SMSFPR 2009/1 - The self managed superannuation funds product ruling system

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Self Managed Superannuation Funds Product Ruling

The self managed superannuation funds product ruling system

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Preamble

A self managed superannuation funds product ruling (SMSF product ruling) provides the Commissioner's view on the application of the *Superannuation Industry (Supervision) Act 1993* and Superannuation Industry (Supervision) Regulations 1994 to a scheme ('product') that the trustees of a number of self managed superannuation funds enter into in substantially the same way with a common entity or group of entities.

A SMSF product ruling is not legally binding on the Commissioner. However, if the Commissioner later takes the view that the law applies less favourably to you than this Ruling indicates, the fact that you acted in accordance with this Ruling would be a relevant factor in your favour in the Commissioner's exercise of any discretion as to what, if any, action is to be taken in response to a breach of that law. The Commissioner may, having regard to all the circumstances, decide that it is appropriate to take no compliance action in response to the breach. PS LA 2009/5 provides more detail on the weight to be given to reliance on a SMSF product ruling.

A SMSF product ruling has no application to superannuation funds other than self managed superannuation funds (and former self managed superannuation funds where they remain regulated by the Commissioner under subsection 10(4) of the *Superannuation Industry (Supervision) Act 1993*).

What this Ruling is about

1. This Ruling outlines the system of Self Managed Superannuation Funds Product Rulings (SMSFPRs).

2. This Ruling outlines:

- what constitutes an SMSFPR (paragraphs 4 to 16 of this Ruling);
- the non binding status of an SMSFPR (paragraphs 17 to 21 of this Ruling);
- the consequences of how the scheme dealt with in an SMSFPR is carried out (paragraphs 22 to 32 of this Ruling);

- the extent of certainty provided by an SMSFPR (paragraphs 33 to 36 of this Ruling);
- the date of effect of an SMSFPR (paragraphs 37 to 40 of this Ruling);
- the income years to which the SMSFPR applies (paragraphs 41 to 43 of this Ruling);
- numbering of SMSFPRs (paragraph 44 of this Ruling);
- publication (paragraph 45 of this Ruling);
- copyright (paragraph 46 of this Ruling);
- the entities covered by an SMSFPR (paragraphs 47 to 50 of this Ruling);
- the impact of legislative amendment on SMSFPRs (paragraphs 51 to 52 of this Ruling);
- applying for an SMSFPR (paragraphs 53 to 73 of this Ruling);
- when the Commissioner may refuse to issue an SMSFPR (paragraphs 74 to 82 of this Ruling);
- obligations after the issue of an SMSFPR (paragraphs 83 to 87 of this Ruling);
- withdrawal of an SMSFPR (paragraphs 88 to 94 of this Ruling);
- the effect of inconsistent SMSFPRs (paragraphs 95 to 97 of this Ruling); and
- accessing information about SMSFPRs on the Tax Office's internet site (paragraph 98 of this Ruling).

Date of effect

3. This Ruling applies from 12 August 2009.

Ruling

What constitutes an SMSFPR

4. An SMSFPR is not covered by Division 358 or section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) and therefore, it is not legally binding.

5. SMSFPRs are issued[1] by the Commissioner in his role as regulator of Self Managed Superannuation Funds (SMSFs) under the *Superannuation Industry (Supervision) Act 1993* (SISA).

6. SMSFPRs were introduced by the Commissioner to provide advice publicly on the prospective application of the SISA and the Superannuation Industry (Supervision) Regulations 1994 (SISR) to particular products in which a number of SMSFs are potential investors.

7. SMSFPRs closely follows the principles and procedural processes behind the issue of Product Rulings dealing with tax matters. Paragraphs 9 and 10 of Product Ruling PR 2007/71 The Product Ruling system explain what is a 'product' for the purposes of a 'product ruling':

> 9. A 'product' is a scheme[2] in which a number of participants enter into substantially the same contractual arrangements and transactions with a common entity or a common group of entities in return for fees or other consideration.
>
> 10. A 'product' includes schemes that may be described as an investment scheme, a tax effective investment, a financial scheme, or an insurance scheme. Often, a 'product' is offered to the general public by way of an Information Memorandum, a Product Disclosure Statement or a prospectus, but it may also be put forward to individuals on an invitation basis.

8. An SMSFPR will differ in that it will deal with a product which is a scheme in which a number of SMSFs have entered into substantially the same contractual arrangements and transactions with a common entity or group of entities in return for fees or other consideration.

9. The product may be provided to the general public but an SMSFPR will only be provided where it is intended for the product to be offered to SMSFs as potential investors or intended investors.[3]

10. An SMSFPR sets out the Commissioner's opinion as to the way in which the relevant provisions would apply to SMSFs in relation to a scheme.

11. Provisions that are relevant to SMSFPRs are those for which the Commissioner is the regulator under the SISA and SISR.

12. All agreements between the parties and the main details of those agreements and of the scheme itself are outlined in each SMSFPR. The Commissioner provides advice only on the precise scheme that is identified in the SMSFPR.

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[1] An SMSFPR is issued when it is published on the Tax Office website at www.ato.gov.au.

[2] The definitions of 'scheme' and 'arrangement' in subsection 995-1(1) of the *Income Tax Assessment Act 1997* are being used for the purpose of defining these concepts in relation to the provision of SMSFPRs.

[3] For advice as to who may apply for an SMSFPR see paragraphs 53 and 54 of this Ruling.

13. This highlights the importance of ensuring that the scheme or class of schemes for which SMSFPR is being sought and for which advice is provided accurately reflects the scheme that will be carried out by the implementer of the scheme.

14. An SMSFPR that is inconsistent with a prior SMSFPR may be made if the Commissioner decides that the law is otherwise than as stated in the earlier SMSFPR. Where the Commissioner decides that the law applies differently to that stated in a prior SMSFPR or in a number of SMSFPRs, the Commissioner may decide not to issue further SMSFPRs for schemes with the same features or may, in future SMSFPRs, change the way the law was applied in the earlier SMSFPRs. The Commissioner will also consider whether an existing SMSFPR or SMSFPRs should be withdrawn to ensure that the integrity of the system designed to protect retirement income is protected.

15. Each application for an SMSFPR is considered on its merits and the law is applied to the scheme as the Commissioner understands it to apply at that time. Paragraphs 51 to 52 of this Ruling consider how legislative change affects SMSFPRs.

16. It is expected that the SMSFPRs would usually be sought for those products for which Product Rulings (which deal with tax issues) are also sought.[4] Where a tax Product Ruling is sought and there is also a request for an SMSFPR in respect of that product, then a separate SMSFPR would issue where possible in conjunction with the tax Product Ruling. As noted earlier, while similar in form to a tax Product Ruling, an SMSFPR is not a public ruling for the purposes of Division 358 of Schedule 1 to the TAA. An SMSFPR is not, therefore, binding on the Commissioner.

The non binding status of an SMSFPR

17. An SMSFPR provides advice in relation to the application of the relevant provisions administered by the Commissioner as regulator of SMSFs under the SISA and SISR. The Commissioner is unable to provide binding advice under the SISA or SISR. Accordingly, an SMSFPR is not legally or administratively binding on the Commissioner. An entity that relies on an SMSFPR will remain responsible for their actions under the SISA or SISR.

18. However, if the Commissioner later takes the view that the law applies less favourably to SMSFs than the SMSFPR indicates, the fact that the trustee acted in accordance with the SMSFPR would be a relevant factor in their favour in the Commissioner's exercise of any discretion as to what, if any, action is to be taken in response to a breach of that law.

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[4] For further information refer to Product Ruling PR 2007/71.

19. This is on the basis that:

- the SMSFPR is applicable to the SMSF's particular circumstances;
- the trustee acts, reasonably and in good faith, in accordance with the SMSFPR; and
- a full and true disclosure has been made to the Commissioner when the SMSFPR was sought.

20. The Commissioner may, having regard to all the circumstances, decide that it is appropriate, in response to a breach:

- to take no action;
- for the trustee to take rectification action (for example, where the SMSF trustee has appropriately relied upon an SMSFPR, and it is later found to be incorrect, the Commissioner may seek an informal agreement or enforceable undertaking involving actions to rectify the breach, including possibly unwinding or reversing of transactions); or
- to take other compliance action[5] (for example, making the fund non-complying).

21. Further detail on the weight to be given to reliance on SMSFPR can be found in Law Administration Practice Statement PS LA 2009/5, paragraphs 111 to 126.

Consequences of how the scheme dealt with in an SMSFPR is carried out

22. If the scheme described in the SMSFPR differs materially from the scheme that is actually carried out, the SMSFPR has no effect. This is because it does not apply to the scheme actually carried out, but to a different scheme. In those circumstances, the SMSFs participating in the scheme will not be considered to have relied on the SMSFPR for the purposes of paragraph 18 of this Ruling.

23. Where the Commissioner becomes aware of, or is made aware of, a scheme being carried out in a materially different way to the scheme set out in the SMSFPR, the SMSFPR will be withdrawn. A difference will be material if it results in a regulatory outcome under the SISA being different to that set out in the SMSFPR.

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[5] See Law Administration Practice Statement PS LA 2006/19 Self managed superannuation funds – notice of non-compliance, which outlines the factors the Commissioner will consider in deciding whether a notice of non-compliance should be given to a fund, and Law Administration Practice Statement PS LA 2006/17 Self managed superannuation funds – disqualification of individuals, which outlines the circumstances in which the Commissioner will consider disqualifying an individual under section 126A of the SISA.

24. Where an implementer of a scheme proposes to implement that scheme differently than set out in the SMSFPR, they should notify the Commissioner in writing before the change occurs, providing full details of:

- the nature and extent of the change;
- the reasons for the change; and
- implications that result from that change.

25. Where a scheme is implemented differently than set out in the SMSFPR due to changes outside the implementer's control or knowledge, then this notification should be made within 14 days of the implementer becoming aware of the difference in implementation.

26. Where a scheme has been implemented differently than set out in the SMSFPR, the Commissioner will consider:

- what effect, if any, the differently implemented scheme will have on the SMSFPR (that is, whether it should be withdrawn or amended); and
- whether it may be appropriate to seek an undertaking from the implementer to remedy the change and to allow the SMSFPR to remain.

27. It is important to note that each SMSFPR is confined to its specific terms and it cannot be used as a precedent for similar schemes or for a future SMSFPR application regardless of how similar the facts of that application may be to the issued SMSFPR.

28. Both the implementer of the scheme and SMSFs participating in that scheme are responsible for ensuring that the scheme is carried out in accordance with the SMSFPR that has been issued. SMSF trustees who are considering participating in a particular scheme may wish to seek assurances from the implementer of the scheme that the scheme will be carried out as described in the relevant SMSFPR. However, the responsibility of participating SMSF trustees goes beyond an initial enquiry. The Constitution of the scheme, or the equivalent founding deed, sets out the rights and obligations of all the parties to the scheme and should be fully understood by all participating SMSF trustees.

29. During the course of the scheme participating SMSF trustees should monitor the governance of the scheme and take appropriate action to ensure that the scheme is carried out in accordance with the SMSFPR. For example, the *Corporations Act 2001* allows entities participating in registered managed investment schemes to call meetings,[6] and, in certain circumstances, to remove the responsible entity.[7] Similar rights are usually contained in the founding deeds of schemes that are not registered managed investment schemes.

[6] See Part 2G.4 of the *Corporations Act 2001*.
[7] See section 601FM of the *Corporations Act 2001*.

30. Potential participating SMSF trustees are cautioned to exercise particular care where the investment that they are being offered contains a feature or features that are not set out in the Scheme part of the SMSFPR or in an addendum to that SMSFPR, or where the investment omits a feature or features set out in the SMSFPR. In these circumstances the ruling is unlikely to apply to the scheme.

31. Potential participating SMSF trustees may also wish to consult the 'Important information for SMSF participants' available on the Tax Office's website www.ato.gov.au (Tax Office's website). Contact telephone numbers, email and postal addresses for all SMSFPR teams are also shown in this area of the Tax Office's website.

32. It should be noted that an SMSFPR does not address the provisions of other legislation administered by the Commissioner (for example the *Income Tax Assessment Act 1997*). A separate tax Product Ruling may exist for the same scheme but in the absence of such a Product Ruling SMSF trustees are advised that the SMSFPR has given no consideration as to the potential impacts of other legislative provisions.

The extent of certainty provided by an SMSFPR

33. SMSFPR provides no assurance:

- that the product is commercially viable;
- that charges are reasonable or represent industry norms; or
- that projected returns will be achieved or are reasonably based.

34. The Tax Office's responsibility is simply to consider whether the investment is permissible under the SISA or SISR for SMSFs.

35. Trustees of self managed superannuation funds must ensure that all of the SMSF's investments are in accordance with the SMSF's properly formulated investment strategy that has regard to the whole of the circumstances of the SMSF including, but not limited to:

- the risk involved in making, holding and realising, and the likely return from the SMSF's investments having regard to its objectives and its expected cash flow requirements;
- the liquidity of the SMSF's investments having regard to the SMSF's total assets and liabilities; and
- risks associated with inadequate diversification.

36. Potential participating SMSF trustees must form their own view about the commercial and financial viability of the scheme. The Commissioner recommends a financial (or other) adviser be consulted for such information.

The date of effect of an SMSFPR

37. All SMSFPRs carry a paragraph setting out a specific date of effect.

38. Except in limited circumstances an SMSFPR has prospective application only. Therefore, SMSFPRs apply only to SMSFs that:

- are within the specific class of entities set out in the SMSFPR (see paragraphs 47 to 50 of this Ruling); and
- enter into the scheme on or after the date the SMSFPR is issued unless the SMSFPR specifies a different date.

39. Apart from limited circumstances an SMSFPR will not apply to SMSFs that enter into a scheme before the date of effect set out in the SMSFPR and trustees of such SMSFs should consider whether it is appropriate to apply to the Commissioner for Self Managed Superannuation Fund Specific Advice (SMSFSA). PS LA 2009/5 contains details on applying for SMSFSA.

40. Each SMSFPR must also specify the closing date for entry into the scheme, that is, the last day an SMSF can enter the scheme and have the SMSFPR apply to it. It should also specify a cessation date for SMSFs who entered the scheme prior to the closing date.

The income years to which the SMSFPR applies

41. For certain financial products SMSFPRs, generally, will have a three year application period for entering into the scheme covered by the SMSFPR. However, the SMSFPR will continue to apply to schemes entered into before the end of the application period. For example, the SMSFPR may deal with a scheme involving a contractual arrangement of, say, 5 years. While the application period of entering the scheme may be limited in the SMSFPR to three income years the SMSFPR will set out how the regulatory laws apply to the contractual arrangement over its full 5 year term provided the scheme was entered into before the end of the application period.

42. Other than in these specific circumstances, an SMSFPR will generally only provide advice on how the regulatory provisions apply to an SMSF for the first income year in which the entity participates in the scheme and then for the following two income years.

43. Regardless of the number of years for which it provides advice an SMSFPR only applies to the extent that a law covered by the SMSFPR remains unchanged. Where the Commissioner issues an SMSFPR and a law is amended that is relevant to the SMSFPR, the SMSFPR is superseded by that amended law (see paragraphs 51 to 52 of this Ruling).

Numbering of SMSFPRs

44. SMSFPRs are:

- grouped as the 'SMSFPR' series;
- prefixed for the particular calendar year in which they issue; and
- numbered in order of issue.

For example, SMSFPR 2009/10 will identify the tenth SMSFPR that issued in the 2009 calendar year.

Publication

45. There are no legislative provisions dealing with the making, publication or withdrawal[8] of SMSFPRs. However the Tax Office will publish SMSFPR notifications in the *Commonwealth of Australia Gazette* and it will publish SMSFPRs on the Tax Office website. SMSFPRs will not be published without the written consent of the applicant.

Copyright

46. Each SMSFPR is protected by copyright. Apart from any use as permitted under the *Copyright Act 1968*, no part of an SMSFPR may be reproduced by any process without prior written permission from the Commonwealth. Requests and inquiries concerning reproduction and rights should be addressed to:

Commonwealth Copyright Administration
Copyright Law Branch
Attorney General's Department
National Circuit
Barton ACT 2600

or posted at: http://www.ag.gov.au/cca

The entities covered by an SMSFPR

47. Each SMSFPR will define the class of SMSFs to which the advice applies and will also set out those SMSFs, if any, which are specifically excluded. The SMSFPR will not apply to SMSFs that do not fall within the defined class of SMSFs, or that are excluded from the defined class of SMSFs.

[8] Paragraphs 88 to 94 of this Ruling deal with the process for withdrawing an SMSFPR.

48. Each SMSFPR will also contain a statement that the advice will only apply to participants who are within the defined class of SMSFs entering the relevant scheme after the 'date of effect' (see paragraph 38 of this Ruling) and within specific dates of a particular income year or years. SMSFs that enter the scheme other than in accordance with these dates are not covered by the SMSFPR.

49. Whether an SMSF is covered by the SMSFPR will depend upon a reading of the whole SMSFPR. For example, there may be some specific qualification in the description of the scheme which, if breached, means that the SMSFPR does not apply to a particular SMSF or for all SMSFs participating in the scheme.

50. An SMSF within the relevant class that has entered into the scheme within the specified dates set out in the SMSFPR need not seek individual SMSFSA about the regulatory consequences of their participation in the scheme that is the subject of that SMSFPR. If there are any particular regulatory consequences peculiar to a participant in the scheme that are not addressed in the SMSFPR, the SMSF can seek SMSFSA about those specific matters.

The impact of legislative amendment on SMSFPRs

51. Although each SMSFPR deals with the SISA or SISR provisions enacted as at the time it is issued, later legislative amendments may impact on the ruling. If the later legislation expresses the same ideas as the original legislation and the outcomes are unaltered then the SMSFPR continues to apply, as issued. However, if the law changes the ideas expressed in the original legislation and the outcomes are altered then the later legislation takes precedence over the application of the advice and, to that extent, the advice is superseded.

52. Where a legislative change occurs that affects an existing SMSFPR, the implementer of the scheme is encouraged to contact the Tax Office and discuss the matter. Where possible, action to deal with the change will be taken. This may involve the issue of an addendum to the SMSFPR or it may require withdrawal and re-issue of the ruling. An addendum or a re-issue of the SMSFPR would be subject to there being no material change in the scheme and to the implementer consenting to that occurring. The Tax Office suggests that the implementer of the scheme ensures that participating SMSFs are fully informed of any relevant legislative changes enacted after the ruling is issued.

Applying for an SMSFPR

Who can apply for an SMSFPR?

53. SMSFPRs will only be issued on written application by, or on behalf of, an entity that is a principal of the scheme or is the implementer of the scheme. An entity who applies for an SMSFPR must be able to sign and give the Commissioner each of the assurances required by the SMSFPR 'Agreement on Terms of Use'. A copy of the 'Agreement on Terms of Use' can be accessed on the Tax Office's website.

54. SMSFPR will not be issued to either scheme participants or to potential scheme participants, or to brokers or similar entities whose business involves promoting or marketing the 'products' of other entities who are the implementers of the scheme being promoted or sold.

Submitting an application for an SMSFPR

55. Applicants are requested to complete an application form (available on the Tax Office's website) and send three copies of the completed form to the relevant SMSFPR contact. The completed form should be directed to the address indicated on the form.

56. A written application is required for an SMSFPR. The information that must be addressed in an application is detailed in the checklist attached to the application. In particular, a draft of the proposed 'Scheme', 'Ruling' and 'Explanation' parts of the SMSFPR must be prepared by the applicant and provided as part of the application.

57. The application must be signed by the applicant and must include a declaration by the applicant that all material contained in the application is true and correct. Reference to published SMSFPRs may assist with the style in which the various parts of an SMSFPR are drafted. Copies of published SMSFPRs can be accessed on the Tax Office's website.

58. Applicants should take particular care to ensure that any draft SMSFPR produced in the course of preparing an application is clearly distinguishable in format from a final SMSFPR as issued by the Tax Office. In particular, each page of any draft SMSFPR produced should carry a notation to the effect that it is a draft for application purposes only. This ensures potential participants are not inadvertently misled about the nature of the document.

59. Three copies of the SMSFPR application and all supporting documents should be provided in hard copy form. The SMSFPR application checklist should be cross-referenced with the supporting documents where applicable.

60. In addition to the hard copies, the applicant is requested to provide a computer disc containing a copy of the proposed parts of the draft SMSFPR and, where available, electronic copies of all other relevant documents, including all draft agreements and the draft public offer document. As time is a factor in the processing of SMSFPR applications, providing the maximum number of application documents and other information electronically will assist.

61. The quality and completeness of information supplied by an applicant (including that contained in the applicant's draft SMSFPR), and the need to research, analyse and resolve issues that arise, are factors in the time taken to provide an SMSFPR.

62. Where an incomplete application is submitted the applicant will be contacted, advised that their application is invalid and that the Tax Office will not begin work on it until the missing information has been provided. This ensures that applicants who do comply with all documentary and information requirements of the application checklist are not disadvantaged.

63. Applicants should note that any revision of the scheme or the submission of additional material by the applicant that has not been requested by the Commissioner will be treated as a fresh application made at the time the revised or additional information is received.

64. Where all information required by the SMSFPR application checklist has been provided but it becomes apparent that a product has features requiring detailed research and analysis or where additional information is necessary, the applicant will be contacted to discuss the issues and a time frame for the provision of the additional information.

65. Where the Commissioner has requested additional information and that information has not been provided within 28 days, or by some other mutually agreed time, the application will be finalised and the applicant notified. Later provision of the requested information will be treated as a fresh application at the time that the information has been provided.

66. An application will also be finalised and the applicant notified if, following a request for additional information, the Commissioner considers that the information provided is inadequate or insufficient for the SMSFPR to be issued.

67. Falling within this category also are applications where the material provided in the original application is inconsistent, inaccurate or contains errors such that the scheme cannot be ascertained with sufficient particularity. It is not the role of the Tax Office to point out errors in drafting or inconsistencies between application documents.

Timing issues

68. Applicants are encouraged to submit applications early in the financial year to which the proposed SMSFPR relates. This should ensure sufficient time to finalise the advice.

69. However, applicants should be aware that changes to the SISA or SISR may create unavoidable delays in the processing of SMSFPR applications. Where new laws are enacted, the impact of those changes on SMSFPRs will need to be carefully considered. This may lead to delays in dealing with new SMSFPR applications affected by the new laws, or before existing SMSFPR can be amended.

70. Changes in interpretation of existing laws may also result in delays, for instance where the Commissioner is concerned that current interpretations are being applied in circumstances outside of the policy intent. This may especially occur in circumstances where as a result of commercial changes, features of schemes are changed in small increments over time and eventually lead to a different result from the earlier interpretation of the law. The length of such delays will depend upon the complexity of the issue being considered. However, any delays that occur are necessary to ensure that the integrity of the system designed to protect retirement income is protected.

The draft SMSFPR

71. After considering all aspects of a proposed scheme the Commissioner will provide the applicant with a draft SMSFPR. At the time it is issued to the applicant a draft SMSFPR is no more than a document prepared for the purposes of discussion and does not represent a commitment by the Commissioner that an SMSFPR will issue. The provision of the draft SMSFPR allows the applicant an opportunity to suggest changes for consideration by the Commissioner.

72. The draft SMSFPR is sent to the applicant to obtain certain statements and agreements. These include an agreement that the applicant abide by the 'Agreement on Terms of Use' of the SMSFPR and statements that the description of the scheme is accurate and covers all relevant features. An agreement for the SMSFPR to be published with all relevant parties named is also included.

Conditions relating to the issue of an SMSFPR

73. The issuing of an SMSFPR in relation to a particular product is conditional on:

(a) the applicant acknowledging that the Commissioner will reveal in the advice:

- the name of each of the entities involved as principals in the carrying out of the scheme;
- the name and a description of the product; and
- a full list and a description of the material parts of each of the agreements, deeds and transactions to which the participants are parties,

(b) the applicant obtaining and providing the express consent from all parties, including all third parties, who are parties to the scheme set out in the SMSFPR, to be named in the advice;

(c) the applicant verifying in writing that the description of the product contained in the proposed SMSFPR is accurate; and

(d) the applicant agreeing to personally sign and abide by the undertakings set out in the 'Agreement on Terms of Use'. A copy of the 'Agreement on Terms of Use' may be obtained on the Tax Office's website or from the Tax Office.

When the Commissioner may refuse to issue an SMSFPR

74. An SMSFPR is only issued where the Commissioner and the applicant agree on all aspects of the advice. As a general proposition, negative SMSFPRs or SMSFPRs expressing adverse views to that of the applicant are unlikely to be issued.

75. It should be noted that the Tax Office's decision not to issue an SMSFPR is not reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The reason is that an SMSFPR is not made under an enactment. The Commissioner provides the ruling because he has the general administration of the SISA and SISR in relation to SMSFs (see section 6 of the SISA).

76. The Commissioner may refuse to issue an SMSFPR.

77. The paramount consideration in the Commissioner's decision will be whether the SMSFPR will provide necessary advice to the SMSF trustees who participate in the scheme or who are considering participating in the scheme. Given that the purpose of an SMSFPR is solely to benefit participating SMSFs it follows that any collateral benefits that flow to the implementer of the scheme are not taken into account when deciding whether an SMSFPR should be issued.

78. For example, an SMSFPR is not given to assist the implementer of the scheme to market the scheme or for the implementer or an associate to raise finance for the 'product' from financiers. All aspects of the 'product', including the means to finance the product, should be settled and in place at the time that the application is submitted.

79. An SMSFPR is a ruling on a single settled 'product'. It is not a ruling on a basic set of principles or conditions where participating SMSF trustees are able to depart from those principles and conditions to suit their particular individual needs. The presence of such choices within a scheme is indicative that, rather than a single settled 'product', it is more likely to be a series of sub-products built around a basic set of conditions. Where participants are able to make choices within a scheme an SMSFPR will not be issued.

80. Although the Commissioner will give the applicant an opportunity to provide their views before a decision is made, SMSFPRs will ordinarily not be issued if:

- there is any uncertainty about the scope of the scheme or how it may operate;
- there is any uncertainty about the application of the SISA or SISR to the scheme or the legal structure under which it is proposed to operate; or
- if the applicant and the Commissioner are unable to agree on any material aspect of the proposed advice.

81. Additionally, and without limiting the discretion to refuse to rule in relation to other instances, SMSFPRs will ordinarily not be issued in the following **specific** circumstances:

(a) where an entity involved with the application for an SMSFPR has failed to comply with their taxation or regulatory obligations, for example, there are outstanding income tax returns or activity statement, or amounts of tax which are overdue for payment;

(b) where all, or a substantial majority of the scheme activities are to be undertaken outside of Australia;

(c) an applicant continues to present 'shifting scenarios', indicating that there is, in fact, no settled scheme on which the Commissioner may provide advice;

(d) the SMSF trustees who may purchase the product are not a homogeneous group in either of the following respects:

- the result is not the same for all members of the group. This would be the case, for example, where the scheme includes options which, if exercised, would create a variety of different classes of participants or would be likely to change the regulatory outcome for some participating entities; or
- the result is dependent on the outcome of an unresolved issue (such as, for example, whether a participant is a related party of another entity in the scheme);

(e) there is a reasonable possibility that the ruling, or circumstances associated with the ruling, could be misleading to potential participants. Falling within this category are requests where:

- the Government has announced a change in the law on which the Commissioner has been asked to provide an SMSFPR. This includes cases where the Commissioner is requested to provide a ruling on law that has not been enacted or that has not yet received Royal Assent. SMSFPRs can only deal with legislation enacted at the time that it issues;
- the Commissioner cannot give a positive clearance on anti-avoidance provisions;
- the material provided in support of the application, including the Product Disclosure Statement, cannot reasonably be relied upon, leading to, among other things, questions of the correct characterisation of the structure for regulatory purposes and/or certainty of the regulatory outcomes for participating SMSFs; or
- past practices by the implementer of the scheme or its associates make it reasonable to suspect that the assurances required by the SMSFPR 'Agreement on Terms of Use' will not be complied with;

(f) the application is frivolous or vexatious. Falling within this category are requests where:

- the scheme is only hypothetical in that the scheme to which the application relates is not being carried out and is not seriously contemplated by the applicant; or
- there is no realistic chance of implementing the scheme;

(g) in the opinion of the Commissioner it is unreasonable to comply with the application given the extent of resources available and/or period of time available to consider the application or other relevant matters. For example, the Commissioner may refuse to issue an SMSFPR in the following circumstances:

- in the case of protracted and very time consuming matters to which the Commissioner cannot devote resources;
- where the issues are sufficiently covered by previously issued public advice; and

- where statutory or other Government requirements (for example, prospectuses, licences or approvals) have not been met and are not expected to be met, have expired, have been withdrawn, or are expected to expire or be withdrawn in the near future;

(h) where the applicant does not provide the express consent of all parties, including third parties, who are parties to the scheme set out in the SMSFPR, to be named in the ruling to be issued;

(i) where the clear purpose of the scheme is to avoid or circumvent a policy intent of a law, especially, but not limited to, one administered by the Commissioner; or

(j) the class of SMSFs to which the ruling applies is so narrow that the anonymity of those SMSFs cannot be guaranteed.

82. When considering an application for an SMSFPR the Commissioner will, as far as possible, take a 'whole of government' approach. For example, an SMSFPR will not be issued if aspects of it are contrary to the requirements of other regulatory or prudential agencies or bodies or with related legislation such as the *Corporations Act 2001*. However, it should not be assumed that each SMSFPR issued has considered all of the non-SISA aspects that might apply to the scheme or to participation in it.

Obligations after the issue of an SMSFPR

Obligations applicable to all SMSFPR applicants

83. An SMSFPR will only be issued if the entity who has applied for the SMSFPR (the applicant) gives an assurance to the Commissioner in the form of the SMSFPR 'Agreement on Terms of Use' as well as any other assurances as may be required.

84. Under the SMSFPR 'Agreement on Terms of Use', the applicant is required to inform the Tax Office of any event that may impact on the continuing application of the SMSFPR. In particular, the applicant must notify the SMSFPR area of the Tax Office if any of the following occur:

(a) a supplementary Product Disclosure Statement or prospectus issues;

(b) a new Responsible Entity, or the equivalent manager of a non-registered managed investment scheme, is appointed;

(c) a receiver or administrator is appointed;

(d) there is a failure to meet a minimum subscription requirement;

(e) a contract for the supply of goods or services lapses or material changes are made to a contract for the sale of the scheme's produce or output;

(f) changes are made to the terms and conditions of the scheme agreements, for example, changes to:

- the services to be provided by any contracting entity, including by the implementer of the scheme, to the participating SMSFs, or the timing of the provision of those services;
- the fees payable by participating SMSFs including the time at which the fees are payable and/or the amount that is payable; or
- the parties to the scheme agreements;

(g) a failure to complete a contract of sale for the purchase of land or a failure to execute a lease or licence agreement occurs; or

(h) the project is abandoned.

85. Notification of such events should be provided to the Commissioner in writing before the relevant event occurs. However, where circumstances outside of the control of the implementer of the scheme prevent this occurring, the Commissioner should be notified no more than 14 days after the event occurs or the implementer becomes aware of it.

86. The *Corporations Act 2001* requires a company, a registered managed investment scheme and other prescribed entities to lodge with the Australian Securities and Investments Commission (ASIC) a directors' report. The report must (among other requirements):

(a) give details of any significant changes in the entity's state of affairs during the financial year;

(b) state the entity's principal activities during the financial year and any significant changes in the nature of those activities during the financial year; and

(c) give details of any matter or circumstance that has arisen since the end of the financial year that has significantly affected, or may significantly affect:

- the entity's operations in future financial years;
- the results of those operations in future financial years; or
- the entity's state of affairs in future financial years.

87. If a report of the type described in paragraph 86 of this Ruling is required to be lodged, the applicant is also required to provide this information to the Commissioner within the time for lodgement of the report with ASIC. The Commissioner must receive this information immediately upon it being provided to ASIC. If the information is not provided, the SMSFPR may be withdrawn.

Withdrawal of an SMSFPR

88. SMSFPRs can be withdrawn by the Commissioner following a request from the applicant or by the Commissioner's own action.

89. SMSFPRs may be withdrawn where:

- there is a change in the Commissioner's view of how the law should be interpreted, or where a court decides that the law applies differently to that set out in an SMSFPR or a number of SMSFPRs;
- they are no longer needed, such as where the scheme described in the advice will not be implemented or will cease being carried on or where a replacement SMSFPR has issued;
- the Commissioner becomes aware of circumstances which, had they been known to the Commissioner or been foreshadowed by the applicant prior to the issue of the SMSFPR, would have caused the Commissioner not to issue it;
- it becomes inappropriate for the SMSFPR to continue to apply to SMSFs; or
- the 'Agreement on Terms of Use' has not been observed.

90. SMSFPRs will be withdrawn where there is a material non-conformance with the scheme set out in the ruling. Without limiting what the Commissioner may consider to be material for these purposes, the following scenarios are likely to lead to consideration of whether the SMSFPR should be withdrawn:

(a) where there is any difference that is considered to be capable of affecting the outcome of the scheme for any SMSFs within the class of SMSFs to which the advice relates;

(b) the offering of finance arrangements, including the provision of bridging finance or other short term finance to participating SMSFs, where those finance arrangements have not been disclosed to the Tax Office; and

(c) the issue of a supplementary Product Disclosure Statement that has not been provided to the Tax Office.

91. SMSFPRs may also be withdrawn where the applicant has not complied with the disclosure obligations discussed in paragraphs 83 to 87 of this Ruling.

92. In making a decision to withdraw SMSFPRs, the Commissioner will take into account all relevant considerations. In order to ensure that all relevant matters are identified and considered, the Commissioner will generally provide an opportunity for submissions from the relevant scheme entity. Such submissions must be supplied within 28 days of the Commissioner informing the scheme entity that the withdrawal of the SMSFPR is being considered.

93. However, in circumstances of necessity or urgency, such as where a product is being aggressively marketed and it is the Commissioner's view that any delay in withdrawing the relevant SMSFPR may lead to potential SMSF participants being misled, the Commissioner may not give the applicant an opportunity to be heard prior to deciding whether to withdraw an SMSFPR. When a tax Product Ruling to which the SMSFPR applies is withdrawn in such circumstances, the Commissioner would also withdraw the SMSFPR.[9]

94. The Commissioner will issue a Notice of Withdrawal explaining the circumstances that have led to the withdrawal and the consequences of the withdrawal to participants. Notification of the Notice of Withdrawal will be published in the *Commonwealth of Australia Gazette.* The Commissioner may also write to participants setting out a fuller explanation of the consequences of the withdrawal.

The effect of inconsistent SMSFPRs

95. If an SMSF trustee acts in accordance with an SMSFPR that applied to the trustee at that time and there is a later Self Managed Superannuation Funds Ruling or Determination that conflicts with the SMSFPR, then the Commissioner will consider it as a relevant factor that the trustee acted in accordance with the SMSFPR in deciding whether to take any compliance action in response to a breach of the SISA or SISR.

96. If an SMSFSA is inconsistent with a later SMSFPR, the earlier SMSFSA is taken not to have been made if, when the SMSFPR is made, the following two conditions are met:

(a) the income year or other period to which the SMSFSA relates has not begun; and

(b) the scheme to which the SMSFSA relates has not begun to be carried out.

[9] See paragraph 107 of PR 2007/71.

97. If the above two conditions do not apply, the Commissioner will consider it as a relevant factor that the trustee acted in accordance with the SMSFSA in deciding whether to take any action in response to a breach of the SISA.

Accessing information about SMSFPRs on the Tax Office's internet site

98. Information about SMSFPRs, including important forms, and useful information for applicants of SMSFPRs or scheme participants, can be obtained from the Tax Office's website. Copies of SMSFPRs issued since 2009 are also available from the legal database on the Tax Office's website.

Commissioner of Taxation
12 August 2009

Appendix 1 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PR 2007/71

Subject references:

- product rulings
- public rulings
- self managed superannuation fund
- SMSF
- SMSF product rulings

Legislative references:

- SISA 1993
- SISA 1993 6
- SISA 1993 10(4)
- SISA 1993 126A
- ITAA 1997
- ITAA 1997 995-1(1)
- TAA Sch 1 Sch 105-60
- TAA Sch 1 Div 358
- Corporations Act 2001
- Corporations Act 2001 Pt 2G.4
- Corporations Act 2001 601FM
- ADJR Act
- Copyright Act 1968
- SISR 1994

Other references:

- Law Administration Practice Statement PS LA 2006/17
- Law Administration Practice Statement PS LA 2006/19
- Law Administration Practice Statement PS LA 2009/5
- Tax Office's website www.ato.gov.au

ATO references

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