

AFS licensing requirements for IPA Members who provide SMSF services

ASIC information sheet (INFO 216):

This is a summary of ASIC Info Sheet 216 which provides guidance for IPA members who provide services relating to SMSF's.

The law prior to 1 July 2016:

Previously the Corporations Regulations 2001, reg 7.1.29A permitted IPA members to provide advice on establishing or winding up an interest in an SMSF without holding an Australian Financial Services licence (AFS licence).

The law from 1 July 2016:

This exemption was removed and accountants now must be appropriately licensed to provide SMSF related financial advice. From 1 July 2016, all IPA members must be covered by an AFS licence to provide advice about acquiring or disposing of an interest in an SMSF to their clients.

This change adds complexity to an already complex area, but there are a number of exemptions from the requirement to hold an AFS licence when providing services relating to SMSF's. These exemptions apply to a variety of activities which are summarised in the table on page-2, but it is important to understand what type of activities fall within these exemptions and what activities require an AFS licence. Members are warned not to stray into providing SMSF advice to a client if you don't hold an AFS licence. ASIC are auditing IPA members to identify these types of activities and are prosecuting members that break the law.

Before we list the exemptions, there are currently three AFS licencing options.

Option-1: ASIC Limited AFS licence

Members can apply to ASIC for a limited AFS licence to provide advice on a limited range of financial services relevant to SMSFs. This is a limited AFS licence as per regulations 7.8.12A and 7.8.14B of the Corporations Regulations 2001. A limited AFS licence permits financial product advice about SMSF's and about a client's existing superannuation holdings in certain circumstances. Class of product advice can be offered about superannuation products, securities, simple managed investment schemes, general insurance products, life risk insurance products and basic deposit products.

Option-2: ASIC AFS licence

Members can apply to ASIC for an AFS licence to provide financial services as part of the business, such as providing financial product advice to clients, dealing in a financial product, make a market for a financial product, operate a registered scheme, provide a custodial or depositary service or provide traditional trustee company services. An AFS licence also permits a member to provide all the services offered under a limited AFS licence.

Option-3: Authorised Representative

Members can be appointed as an authorised representative of a limited AFS licence holder or an AFS licence holder and provide specified services on the licensee's behalf. AFS licensees that appoint authorised representatives must notify ASIC of the appointments they make. There are limitations to this requirement explained in s916F(1AA) of the *Corporations Act 2001*.

Exemptions that apply to SMSF services:

Type of SMSF service	What you may do without being covered by an AFS licence	Legislation
(1) Establishing, operating, structuring or valuing an SMSF, including advice and assistance on administrative and operational issues, and the process of winding up or exiting an SMSF	You may provide general factual information on establishing, operating, structuring or valuing an SMSF, as long as you give your client the appropriate warnings. This includes: <ul style="list-style-type: none"> • general factual information provided for the sole purpose of, and only to the extent reasonably necessary for, ensuring compliance with the superannuation legislation, • general factual information on the process of winding up or exiting an SMSF, <u>But you may not recommend that your client acquires or disposes of an interest in an SMSF.</u>	Regulation 7.1.29(5)
(2) Asset allocation and investment strategy	You may provide a recommendation or statement of opinion on how your client should distribute their available funds among different categories of investments. <u>But you may not advise your client to make particular investments through the SMSF.</u>	Regulation 7.1.33A
(3) Tax advice on SMSFs and other financial products	You may provide general factual information on tax implications of financial products, such as an interest in an SMSF and underlying investments held by the SMSF, as long as you do not receive a benefit as a result of your client acquiring a financial product (or a financial product that falls within the class of products) mentioned in the general factual information and you give your client the appropriate warnings.	Regulation 7.1.29(4)
(4) Tax agent and BAS services	If you are a registered tax agent or BAS agent, you may provide general factual information that is given in the ordinary course of these activities of such an agent and that is reasonably regarded as a necessary part of those activities	Section 766B(5)(c)
(5) Referring clients to an AFS licensee or representative	You may refer clients on to an AFS licensee or representative for financial product advice, as long as you make the appropriate disclosures in the referral.	Regulations 7.6.01(1) (e) - (ea)

More detail on these five exemptions:

1) Establishing, operating, structuring or valuing an SMSF, including advice and assistance on administrative and operational issues, and the process of winding up or exiting an SMSF.

IPA members may provide general factual information on establishing, operating, structuring or valuing an SMSF without an AFS licence under regulation 7.1.29(5) such as:

- provide general factual information on:
 - the practical steps that need to be taken to establish or wind up an SMSF,
 - how to add new trustees and members to an existing SMSF,
 - the different ways an SMSF could be structured,
 - how to process transfers or rollovers of funds,
- assist clients to complete documentation (e.g. to acquire securities through the SMSF, as long as members do not influence the decision to acquire those securities),
- assist clients in adding new members and trustees to a fund or to exit a fund,
- arrange to wind up an SMSF on a client's behalf.

Members may also provide other relevant factual information that a client should know about establishing an SMSF (e.g. that they must have the financial accounts and statements for the SMSF audited each year by an approved SMSF auditor).

Members can only rely on this exemption if the general factual information is provided to a trustee, a director of a trustee, an employer sponsor or a person who controls the management of the SMSF. The general factual information must be given to the person in their capacity as a person who controls the assets owned by the trustee of the SMSF, and not in their capacity as a beneficiary of the SMSF.

General factual information members provide about establishing, operating, structuring or valuing an SMSF must not amount to an explicit or implied recommendation to establish an SMSF, or to acquire or dispose of an interest in an SMSF (or another superannuation product). However, general factual information supplied to a client about the establishment of an SMSF may also carry an implicit recommendation that the person acquire an interest in the SMSF. Members are more likely to be able to rely on the exemption when a client has already made a decision to establish an SMSF before seeking assistance to take the next steps. For example, members may recommend the best structure for an SMSF to suit a client's situation after the client has made the decision to establish an SMSF.

Members may also provide general factual information about the sole purpose of, and only to the extent reasonably necessary for, ensuring compliance with superannuation legislation – the SIS Act, the *Superannuation Guarantee (Administration) Act 1992* and the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations). See regulation 7.1.29(5)(c). This might include:

- modifying contribution levels due to changes in the superannuation guarantee levy
- complying with rules on investment restrictions.

Providing general factual information for the sole purpose of ensuring compliance with the superannuation legislation may stray into areas that would not normally be covered by the exemptions applying to SMSF services, such as general factual information about acquiring or disposing of an interest in an SMSF, the investment strategy of the fund, and financial products acquired through the fund.

For example, members may provide general factual information on how to comply with the requirement for an SMSF trustee to act in the best interests of beneficiaries (section 52(2)(c) of the SIS Act) – but if a member were to recommend the purchase of a particular asset through the SMSF because this would generate a good investment return for beneficiaries, this would not satisfy the requirement that the general factual information be for the sole purpose of, and only to the extent reasonably necessary to, ensure compliance with the legislation.

(2) Asset allocation and investment strategy

Without an AFS licence, members may not advise clients about their retirement investment strategy, including whether a client should increase or decrease their contributions into their SMSF, what their overall investment strategy should be for their SMSF (e.g. what the target investment return should be and how to achieve this), or what contributions they should make to their SMSF relative to any other superannuation fund of which they are a member.

However, members may provide a recommendation or statement of opinion to a client on broad asset allocation within their SMSF (see regulation 7.1.33A), that is, what proportion of funds should be allocated across one or more of the following investment categories:

- shares
- debentures
- debentures, stocks or bonds issued, or proposed to be issued, by a government
- deposit products
- managed investment products
- investment life insurance products
- superannuation products
- other types of assets.

Providing a recommendation or statement of opinion to clients on asset allocation within their SMSF is different from providing class of product advice, which requires a licence. The exemption for providing a recommendation or statement of opinion on asset allocation does not apply to making a recommendation on or giving a statement of opinion about specific financial products or classes of financial product.

(3) Tax advice on SMSFs and other financial products

Providing tax advice is a core part of a members practice. In the course of providing tax advice relating to SMSFs, a member may provide financial product advice. For example, when a member advises on the taxation implications of acquiring, holding or disposing of an interest in an SMSF, or a financial product held through the SMSF (e.g. shares), this could be financial product advice because it might influence a decision about that financial product.

Under regulation 7.1.29(4), a member may provide general factual information on the taxation implications of financial products without being covered by an AFS licence. This exemption allows a member to provide general factual information on a financial product on a client's interest in an SMSF or a financial product they hold through their SMSF, as long as this is merely incidental to the general factual information around tax implications provided and not a separate recommendation on the merits of the financial product itself.

Members can only rely on this exemption if:

- they do not receive a benefit as a result of a client acquiring a financial product mentioned in providing general factual information (other than the remuneration received directly from the client or someone associated with the client, such as another SMSF member),
- the client is a retail client and the member also provides a statement warning them that:
 - the member is not licensed to provide financial product advice under the Corporations Act,
 - taxation is only one of the matters that must be considered when making a decision on a financial product,
 - the client should consider taking advice from an AFS licensee before making a decision on a financial product.

Members who provide tax advice in the context of financial advice must be registered with the Tax Practitioners Board.

(4) Tax agent and BAS services

Members registered with the Tax Practitioner Board (TPB) as a tax agent or BAS agent do not need a AFS licence or to be a representative of a licensee to provide general factual information that is given in the ordinary course of activities as a tax or BAS agent and which is reasonably regarded as a necessary part of those activities – see section 766B(5)(c) of the Corporations Act.

To understand what services are within the ordinary course of the activities of a tax agent or BAS agent, see the TPB website. For the purposes of relying on this exemption, a tax agent service or BAS agent service will generally:

- involve advising on liabilities, obligations or entitlements a client may have under a taxation law (for a tax agent service) or BAS provision (for a BAS service)
- be provided in circumstances where it is reasonable to expect that the client will rely on that general factual information to satisfy liabilities or obligations or to claim entitlements under a taxation law (for a tax agent service) or BAS provision (for a BAS service).

The general factual information that you give in your capacity as a tax agent or BAS agent will be considered a necessary part of your activities as a tax agent or BAS agent if you cannot provide a competent tax agent or BAS service without giving such general factual information. A tax agent may provide general factual information on the tax implications of acquiring a financial product (such as an SMSF), but cannot advise on whether to actually acquire the financial product because advice on whether to actually acquire the financial product is not necessary to provide a competent tax agent service.

For registered tax agents, the exemption in section 766B(5)(c) will cover most of the same types of advice as the exemption in regulation 7.1.29(4) of the Corporations Regulations. However, the definition of 'taxation law' which applies to section 766B(5)(c) is slightly narrower than the tax laws that you can advise on under regulation 7.1.29(4). General factual information about foreign tax laws and state and territory tax laws such as stamp duty, payroll tax and land tax is not covered under section 766B(5)(c).

Scenario's on how these exemptions may apply:

Scenario-A: Contributions into an SMSF

Under the exemption, a registered tax agent may provide general factual information on any tax implications of contributions into an SMSF (or other superannuation fund), such as a client's eligibility to make concessional and non-concessional contributions and the tax treatment of those contributions. A tax agent can use a client's total superannuation balance to provide general factual information to the client on their eligibility for:

- the unused concessional contributions cap carry-forward,
- the non-concessional contributions cap and the two-year or three-year bring-forward period.

However, they cannot recommend that a client make a particular level of contributions (although they can advise on the maximum level of contributions a client can make). This is because the decision to make a particular level of contributions involves considerations other than tax.

Another example, is a tax agent can provide general factual information to a client that they will be eligible for a tax offset if they make a spousal contribution. The tax agent cannot recommend the amount of the spousal contribution. However, they may provide factual information about the spousal contribution eligibility criteria that is relevant to calculating the amount of the tax offset. This may include, but is not limited to, the spouse's income and the amount of the non-concessional contribution to superannuation.

Scenario-B: Accumulation vs. pension phase

A registered tax agent may also provide general factual information to a client on the tax implications of moving their superannuation benefits from accumulation to pension phase, but may not make a recommendation to a client about when to do so. A tax agent may provide general factual information to a client of the tax implications of retiring at different ages (such as a client being able to withdraw superannuation benefits tax-free after a certain age), but should make it clear to the client that tax is not the only consideration involved in making retirement decisions.

Scenario-C: Transfer of assets

A registered tax agent may provide general factual information to a client on the need to meet the requirements of a tax law (such as the transfer balance cap) and of the tax consequences of a particular transfer of assets. However they cannot provide general factual information to the client about whether or not to transfer the assets or what assets to actually transfer. This is because tax outcomes are only one factor to consider when making such decisions.

(5) Referring clients to an AFS licensee or representative

Members may refer a client to an AFS licensee or representative if the member is not licenced to provide financial advice. Making a referral to an AFS licensee or representative will usually not constitute financial product advice unless a member phrases the referral in a way that explicitly or implicitly contains a recommendation or statement of opinion about a financial product or class of financial product.

When making a referral, a member should ensure the referral does not constitute financial product advice by choosing to rely on the exemption in regulations 7.6.01(1)(e)–(ea) by the referral consisting only of:

- letting a client know that the AFS licensee or representative can provide the type of financial service or services the client requires,
- giving the client the contact details for the AFS licensee or representative.

In order to rely on the exemption, a member must disclose any benefits or commissions that the member or the members associates might receive as a result of the referral or any subsequent services provided to the client, unless the AFS licensee or representative to whom the client is referred to is related to the member (e.g. it is a related company).

A client may also want the member to facilitate the financial service by engaging with the AFS licensee or representative. This is permitted provided the member does not give any explicit or implicit financial product advice when doing so. Members must not endorse or make any recommendations regarding the financial product advice provided by the AFS licensee or representative.

The information above is a summary and the IPA recommend you read the following five ASIC references to ensure an understanding of your compliance obligations:

(1) INFO sheet 216:

<http://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/limited-financial-services/afs-licensing-requirements-for-accountants-who-provide-smsf-services/>

(2) Establishing, operating or valuing an SMSF:

<https://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/limited-financial-services/afs-licensing-requirements-for-accountants-who-provide-smsf-services/#Establishing>

(3) Asset allocation:

<https://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/limited-financial-services/afs-licensing-requirements-for-accountants-who-provide-smsf-services/#Assetallocation>

(4) Tax advice on SMSF's and other financial products:

<https://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/limited-financial-services/afs-licensing-requirements-for-accountants-who-provide-smsf-services/#Taxadvice>

(5) Referring clients to an AFS licensee or representative:

<https://asic.gov.au/for-finance-professionals/afs-licensees/applying-for-and-managing-an-afs-licence/limited-financial-services/afs-licensing-requirements-for-accountants-who-provide-smsf-services/#Referring>