

JANUARY 2019

# client alert

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## ASIC enforcement action on SMSF auditors

If you are a trustee of an SMSF, you have certain important obligations, including ensuring that your SMSF auditor is registered.

ASIC has released information on its enforcement action against over 100 self managed superannuation fund (SMSF) auditors, some of whom were referred to the regulator by the ATO for breaches including not meeting independence requirements, not complying with auditing standards, not reporting non-compliance, and not meeting the “fit and proper person” requirement. ASIC has said it will continue to take action where the conduct of SMSF auditors is inadequate, to protect consumers and the integrity of the superannuation system.

Overall, ASIC has the responsibility for registered “approved SMSF auditors”, which includes setting competency standards and imposing any necessary administrative outcomes. To register as an approved SMSF auditor, eligibility requirements must be met (ie having prescribed qualifications and experience, passing a competency exam, being a fit and proper person, having adequate professional indemnity and being an Australian resident). After their registration is approved, SMSF auditors must also fulfil ongoing obligations such as undertaking professional development, complying with required standards, lodging an annual statement and notifying ASIC of certain matters.

When releasing the latest information on enforcement actions, ASIC Commissioner John Price said, “Self managed superannuation fund auditors perform an important role in giving independent assurance over fund financial reports and reporting non-compliances with fund requirements. As gatekeepers, they are expected to adhere to the highest standards in the performance of their role. ASIC will continue to take action where the conduct of SMSF auditors is inadequate”.

The conditions imposed on the registration of SMSF auditors also include restrictions on what funds can be audited (including specific independence circumstances), limits on the number of SMSF audits that can be conducted, peer review of audits (with the results reported back to ASIC), adherence to strict timeframes for responding to ATO or ASIC, and providing notice of registration conditions to professional associations.

To 30 June 2018, ASIC has considered the conduct of over 120 SMSF auditors, including 98 matters referred by the ATO. As a result of investigations, ASIC has removed 76 auditors from the register, suspended one auditor, and imposed conditions on the registration of 24 others. The action taken mostly related to the following types of breaches:

- not meeting auditor independence requirements – auditing their own fund, a family member’s fund, a business partner’s fund or funds for which the auditor is responsible for preparing accounts or financial statements;
- not complying with auditing standards – not planning or properly performing audits, not obtaining sufficient appropriate audit evidence and/or not adequately documenting audit work;
- not identifying or reporting non-compliance – non-compliance with fund trustee composition requirements, ownership of assets requirements and/or the sole purpose test;
- not meeting the fit and proper person requirement – providing false and misleading statements, insolvency or bankruptcy, acting fraudulently, not managing their own tax compliance, not cooperating with enquiries by ATO or ASIC, and breaches of their duties as a registered company auditor.

## Make sure your fund is protected

If you are a member and trustee of an SMSF, your obligations include ensuring that your SMSF auditor is registered. To find out more, search ASIC’s free SMSF auditor register or talk to us today.

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## Financial adviser renewal notices: have you got yours?

If you have an ongoing fee arrangement with a financial adviser or a Australian financial services (AFS) licence holder, they are required by law to provide you with a fee disclosure statement (FDS) every 12 months and a renewal notice every two years. These measures are designed to enable consumers to get a better understanding of the advice services they're being charged for, and to reduce the likelihood of passive or disengaged consumers being charged ongoing fees. ASIC is currently undertaking a review on these two requirements to ensure continuing confidence in the financial advice industry.

The FDS you receive should set out details about the amount of ongoing fees you pay, information about the services you were entitled to receive under the arrangement, and information about the services you actually received. In addition to the FDS, if you have an ongoing fee arrangement with your financial adviser they must also provide you with a written notice every two years to renew the arrangement.

Under the *Corporations Act 2001*, which governs these requirements, if you either opt out or do not actively opt in to renew when you receive a renewal notice, the ongoing fee arrangement is considered to be terminated.

The FDS and written renewal notice requirements were implemented as a part of the Future of Financial Advice (FOFA) reforms in 2013, and failure to comply terminates the entitlement of an AFS licence holder to charge an ongoing service fee to the client, and may result in civil penalty action against the licence holder. ASIC oversees and enforces these requirements and the remediation programs for consumers who have paid fees for no service.

Thus far, ASIC's remediation programs have resulted in AFS licence holders paying a substantial amount of compensation to consumers who have not received FDS and/or renewal notices. That amount is set to increase with the commencement of an ASIC review into compliance of financial advisers with the FDS and renewal notice requirements.

The industry-wide review stems from a high number of breach reports received that indicate licensees' failure to comply with FDS and renewal notice requirements. ASIC will investigate the particular breaches reported, but also more broadly considers the volume and range of reports received to indicate a significant risk for consumers.

The review will examine compliance across a range of small and large AFS licensees, including whether:

- FDSs and renewal notices were issued to customers;

- FDSs and renewal notices were issued within the timeframes set out by law;
- FDSs included the required content and were accurate (ie correctly described what customers were charged for and what services were received); and
- appropriate procedures were in place to ensure fees for ongoing services were discontinued when arrangements were terminated as a result of licensees failing to comply with FDS or renewal notice requirements.

The results of this review will be released next year. In the meantime, ASIC will continue to investigate substantial breaches and take enforcement action where required.

### Want to find out more?

Not sure whether you have an ongoing fee arrangement with your financial adviser? We can help you check. If you only need financial advice related to certain issues, such as superannuation, your accountant with a limited AFS licence may be able to help without the need to go through a financial adviser. Contact us today to find out more.

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## Does your SMSF have a sole purpose?

The "sole purpose" requirement is one of the fundamental tests that a self managed superannuation fund (an SMSF) must pass to be eligible for tax concessions. The SMSF must be maintained for the sole purpose of providing retirement benefits to its members, or to their dependents if a member dies before retirement. Broadly, the test can be contravened when a fund member, or a related party, directly or indirectly obtains a financial benefit when making an investment decision. Trustees need to be careful about this, as the ATO, which administers the relevant super laws in relation to SMSFs, applies very high compliance standards in relation to the sole purpose requirement.

According to the ATO, the sole purpose test is particularly concerned with how an SMSF comes to make an investment or undertake an activity.

The question of whether the sole purpose test has been contravened is usually determined by looking closely at the facts of each case. The ATO requires "exclusivity of purpose", but does accept that provision of incidental, remote or insignificant benefits that fall outside of the sole-purpose scope may occur in certain circumstances.

Trustees need to ensure that they do not purposefully provide other benefits to members or related parties when undertaking SMSF activities – this is the case even if there is no net cost to the SMSF in providing the benefit. Ultimately, the object purpose of providing the

benefit, rather than the net financial impact of the arrangement on the SMSF's resources, is what determines whether the sole purpose test is contravened.

Factors that indicate the sole purpose test being contravened may include:

- the trustee negotiating or seeking out additional benefits, even if the additional benefit was sought out in the course of undertaking other activities consistent with the sole purpose test;
- a benefit influencing the decision-making of the trustee;
- a benefit being provided by the SMSF to a member or another party at a cost or financial detriment to the SMSF; and
- a pattern of events that, when viewed in its entirety, amounts to a material benefit being provided that is not consistent with the sole purpose test.

On the other hand, factors that weigh in favour of the ATO reaching a conclusion that an SMSF is being maintained in accordance with the sole purpose test may include:

- a benefit being an inherent or unavoidable part of other activities consistent with the sole purpose test;
- a benefit being remote, isolated or insignificant when considered in light of other activities;
- a benefit being provided on arm's-length commercial terms consistent with the financial interests of the SMSF;
- all activities of the trustee being in accordance with covenants specified in the legislation; and
- all investment and activities being undertaken as part of or consistent with a properly considered and formulated investment strategy.

### **New investment opportunity?**

Determining whether an investment in an SMSF meets the sole purpose test is a complex area. This is especially true for any new or planned investments in the areas of property, club memberships/licences, artwork, discount cards and instalment warrant arrangements. Before you decide to invest, talk to us to make sure the investment won't contravene the sole purpose test and leave your SMSF in the lurch.

**Important:** Clients should not act solely on the basis of the material contained in Client Alert. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. Client Alert is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without our prior approval.