The SIS Act definition of 'stake' in an RSE licensee has the same meaning as in the *Financial Sector (Shareholdings) Act 1998* (FSS Act). Clause 10 of Schedule 1 of the FSS Act sets out that a person's stake in a company is the aggregate of the person's direct control interests and the direct control interests held by associates of the person.

The change of ownership and control provisions in Division 8 of Part 2A of the SIS Act may affect certain RSE licensee directors. Some RSE licensee directors are required to, or may, hold shares in the RSE licensee for the term of their appointment. As directors are considered to be associates of each other, each director shareholder is treated as having a 100 per cent stake in the RSE licensee, and thus is deemed to have a controlling stake. This is the case even where an individual director has a shareholding of 15 per cent or less.

2. Purpose and operation of the instrument

The purpose of the instrument is to exempt directors of an RSE licensee from compliance with sections 29HA and 29JCB of the SIS Act where certain conditions are met. These provisions respectively require a person to apply to APRA for approval to hold a controlling stake in an RSE licensee, and set out that a person that holds a controlling stake in an RSE licensee without approval commits an offence for which strict liability applies.

The legislation ensures that persons who seek to acquire a controlling stake in an RSE licensee are subject to an APRA approval process that is similar to that required to be undertaken to become an RSE licensee. This is to address the risk that an RSE licensee is unduly influenced by persons that have a controlling stake in the ownership of the RSE licensee.

The exemption applies to a narrow class of persons and addresses an unexpected operation of the relevant FSS Act provisions in the superannuation industry context. It applies to persons that are directors of an RSE licensee and meet certain conditions which are explained in detail below, such that it only applies to persons whose shareholding in the RSE licensee:

- must be transferred or forfeited when they cease to be a director of the RSE licensee;
- does not carry with it an entitlement to any financial benefit directly arising from the shareholding; and
- is only a controlling stake based on the aggregation of their shareholding with the shareholdings of the other directors.

APRA's view is that governance concerns with individual directors of an RSE licensee are managed through other prudential requirements, including all RSE licensee director appointments being subject to *Prudential Standard SPS 520 Fit and Proper*. APRA considers there is, therefore, little utility in additionally subjecting individual directors to the controlling stake approval process.

Explanation of each provision in the instrument

Sections 1 to 4 are the operative provisions relating to the instrument's name and commencement date, the legal authority under which it is made and relevant definitions.

Section 5 defines the class of persons to which the instrument applies, namely, individuals that are current, prospective or former directors of the RSE licensee.

Section 6 exempts the class of persons defined in section 5 from compliance with the specified 'modifiable provisions', being sections 29HA and 29JCB. 'Modifiable provision' has the meaning given in s 327 of the SIS Act and includes a provision of Part 2A of the SIS Act. Sections 29HA and 29JCB are located in Division 8 of Part 2A of the SIS Act and may therefore be the subject of an exemption under s 328 of the SIS Act.

Section 7 imposes a number of conditions on the exemption. Condition (a) provides that a person seeking to rely on the exemption must hold a direct control interest in the RSE licensee at a particular time of 15% or less. A person's 'direct control interest' in a company at a particular time is equal to the percentage of voting power in the company that the person is in a position to control at that time: see clause 11 of Schedule 1 of the FSS Act. For example, if a single director holds the only issued shares with voting rights in the RSE licensee then this director will control 100% of the voting power in the company and will not be able to rely on the exemption as their direct control interest will be more than 15%. In contrast, if 10 directors each hold one share with voting power, being the total share capital of the RSE licensee, each director's direct control interest will be 10% and therefore a newly appointed director will be able to rely on the exemption (provided the other conditions of the exemption are met) to acquire a share in the RSE licensee without APRA's approval.

The effect of condition (b) is that a person's stake in the RSE licensee of more than 15% must only arise as a result of the aggregation of (i) the direct control interest in the RSE licensee that the person holds (see explanation in the previous paragraph) and (ii) the direct control interests in the RSE licensee held by associates of the person. Condition (c) then specifies that a person must be an associate of the director only under clause 4(1)(e) of Schedule 1 of the FSS Act. That is, a relevant associate of the director is another director of the RSE licensee.

Condition (d) provides that a person seeking to rely on the exemption must have acquired the controlling stake in the RSE licensee on or after the date of commencement of the exemption. In other words, the exemption does not operate retrospectively.

Under condition (e), a person seeking to rely on the exemption must not be entitled to any financial benefit directly arising from the person's shareholding in the RSE licensee. Given the definition of 'financial benefit' in section 4 of the instrument, this condition does not prevent director shareholders of an RSE licensee from being remunerated for the performance of their duties as a director. However, condition (e) would, for example, preclude a director from relying on the exemption where the director was entitled to the payment of dividends as a result of the shareholding or to the capital of the RSE licensee in the event the company is wound-up.

Condition (f) provides that a person seeking to rely on the exemption must, as soon as practicable after ceasing to be a director of the RSE licensee, transfer or forfeit the person's shareholding in the RSE licensee subject to the terms of the RSE licensee's constituent document. The proviso 'subject to the terms of the RSE licensee's constituent document' is intended to acknowledge minor differences in practice for the timing in which an RSE licensee's constitution requires the transfer of shares.

Exemption from disallowance and sunseting

This instrument is exempt from disallowance in accordance with section 44(2)(b) of the *Legislation Act 2003* (Legislation Act) and regulation 9 of the *Legislation (Exemptions and Other Matters) Regulations 2015* (Legislation Regulations) as this instrument is an 'instrument (other than a regulation) relating to superannuation'.

This instrument is also exempt from sunseting in accordance with section 54(2)(b) of the Legislation Act and regulation 11 of the Legislation Regulations as this instrument is 'an instrument (other than a regulation) relating to superannuation'.

As the instrument falls within the above-mentioned exemptions from disallowance and sunseting, APRA does not have discretion to subject the instrument to disallowance and sunseting. To mitigate against any adverse impact arising from the above-mentioned exemptions from disallowance and sunseting, APRA undertook consultation on the proposed exemption (refer to paragraph 3 for further details) and will conduct reviews of the operation of the instrument from time to time to ensure it remains applicable and fit for purpose.

3. Consultation

On 19 April 2023, APRA released a consultation letter requesting feedback on the draft class exemption by 17 May 2023. The consultation letter sought views on any risks associated with the draft class exemption and whether there are other circumstances that APRA should consider when finalising the class exemption.

APRA received four submissions, which all supported the proposal and identified the benefits from the reduced regulatory burden. The submissions suggested some minor technical changes to ensure that the exemption could be confidently relied upon and did not raise any risks or concerns. The submissions were made by two industry bodies which represented the superannuation industry, and two RSE licensees that would be directly affected by the class exemption.

APRA is satisfied the consultation was appropriate.

4. Regulation Impact Statement

The Office of Impact Analysis confirmed that a Regulation Impact Statement was not required.

5. Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

A Statement of compatibility prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is provided at Attachment A to this Explanatory Statement.

ATTACHMENT A

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

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This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instrument listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (HRPS Act).

Overview of the Legislative Instrument

The purpose of the instrument is to exempt a class of person from compliance with sections 29HA and 29JCB of the SIS Act.

Human rights implications

APRA has assessed the Legislative Instrument and is of the view that it does not engage any of the applicable rights or freedoms recognised or declared in the international instruments listed in section 3 of the HRPS Act. Accordingly, in APRA's assessment, the Instrument is compatible with human rights.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.