

ASIC INFO216 – a SMART Guide

ASIC has clarified what unlicensed accountants can and cannot do when providing services to SMSFs

What they CAN do (in addition to their already AFSL-exempt accounting and tax-related activities)

1. Discuss LRBA and other facilities that can be used to borrow money in compliance with sections 67 and 67A of SISA
2. Provide advice on establishing, operating, structuring and valuing a SMSF provided certain warnings are provided to the client first (refer Corps Reg 7.1.29(5))
3. Provide a recommendation or a statement of opinion on how client should distribute their available funds amongst various asset classes (refer Corps Reg 7.1.33A)
4. Provide tax advice on financial products (like an interest in superannuation or an underlying financial product held within super) as long as you do not receive a benefit as a result of the client acquiring a financial product (or one that falls within that class of financial products) plus you give the appropriate warnings (refer Corps Reg 7.1.29(4))
5. Refer clients to another AFSL to receive specific financial product advice outside your scope of AFSL – e.g. investment advice, insurance advice.

What they CAN'T do

1. Recommend a client use a margin loan to borrow money under s67 and 67A of SISA
2. Recommend a client use a credit product to borrow money under same provisions
3. Recommend someone acquires or disposes of an interest in a SMSF
4. Advise a client about particular financial products they can hold within SMSF

ASIC sets out detail on a variety of scenarios to help Accountants understand where the line is drawn – see appendix to this Guide.

- Establishing, operating, structuring or valuing an SMSF
- Advice for ensuring compliance with the superannuation legislation
- Asset allocation and investment strategy
- Tax advice on SMSFs and other financial products
- Referring clients to AFSLs or representatives of AFSLs

If you are a limited AFSL or one of their representatives INFO 216 applies slightly differently:

Establishing, operating, structuring or valuing an SMSF

The exemption that applies to unlicensed accountants when giving advice about establishing, operating, structuring or valuing a SMSF won't apply to you because one of the warnings required by the regulation (the one about you not being licensed) cannot be given by you.

This may have implications for your PII as an AFSL – check with your broker to confirm any impacts to your ongoing RG126 compliance obligations. ASIC is saying that ANY ESTABLISHMENT, OPERATIONAL, STRUCTURING OR VALUATION ADVICE you give will be considered provision of financial product advice.

Asset allocation and investment strategy

The **asset allocation exemption** under Regulation 7.1.33A still applies to you but be aware of the limitations inherent in that carve out. The asset classes are as follows:

- “(a) shares;
- (b) debentures;
- (c) debentures, stocks or bonds issued, or proposed to be issued, by a government;
- (d) deposit products;
- (e) managed investment products;
- (f) investment life insurance products;
- (g) superannuation products;
- (h) other types of asset.

Note: This regulation does not apply to a recommendation or statement of opinion that relates to specific financial products or classes of financial products.”

Tax advice on SMSFs and other financial products

You can still give **tax advice** about financial products or classes of financial products that are not on your AFSL – e.g. income protection insurance deductibility.

A specific carve out permits you do this but a modified warning must be given to the client.

That **warning** basically says (i) you are a limited AFSL holder (or its representative), (ii) taxation is only one of the matters that must be considered when making a decision on a financial product and (iii) the client should consider taking advice from an AFSL other than a limited AFSL before making a decision on a financial product.

The exemption will not affect your liability as an AFSL (or its representative) for advice given within the bounds of the AFSL.

Referring clients to AFSLs or representatives of AFSLs

If you want to refer clients to another AFSL you must meet the referral rules set out in ASIC Regulatory Guide 36:

RG 36.72 You do not need to hold an AFS licence if you provide a financial service that consists only of a referral—that is: (a) informing another person that a licensee (or one of its representatives) is able to provide a particular financial service or class of financial services; and (b) giving that other person contact details for the licensee or representative.

RG 36.73 Unless you are a representative of the licensee (or a related body corporate of the licensee), you must disclose any benefits (including commission) that you (and your associates) are to receive in respect of, or that are attributable to, the service: regs 7.6.01(1)(e) and 7.6.01(1)(ea).

APPENDIX – an extract from INFO216

These are the primary clauses relating to unlicensed accountants

“Establishing, operating, structuring or valuing an SMSF

You may provide advice on establishing, operating, structuring and valuing an SMSF without a licence: regulation 7.1.29(5). This means that without being covered by an AFS licence, you can:

- provide advice 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 paperwork (e.g. to acquire securities through the SMSF, as long as you do not influence the decision to acquire those securities)
- help clients to add new members and trustees to a fund or to exit a fund
- arrange to wind up an SMSF on a client’s behalf.

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

You can only rely on this exemption if the advice is provided to a trustee, a director of a trustee, an employer sponsor or a person who controls the management of the SMSF. The advice 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 (member) of the SMSF.

Where you are relying on this exemption, if your client is a ‘retail’ client (as opposed to a ‘wholesale’ client – see section 761G and related regulations for the definition of this term), under regulation 7.1.29(5)(d) you must provide a written statement to your client that:

- you are not licensed to provide financial product advice under the Corporations Act
- they should consider taking advice from an AFS licensee before making a decision about a product.

The advice you give 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, we recognise that advice given to a person about the establishment of an SMSF may also carry an implicit recommendation that the person acquire an interest in the SMSF. Therefore, you are more likely to be able to rely on the exemption when your client has already made a decision to establish the SMSF before seeking your assistance to take the next steps. For example, you may recommend the best structure for an SMSF to suit your client's situation, once they have made the decision to establish an SMSF.

Advice for ensuring compliance with the superannuation legislation

You may also provide advice that is for the sole purpose of, and only to the extent reasonably necessary for, ensuring compliance with superannuation legislation – that is, the SIS Act, the Superannuation Guarantee (Administration) Act 1992 and the Superannuation Industry (Supervision) Regulations 1994 (SIS Regulations): regulation 7.1.29(5)(c). This might include matters such as:

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

Advice provided 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 advice 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, you may provide advice 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 you then go on 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 advice be for the sole purpose of, and only to the extent reasonably necessary to, ensure compliance with the legislation.

If you provide advice about compliance with section 52(2)(f) of the SIS Act (which places a duty on trustees to act fairly in dealing with beneficiaries within a class) or advice about compliance with regulation 4.09 of the SIS Regulations (which imposes certain standards for trustees in formulating an investment strategy for SMSFs), you must ensure that the advice:

- is not about the acquisition or disposal by a superannuation fund, including an SMSF, of specific financial products or classes of financial product
- does not include a recommendation that a person acquire or dispose of a superannuation product
- does not include a recommendation about a person's existing holding in a superannuation product, for the purpose of modifying an investment strategy or a contribution level.

If your client is a retail client, under regulation 7.1.29(5)(d) you must also provide a written statement warning them that:

- you are not licensed to provide financial product advice under the Corporations Act
- they should consider taking advice from an AFS licensee before making a decision about a product.

Asset allocation and investment strategy

Without an AFS licence, you may not advise your client about their retirement investment strategy, including whether your 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.

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However, you may provide a recommendation or statement of opinion to your clients on broad asset allocation within their SMSF: regulation 7.1.33A. That is, what proportion of funds should be allocated across one or more of the following 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 to providing class of product advice, which requires a licence: see Limited financial services. 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: see regulation 7.1.33A.

This means that you may provide a recommendation or statement of opinion on asset allocation among the broad categories listed above, but not among classes of financial product or specific products within those categories. For example, you may recommend that your client hold a certain proportion of their SMSF funds in one of the eligible product types (e.g. shares), but to make any of the recommendations set out in the table below you will need the appropriate licence.

Tax advice on SMSFs and other financial products

Providing tax advice is a core part of an accountant's practice. However, in the course of providing tax advice relating to SMSFs, you might also provide financial product advice. For example, when you advise 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), you may provide advice on the taxation implications of financial products without being covered by an AFS licence. This exemption allows you to provide financial product advice on your client's interest in an SMSF or a financial product they hold through their SMSF, as long as this advice is merely incidental to the tax advice you are providing and not a separate recommendation on the merits of the financial product itself.

However, you can only rely on this exemption if:

- you do not receive a benefit as a result of your client acquiring a financial product mentioned in your advice (other than the remuneration you receive directly from the client or someone associated with the client, such as another SMSF member)
- your client is a retail client and you also provide a statement warning them that:
- you are not licensed to provide financial product advice under the Corporations Act

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- taxation is only one of the matters that must be considered when making a decision on a financial product
- they should consider taking advice from an AFS licensee before making a decision on a financial product.

All AFS licensees and their representatives who provide tax advice in the context of financial advice (tax (financial) advisers) for a fee or other reward must be registered with the Tax Practitioners Board. For further information about tax (financial) advisers and the requirement to be registered, please see www.tpb.gov.au.

Referring clients to AFS licensees or representatives

At various points across the range of SMSF services you provide, clients might seek advice from you that is financial product advice and does not fall within any of the exemptions described in this information sheet – for example, whether they should establish an SMSF, whether they should transfer their balance from another fund, or what investments they should make through the SMSF.

While you may not provide such advice without being covered by an AFS licence, you may refer your client on to an AFS licensee or representative: regulations 7.6.01(1)(e)–(ea). In doing so, you must:

- let your client know that the AFS licensee or representative can provide the type of financial service or services the client requires
- give the client contact details for the AFS licensee or representative (rather than arranging for contact to occur yourself)
- unless the AFS licensee or representative is related to you (e.g. it is a related company or you are its representative), disclose any benefits or commissions that you or your associates might receive as a result of the referral or any subsequent services provided to the client.”

ANY QUERIES PLEASE CONTACT ME:

Brett Walker

brett@fsi.net.au

NOTE: This guide is not legal advice, it is a summary of the relevant topic. Do not rely on anything in this guidance without first discussing with Brett Walker.