

There is often confusion over the disclosure requirements for an SMSF. Is a PDS required and if so, in what circumstances? The following article gives some insight into the disclosure requirements and other ASIC issues relating to SMSFs.

ASIC administers the regulatory system of consumer protection for superannuation through the following legislation (or relevant parts of it), as well as relevant regulations made under it:

- Corporations Act 2001 including Corporations Regulations 2001
- Australian Securities and Investments Commission Act 2001
- Insurance Contracts Act 1984
- Superannuation (Resolution of Complaints) Act 1993
- Superannuation Industry (Supervision) Act 1993
- Retirement Savings Accounts Act 1997
- Life Insurance Act 1995
- Medical Indemnity (Prudential Supervision and Product Standards) Act 2003.

Other regulators also administer some parts of these Acts. For example, parts of the last four Acts dealing with prudential regulation are administered by the Australian Prudential Regulation Authority (APRA).

## Corporations Law

Chapter 7 of the Corporations Act 2001 and Chapter 7 of the Corporations Regulations 2001 contain certain requirements applicable to superannuation funds. These are known as the Financial Services provisions, and under these provisions superannuation is treated as a financial product.

While SMSFs are exempt from some of these provisions, in general the requirements apply to all superannuation funds.

## Disclosure Requirements for New Members

Division 2 of Part 7.9 of the Corporations Act and regulation 7.9.04 and Part 17 of Schedule 10A of the Corporations Regulations deal with the requirements for disclosure to new members and prospective employer-sponsors applying to join the fund. This disclosure is required to be in the form of a Product Disclosure Statement (**PDS**).

Subject to the test in section 1013F of the Corporations Act, the PDS must contain the information listed in sections 1013B, 1013C, 1013D, 1013DA and 1013E. This information is given on the basis that it is information that the trustee should reasonably believe that a member would require for the purpose of deciding whether to join the fund.

Pursuant to section 1012J of the Corporations Act, all information disclosed in the PDS must be up to date. The PDS itself must be worded and presented in a clear, concise and effective manner in accordance with section 1013C (3) of the Corporations Act.

Under Sub-section 1012D(2A) of the Corporations Act, a PDS does not have to be given to a new member of an SMSF where the trustee believes on reasonable grounds that the member has received, or knows they have access to, all of the information that a PDS would be required to contain.

The exemption from providing a PDS does not apply where a pension is commenced from an SMSF, and in all such circumstances a member must be given a PDS in relation to that pension.

A PDS may be in more than one document if all are given to the member at the one time, and so the parts of a fund's PDS which will require regular updating can be contained in a smaller separate document.

## **Ongoing Disclosure of Material Changes & Significant Events**

In accordance with section 1017B of the Corporations Act, the fund must notify members of any material change in a matter, or significant event that affects a matter, required to be disclosed in the PDS.

- Failure to notify constitutes an offence under subsection 1311(1).
- The notice must be in writing or delivered electronically.
- If the change or event relates to a change in fees or charges, the trustee must notify the members 30 days before the change takes effect.
- If the change or event does not relate to a change in fees or charges, then the members must be notified as soon as practicable, but no later than 3 months after the change or event has happened.

## **Periodic Statements**

Section 1017D of the Corporations Act requires a periodic statement that is released to members at least annually.

### **Basic Information**

The statement must contain all information that a member would reasonably need for the purpose of understanding their investment in the fund, including:

- opening and closing balances for the reporting period;
- the termination value of the investment at the end of the reporting period (to the extent to which it is reasonably practicable to calculate that value for the investment or a component of the investment);
- details of transactions in relation to the product during the reporting period as required by regulations made for the purposes of this paragraph;
- any increases in contributions in relation to the financial product by the holder or another person during the reporting period;
- return on investment during the reporting period (on an individual basis if reasonably practicable to do so and otherwise on a fund basis);
- details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement.

For regulated superannuation funds (except SMSFs), regulation 7.9.20 of the Corporations Regulations sets out a number of additional items that must be shown on the periodic statement.

## Information on Request

Sections 1017A and 1017C of the Corporations Act and subdivisions 5.9 and 5.10 of Part 7.9 the Corporations Regulations contain the rules regarding the provision of information upon request.

### Member Requests

Under section 1017A of the Corporations Act, persons who are not members may request information that has previously been made generally available to the public by the fund. Such requests can only be made in circumstances where:

- that information might reasonably influence a person's decision as to whether to become a member;
- the provision of the information is reasonably practicable; and
- the requesting person agrees to pay any costs charged by the fund for providing such information.

### Concerned Persons

Further, pursuant to section 1017C (2) of the Corporations Act, where a concerned person makes a request, the trustee must give that person information that they reasonably require in order to:

- make an informed judgment about the investment performance of the relevant sub-plan of the fund, or of the fund itself; or
- understand the particular investment of the fund and the relevant sub-plan (if any).

A "concerned person" is a person who was a member of the fund within the preceding twelve months, or a beneficiary of the fund to which the request is made.

Under section 1017C (3) of the Corporations Act, a trustee must disclose the same information to an employer-sponsor after receiving a written request.

Part 11 of schedule 10A of the Corporations Regulations affects the operation of these provisions of the Corporations Act such that any costs charged for providing the requested information must not exceed the reasonable costs of providing that information as incurred by the fund.

Pursuant to section 1017C (6), the Trustee of an SMSF does not need to comply with a request to provide a document or specific information when requested by a concerned person.

## Other Requirements

### Dollar Amounts

The following information needs to be disclosed in dollar amounts by funds other than SMSFs, unless ASIC makes a determination exempting the dollar disclosure:

#### For a PDS –

- any significant benefits to which the product holder will or may become entitled
- the cost of the product (including ongoing costs), and
- any commission (or similar payments) that will or may impact on the amount of a return, if any.

### **For a periodic statement –**

- opening and closing balances for the reporting period
- the termination value of the investment at the end of the reporting period
- a summary of all transactions in relation to the financial product during the reporting period
- increases in contributions in relation to the financial product during the reporting period, and
- the return on investment during the reporting period.

ASIC will make a determination exempting dollar disclosure where there are compelling reasons to do so in a situation where:

- it is not possible to disclose amount in dollar terms, or
- disclosing the amount in dollar terms would:
- impose an unreasonable burden on a providing entity (or class of providing entities) or product issuer (or class of product issuers), or
- impose an unreasonable burden on a providing entity (or class of providing entities) or product issuer (or class of product issuers) within a specified period, or
- be contrary to the interests of a client (or class of clients).

If an ASIC determination is made, the amount must instead be disclosed as a percentage or a narrative description.

### **Cooling Off Periods**

A member has the right to return a superannuation product, such as a pension, and have their money refunded if done so in writing within 14 of the issue of the product or the discovery of a right of return (eg. due to fraud, misconduct, defective PDS).

In order to have the money refunded, the member must nominate a complying fund for the money to be deposited in. The nomination must occur within 1 month of giving notice to the fund of the right to return the product.