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Accountant's Advising SMSF's – You'll Soon Need a Licence

A large part of any accountant's practice may be the provision of advice relating to the acquisition or disposal of interests in self-managed superannuation funds ('SMSFs'). To provide such advice from 1 July 2016 such accountants will require an Australian financial services licence ('AFSL') or be an authorised representative of such a licence holder. There is, however, an alternative between a full AFSL and forgoing this area of practice. The limited financial services licence is a middle ground that has been available from 1 July 2013, which accountants should consider as potentially suitable to their practice.

Background

The provision of advice to SMSFs is advice that ordinarily requires the professional to hold an AFSL. Since 2004 there has been an 'accountants' exemption' to that requirement. Accountants that are 'recognised accountants' within the meaning of regulation 7.1.29A of the *Corporations Regulations 2001* (Cth) have been exempt from having to hold an AFSL or to be an authorised representative of an AFSL when providing advice relating to the acquisition or disposal of interests in SMSFs.

In a number of ways this exemption has created a less onerous position for the 'recognised accountants' it covers. They do not:

- have to meet ASIC prescribed standards for training, monitoring and supervising staff involved in providing the advice;
- need to implement arrangements allowing retail clients to access ASIC approved external dispute resolution schemes at no cost to the retail clients that seek to claim against the advice provider;
- need to implement arrangements to ensure consumer compensation arrangements exist for retail clients who may claim against them;
- fall within the *Corporations Act 2001* (Cth) tests that require any advice given must be in the client's best interest; and
- need to meet the ordinary, and mandatory, disclosure obligations that apply to AFSL holders.

Removal of the Accountant's Exemption

In April 2010 the then Commonwealth Government announced that the accountant's exemption would be removed from 1 July 2016. This announcement has been given effect in *The Corporations Amendment Regulation 2013* (No. 3) (Cth), which amends the *Corporations Regulations 2001* (Cth) to provide for the removal of regulation 7.29A.

As part of the transition from the accountants' exemption the following options are available:

- ‘recognised accountants’, partnerships or corporations that apply for an AFSL between 1 July 2013 and 30 June 2016 are not required to demonstrate their satisfaction of levels of experience for competence (or organizational competence) in s 912A(1)(e) of the *Corporations Act 2001* (Cth) (the ‘**streamlined process**’);
- any licences granted under the streamlined process must, within 3 years of grant if ASIC requests in writing, demonstrate to ASIC that they satisfy those knowledge and competence requirements;
- an annual compliance certificate can be lodged in lieu of an auditor’s report for licencees that only have a limited licence and do not handle client money.

The Limited Licence Regime

Regulation 7.6.01BA of the *Corporations Regulation 2001* (Cth) provides for a ‘limited licence’ that authorizes the provision of ‘limited financial services’. While the limited licence expands the scope of activities permitted for accountants in respect of the advice able to be given, issues remain including the need for guidance from ASIC on aspects of the regime.

Regulation 7.6.01BA(3) modifies s 912A of the *Corporations Act 2001* (Cth) by inserting a notional s 912A(4) that defines the following: ‘class of product advice’, ‘limited financial services’, ‘limited licencee’, ‘recognised accountant’ and ‘simple managed investment scheme’.

It provides for ‘limited financial services’ as:

1. financial product advice on SMSFs, including but not limited to, advice to acquire, refrain from acquiring or disposing of an interest in an SMSF;
2. financial product advice on superannuation products in relation to a person’s existing holding in a superannuation product, but only to the extent required for:
 - a. making a recommendation that the person establish a SMSF; or
 - b. providing advice to the person on contributions, or pensions, under a superannuation fund;
3. ‘class of product advice’ on the following: superannuation products, securities, simple managed investment schemes, general insurance products, life risk insurance products and basic deposit products; and
4. arranging to deal in an SMSF.

The ‘class of product advice’ is defined as financial product advice about a class of products, but does not include a recommendation about a specific product in the class. The following example is provided in regulation 7.6.01BA:

A financial services licensee may give a recommendation about term deposit products but must not make a specific recommendation that a person deposit their money into a term deposit product offered by a particular bank or building society.

An accountant applying for such a limited licence need not apply for all authorizations – they can apply for only those in which they wish to advise.

Obligations of a ‘Limited’ Licence

The term ‘limited’ in the ‘limited licence’ is somewhat misleading when referring to the obligations it imposes. Nearly all of the obligations that apply to an AFSL apply to a limited licence. This includes the obligations in respect of providing personal financial product advice to ‘retail clients’ within the meaning of s 761G of the *Corporations Act 2001* (Cth). Providing financial services requires the provider to issue the client with a ‘financial services guide’,¹ which is a document providing prescribed information and disclosures to retail clients as set out in s 942B of the *Corporations Act 2001* (Cth), various regulations under the *Corporations Regulations 2001* (Cth) and the ASIC *Regulatory Guide RG 175*. The least requirements of a financial services guide are information about the:

- kinds of financial services that the licensee is authorized to provide;
- remuneration or other benefits that the licensee or authorized representative is to receive in respect of, or that is attributable to, the provision of any of the authorized services; and
- licensee’s dispute resolution system.

Unless one of the limited exemptions applies, the provision of personal advice requires the issuer to provide, at the time of the advice or as soon as practical thereafter, a statement of advice,² the requirements of which are specifically determined in ASIC *Regulatory Guide RG 175*. The least requirements of a statement of advice are:

- a statement setting out the advice that has been provided to the client;
- information about factual circumstances on which the advice is based;
- a statement setting out the name and contact details of the ‘providing entity’; and
- information about the remuneration and any interests, associations or relationships that the advice provider has that might reasonably be expected to, or be capable of, influence the ‘providing entity’.

It must also be in the client’s best interest: s 961B of the *Corporations Act 2001* (Cth). Accountants operating under the limited licence regime will have to comply with the best interests test by:

- identifying the objectives, financial situation and needs of the client that were disclosed by the client through the advice provider’s enquiries;
- identifying the subject matter of the advice the client seeks and the objectives, financial situation and needs of the client so far as relevant;
- press for further information where the accountant considers it reasonably apparent the full information has not been provided;
- confirming that they are properly qualified to address the advice needs of the client;

¹ See s 941A of the *Corporations Act 2001* (Cth)

² See ss 946A to 946C of the *Corporations Act 2001* (Cth)

- if it is reasonable to consider recommending a particular financial product, conducting a reasonable investigation into the financial products that potentially achieve the client’s objectives and needs;
- basing all advice and recommendations on the client’s relevant circumstances, and nothing else.

Finally, if the advice contemplates recommending a financial product be replaced with a superannuation product recommended by the account – for instance, the replacement of a client’s current superannuation scheme with a SMSF – the replacement product disclosures within the meaning of s 947D of the *Corporations Act 2001* (Cth) also require satisfaction. This, broadly, involves disclosing to the client all relevant costs of changing products, comparing between the products’ benefits and their costs and providing information about the benefits to the client in switching to the new product balanced against any benefit at the client will lose by switching.

Limitations of the Limited Licence

In contrast to the above, the term ‘limited’ in the ‘limited licence’ is appropriate when referring to the area in which it allows activity. A ‘recognised accountant’ operating under a limited licence cannot provide advice in the form of investment strategies for SMSFs, advice about the relative merits of SMSFs when compared to other financial products or advise on any other superannuation product. Whilst it has always been open to accountants to obtain an AFSL to provide these additional areas of advice, this limitation of the limited licence should not be forgotten in weighing whether an accountant’s practice would benefit from such recognition.

Coincidentally, at the same time accountants are being forced to move into the AFSL regime to provide superannuation advice, financial advisers providing tax advice will soon be ‘tax (financial) advisers’ under the *Tax Agent Services Act 2009* (Cth) and fall under the purview of the Tax Practitioners’ Board. A notification period from 1 July 2014 to 31 December 2015, a transitional period from 1 January 2016 to 30 June 2017 and the full regime from 1 July 2017 will apply.³

Practical Considerations for the Accountant

The advantages the accountants’ exemption has over an AFSL, or being an authorized representative, are set out above. Many of those advantages are the practical considerations an accountant must weigh in deciding whether to apply for a limited licence on or before 30 June 2016. They are considered separately.

Audit Obligation: Standard AFSLs are audited annually by a registered company auditor and submit a prescribed audit report to ASIC. These obligations apply to a limited licence holder unless they do not handle client money. In that circumstances they may instead lodge with ASIC an annual compliance certificate and a true and fair profit and loss statement and balance sheet appropriately signed.

Dispute Resolution: A licensee (including holders of limited licenses) that advisers retail clients must have adequate professional indemnity insurance, a copy of which is to be provided to ASIC together with a completed PI insurance questionnaire. The licensee must be a member of an ASIC approved external dispute resolution scheme, who provides a free service for consumers to make a claim against the adviser. The adviser meets the costs of such a scheme whether or not the licensee ultimately wins or loses the case.

³ If information in relation to this regime is of interest please contact the writer.

Training Requirements: A licensee (including holders of limited licenses) that advises retail clients must be adequately trained to provide that advice. ASIC's training requirements are contained in *Regulatory Guide 146: Licensing: Training of financial product advisers*. It sets out different requirements depending on the type of advice given by the adviser and the type of products being recommended. ASIC has separated training requirements into 2 tiers where tier 1 is all non-tier 2 products, and tier 2 products are:

- general insurance products, except for personal sickness and accident;
- consumer credit insurance;
- basic deposit products;
- non-cash payment products; and
- first home saver accounts issued by an authorised deposit-taking institution.

Superannuation is therefore a tier 1 product. The training requirements for a tier 1 product is a broad knowledge of all types of superannuation products, even if the accountant is only advising on one product (such as an SMSF). ASIC maintains a training register in place with courses that enable satisfaction of an RG 146 compliant qualification such as a Diploma of Financial Services. An accountant is unlikely to satisfy these requirements without further training being undertaken. Each accountant, however, will need to consider this issue themselves.

Summary

The incoming 'limited' licence regime is not so limited when compared to the requirements of an AFSL or being an authorized representative but is limited in the scope of work an accountant will remain able to perform. The loss of the accountants' exemption will therefore result in one of two things: an administrative and compliance burden on accountants wishing to remain in the SMSF area or their vacating it. When this is considered together with the limitations on the scope of work available, it is possible many accountants will seek an AFSL rather than a limited licence to replace the accountants' exemption.

In either case we await further guidance from ASIC on aspects of the rules' operation. With over 2 years before the 1 July 2016 deadline this remains an important area for accountants to monitor before deciding where their practice will go in relation to SMSFs.