

27 October 2023

Alan Ashford
Senior Specialist, Companies and Small Business
Regulation and Supervision
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: RG217.Feedback@asic.gov.au

Dear Alan

Proposed amendments to ASIC Regulatory Guide 217: Duty to prevent insolvent trading: Guide for directors

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 173,000 members in over 100 countries and regions. We make this submission in response to the Australian Securities and Investments Commission (ASIC) [consultation](#) on the [proposed amendments](#) to Regulatory Guide 217 Duty to prevent insolvent trading: Guide for directors (RG 217) on behalf of our members and in the broader public interest.

CPA Australia supports ASIC's proposed amendments to RG 217 in line with the recommendation from the [Review of the insolvent trading safe harbour](#). Our responses to specific questions in the [Consultation Paper 372 Guidance on insolvent trading safe harbour provisions: Update to RG 217](#) (CP 372) are as follows.

Proposal B1 – feedback on existing guidance

B1Q1: The existing guidance remains relevant and comprehensive, and no specific deficiencies have been raised by our members over the past three years.

We suggest that RG 217.22 could be combined with RG 217.18 to better clarify the connection between a company failing to keep proper financial records, an insolvent trading claim and the company potentially being deemed insolvent for the period of time that it failed to keep proper financial records.

B1Q4: The guidance in RG 217 is relevant and suitable for all directors, including those of SMEs. RG217 is appropriately focused on the interpretation and application of the relevant statutory provisions which apply to all directors, regardless of size.

More generally, however, we observe limited awareness of director obligations across the SME market and a low understanding of their personal responsibilities and exposure to risk in relation to their companies. This has become particularly evident as the ATO increases its tax debt collection and insolvency actions, with many directors only now becoming aware of the potential consequences of being a director.

Therefore, we believe it is important to consider further opportunities to enhance and remind directors of these obligations. This requires more tailored and accessible communication and clear messages to be provided at engagement points including when incorporating a new company and at renewal. Content should raise awareness or remind individuals of their key obligations as a director, including the obligation to prevent insolvent trading.

B1Q6: The inclusion of guidance on the liability of a holding company is very useful as SMEs groups are often structured to include holding companies and trusts. These new paragraphs provide clarity to directors and their advisers on this commonly used entity type and confirming that the safe harbour is available is highly beneficial.

Proposal B2 – safe harbour provisions

B2Q1: The new safe harbour guidance is clear and addressing specific issues such as the debts included under safe harbour protection is very helpful.

Some directors, especially those of SMEs, may remain uncertain about ASIC's interpretation of terms such as "proactive", "decisive", etc., which is an ongoing and broader challenge in areas where outcomes are very much driven by the facts and circumstances of each case.

B2Q3: Paragraph 217.72 is particularly beneficial as it provides practical examples for directors to consider and gives greater confidence that taking such actions are more likely to satisfy the safe harbour requirements than not. The inclusion of a direct reference to small business restructuring in subparagraph (h) may assist directors to better understand the meaning of this course of action and link it to the guidance at paragraphs 217.96 - 98.

B2Q4: The guidance on seeking appropriate advice is welcomed as it encourages directors to seek support from a professional and reduces the risk of poor or uninformed decision-making.

More generally, we note that the reference to advisers throughout RG 217 uses terms interchangeably such as "suitably qualified person", "suitably qualified adviser", "appropriately qualified adviser", or "appropriately qualified entity". We recommend that a single consistent terminology is used when referring to advisers throughout the guidance.

While 217.87 specifically points the director towards turnaround and insolvency professionals, other professionals such as accountants, financial planners and registered tax agents often play an important role in preparing and analysing financial information as well as negotiating tax debts with the ATO. This is particularly evident in the SME market and further details of ASIC's views on the involvement of these other advisers in supporting directors to identify and manage insolvent trading risks would be helpful.

Consideration could also be given to the inclusion of a paragraph after 217.87 that warns about the risks of engaging an unqualified or unsuitable adviser, particularly in relation to pre-insolvency advisers and illegal phoenix activity. This could be based on ASIC's existing [web guidance](#).

B2Q6: Table 2 is useful, particularly as it clearly differentiates the evidentiary requirements between determining whether a director breach has occurred, or whether the safe harbour protections can be accessed.

B2Q8: Financial literacy and awareness of obligations in the SME market remains an ongoing challenge. SME directors are heavily reliant on their advisers with more than 95 per cent of Australian businesses engaging a tax practitioner to assist them with their tax affairs. These practitioners will also generally be an ASIC agent and support business owners establish their structures and may also provide financial planning and/or audit services.

As a key leverage point for business engagement, communications and alerts tailored to advisers can assist in maintaining visibility of key issues across the profession and influence conversations with clients, particularly in relation to ASIC focus areas. Specifically identifying SMEs as the target market and promoting plain English resources will support dissemination of ASIC's views and compliance approaches.

The existing guidance on insolvent trading on the ASIC website could also be enhanced. For example, the [website guidance](#) for small business company directors makes reference to insolvency but this is included as part of broader guidance on how directors should manage assets, debts, employees and investments. Given the consequences of breaching this statutory obligation, we recommend that it should have its own section that emphasises the importance and consequences of complying and reference RG 217 and the relevant provisions in the *Corporations Act 2001*.

Further efforts to raise awareness around insolvent trading and safe harbour provisions could include:

- Increasing access to information for culturally and linguistically diverse communities by making a range of key resources available in other languages, and
- Enhancing directors' awareness of their obligations by expanding the Moneysmart website to include existing small business resources, such as ASIC's *Running a Small Business in Australia – What you need to know* publication
- Ensuring that advisers are well-informed by working with professional associations to develop targeted and tailored guidance and communications

- Working with the ATO and Australian Business Registry Services (ABRS) to develop an ongoing and integrated communications campaign that substantially enhances awareness of director obligations in the SME market including compliance requirements and the consequences of non-compliance. These may be most effective when aligned with key touchpoints such as:
 - establishment of a company
 - registration of an ABN
 - tax debt collection activities including payment demand notices and referrals to credit reporting bureaus, and
 - non-lodgment actions by ASIC and ATO.

If you have any queries about this submission, please contact Keddie Waller, Senior Manager Public Practice, Financial Planning and Ethics Policy on Keddie.waller@cpaaustralia.com.au or 0401 716 083.

Yours sincerely

Elinor Kasapidis
Head of Policy and Advocacy