

Technically Speaking...

Electing to be regulated as an SMSF – the devil's in the details

Section 19 of the SIS Act may seem like a pretty straightforward set of words. It tells you a superannuation fund must have a trustee which can be a corporation or it must be for the provision of old-age pensions. In addition, the trustee(s) must have provided an irrevocable election on the approved form to the regulator within 60 days of establishment that the SIS Act will apply to the fund.

This may sound a relatively simple process but, there's much more to becoming a regulated superannuation fund than meets the eye. First, there are the requirements of the trust law or trust deed of the fund, whatever prevails; second, the acceptance of the trustees to act in that capacity and, third, that the fund is constituted as a valid trust. One requirement to be constituted as a valid trust is that legal consideration must be given for the trust to be settled. This usually involves the payment of cash, such as the first contribution, or giving of an asset such as shares or other property. Then there's the trustee to see whether they are an appropriate person under the provisions of the SIS Act.

While most new SMSFs are able to meet the SIS legislation and ATO requirements, some do not due to various reasons. In practice, the establishment of a superannuation fund as a valid trust will mean the establishment of a bank account and placing a deposit in it or the transfer of an asset to the fund. But, many do not take up the opportunity as they think the fund requires a TFN or ABN before the fund's bank account is established. This is not correct, nearly all banks permit an account to be established without the need for a TFN or ABN, although some do require the trustees to physically attend the bank to see that the fund actually exists and it has trustees. The reason the TFN or ABN are required is so the bank is not required to deduct tax from any interest that accrues on the amount held in the account, nothing more than that.

Another requirement is the suitability of an individual to act as trustee of the fund or as director of the corporate trustee. The requirements of section 17A and Part 15 of the SIS Act relates to individuals who are able to act in the capacity of trustee or director of the corporate trustee. However, in addition to these requirements trustees need to display they have a reasonable understanding of what is required to act in that capacity. During this process of registering the fund the ATO may take the liberty of 'auditing' the application to see whether the trustees/directors have an understanding of what is required to operate an SMSF.

Changes to the SuperFund Lookup (SFLU) and the ATO's procedures earlier this year concerning the notification of superannuation funds have impacted SMSFs. Funds that seek registration as regulated superannuation funds need to make sure that they have their 't's crossed and 'i's dotted otherwise the fund may be banned from accepting rollovers and superannuation guarantee contributions. This has led to frustration for many trustees and their advisers as often the reasons for not accepting the fund as a regulated fund is either obscure or resisted.



Some of the changes to the system can be justified as part of the ATO's integrity measures for superannuation such as preventing illegal access to superannuation and fraud. However, there are a number of cases referred to us where the reason for refusing registration as a regulated fund is a mystery at best. These 'reasons' have been provided in what seems to be a letter consisting mainly of standard paragraphs which provide no reason as to the particular circumstances applying to the client's case. Subsequently, seeking a written response for the reasons of the disallowance has been met with mixed reactions from the ATO by advisers and their clients. This is disappointing for trustees and their advisers who, in the cases experienced are genuinely attempting to establish an SMSF.

The process of becoming regulated requires a superannuation fund to make an application to the ATO for registration as a regulated superannuation fund within 60 days of establishment. Access to the application form can be obtained from <https://www.ato.gov.au/forms/fund-income-tax-return-instructions-2014/?page=124>. Once the ATO has received the application it makes a number of checks which are referred to as audits of the fund and take up to seven days to complete. Where an audit is undertaken by the ATO the experience of some advisers and their clients is that the process takes longer than the seven days especially where the client is trying to determine the reasons for not having the fund registered as a regulated fund. Being accepted as a regulated fund means that the SMSF is authorised to accept members' benefits or rollovers from other funds.

A word of advice here. If a client is contacted by the ATO as part of the audit of the application it will probably be during the day and at a time when they are busy at work, looking after the children or going about their business. Don't forget there may be more convenient times to have a chat about the setup of the SMSF and it may be worthwhile for the client to contact you as the adviser to be briefed or reminded of what you have probably told the client during your meetings with them.

Unfortunately, once the audit of the application has been completed it is unusual for the ATO to provide detailed information of the reasons why the fund has not been included on the SFLU. This makes it very difficult for trustees and their advisers to correct or amend aspects of the fund or the application so that it may satisfy the ATO requirements and be regulated for purposes of the SIS legislation.

While the ATO may accept the fund as a regulated fund it's not the end of the story as the fund's registration may appear on the SFLU under a number of categories. The categories under which a fund may appear on the SFLU are:

- Election to be regulated is being processed

This means that an application has been received by the ATO and checks are being undertaken before the fund can be including on the SFLU as an ATO regulated SMSF. Transfers and rollovers cannot take place until this occurs.

- Registered – status not determined



A fund that has a 'status not determined' category is a regulated fund which has not been issued with a Notice of Compliance or Non-compliance. The fund's complying status is determined after the fund has lodged its first SMSF annual return sometime after the end of the relevant financial year. The fund qualifies for concessional taxation status and is able to receive transfers, rollovers of member's benefits and contributions.

Some employers may need to confirm that the fund is a complying superannuation fund for them to make contributions that will qualify for purposes of the superannuation guarantee legislation. The ATO accepts that a fund that has a status 'Registered - status not determined' is able to accept contributions that will meet these requirements.

- Complying

A fund that has a 'complying' status is a regulated fund which has been issued with a Notice of Compliance. The fund qualifies for concessional taxation treatment and can accept contributions from employers and members as well as transfers and rollovers from other funds.

- Non-complying

A 'non-complying' SMSF falls into two categories – those where the fund has been continuously non-complying and others which have been accepted as a regulated fund and recklessly breached the SIS legislation. The ATO has determined the fund is non-complying and has issued a notice of non-compliance to the fund. A non-complying fund does not qualify for concessional tax rates. In the first year in which a fund is treated as non-complying it will be taxed at 47% on its income and assets, including concessional contributions but excluding non-concessional contributions. The income of a fund that has always been non-complying will be taxed at 47%.

- Regulation details withheld

There may be a number of reasons for withholding the fund's regulation details from the SFLU. This may include a trustee being disqualified or considered not to be competent. There are many other reasons why this may occur which depend on the particular SMSF. Transfers and rollovers to funds that have regulation details withheld would usually not be authorised by the transferring fund.

In some letters from the ATO it says that the fund is unable to accept superannuation guarantee contributions. It is questionable whether this is the case and that for practical purposes extends to all contributions to the fund. The reason is that technically the SG operates as a tax which is reduced or offset if an employer makes a contribution of any amount up to the required percentage to a complying superannuation fund.

Employers do not make 'SG contributions' to a complying superannuation fund. Contributions may be made for various reasons such as for purposes of a salary sacrifice agreement, to satisfy the requirements of an industrial award or agreement, or the contribution may be made by an employer as a voluntary amount especially where the employee is related to the company such as a director or relative and there is no agreement or formal arrangement covering the payment of the contribution or the amount to be made.

- Regulation details removed



Funds that have had their details removed from the SFLU are usually as a result of the fund not lodging returns for some years. Transfers and rollovers to funds that have regulation details removed would usually not be authorised by the transferring fund.

Any trustee who wishes to appeal against the decision of the Commissioner after all avenues have been exhausted will be left to apply to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* which is a very expensive and cumbersome route. The role of the courts in these cases is to see whether the processes in making the decision have been appropriate. This can mean referral of the matter back to the regulator to reconsider the process which may, in some cases, result in a different outcome but it is not guaranteed.

So there it is, becoming a regulated fund is more than just a simple set of steps to getting a package together and filling in a form with the expectation that it will be plain sailing. The client needs to have a valid superannuation fund in place, meet the trustee requirements and if questioned by the regulator are able to display to a reasonable degree that they understand what the fund is all about.

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