

Sydney Community Foundation

Professional Advisers Network Seminar

Private Ancillary Funds

12 October 2009

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Freehills

Topics

- Background to review of prescribed private fund rules
- Source materials for private ancillary fund rules
- ATO materials
- Highlights of new rules
- Transitional provisions
- QTMBFAQs
- Discussion/questions

Background to review of prescribed private fund (PPF) rules

- Some compliance issues identified by ATO
- Change in practice with regard to approving gift accumulation plans
- Government started reviewing policy in 2006

Source materials for PAF rules

- May 2008 budget announcement - legislation to improve integrity of PPFs
- Discussion paper released on 26 November 2008 - 138 submissions made
- Exposure Draft Bill released 14 May 2009 - 14 submissions made
- Tax Laws Amendment (2009 Measures No. 4) Bill 2009 introduced 25 June 2009 (Schedule 2)
- Explanatory Memorandum on 25 June 2009
- Consultation draft of guidelines released on 25 June 2009

Source materials for new rules (cont'd)

- Correction to the Explanatory Memorandum
10 September 2009
- Tax Laws Amendment (2009 Measures No. 4) Act 2009
passed 10 September 2009 and received Royal Assent
on 18 September
- Private Ancillary Fund Guidelines 2009 signed on 28
September 2009
- Explanatory Statement to Private Ancillary Fund
Guidelines 2009 (28 September 2009)

ATO materials

- ATO Non-Profit News Service No. 0246 1 July 2009

Imminent

- Model trust deed
- Agreement to comply with rules in PAF Guidelines
- Revocation of agreement
- [Current] DGR application for endorsement form NAT 2948
- Instructions – PAF endorsement as a DGR NAT 2949
- Schedule for DGR applicants

www.ato.gov.au/nonprofit and searching for 'PAF web page'

ATO materials (cont'd)

Not so imminent

- FAQs
- Web page

Highlights of new rules

- General application of new rules from 1 October 2009
- The new guidelines are a legislative instrument and so have legal effect
- Two steps to obtain DGR status
 - establish a private ancillary fund; and
 - have it endorsed as a DGR
- Only a constitutional corporation can be a trustee of a PAF
- Penalties can be imposed on trustees and their directors

Highlights of new rules (cont'd)

- Commissioner may suspend or remove a trustee if breach of guidelines or other law
- A PAF must agree to comply with the guidelines
- In each year, a PAF must distribute (an amount equal to the value of) at least 5% of its net assets
- Market value of the assets, other than land, must be estimated at least annually
- Market value of land must be estimated at least once in three years

Highlights of new rules (cont'd)

- A current investment strategy must be maintained and implemented - records of decision-making kept
- A PAF may not borrow or maintain an existing borrowing (some exceptions)
- A PAF must not acquire a collectable (exception in the case of a gift if item is disposed of within 12 months)
- A PAF may not carry on a business
- A PAF must not solicit donations from the public
- A PAF must not accept donations in any year that total more than 20% of the market value of its assets except from the founder, associates of the founder, employees of the founder, or a deceased estate of the above

Highlights of new rules (cont'd)

- The fund must issue a receipt for every gift to it
- If the fund ceases to be a PAF, its assets must be fully distributed to DGRs
- With the agreement of the Commissioner, the fund may convert to a public ancillary fund

Transitional rules for PPFs

- PPFs are taken to have agreed on 1 October 2009 to comply with the new guidelines
- PPFs are taken to have been endorsed as DGRs on 1 October 2009
- The rules with regard to constitutional corporations do not apply to PPFs until all trustees are in fact constitutional corporations
- A PPF can, if authorised by its trust deed, transfer its assets to a PAF
- An existing accumulation plan can operate until 30 June 2014 unless the fund chooses to adopt the 5% distribution requirement earlier

Transitional rules for PPFs (cont'd)

- If the trust deed prevents compliance with a guideline, the fund is generally exempt from complying with that guideline until 1 October 2012
- A fund may maintain a borrowing it holds as at 30 September 2009
- A fund whose rules prevent the trustee from complying with a requirement in the guidelines must seek to change its rules by 1 October 2012

Questions that may become Frequently Asked Questions

- Will a PPF established using a version of the PPF model deed, be able to comply with the new legislation and guidelines without variation of the deed?
- Will a PAF be in breach of the “no business” rule by trading in shares etc?
- Is it possible to “adopt” the new 5% distribution rule as from 1 July 2009?
- Is it necessary for a PAF to be wound up if it ceases to be a PAF, even though its endorsement as a DGR has not been revoked?
- From what date can new PAFs be established?

Questions that may become Frequently Asked Questions (cont'd)

- What are the likely time-frames for PAF endorsements?
- Can expenses be deducted from the minimum 5% distribution requirement?
- Do I need to send the PAF's investment strategy to the ATO?
- How will PAFs that do not have a constitutional corporation as trustee be treated?
- Should I resign as a Responsible Person!!?

Serious caution!

These slides contain some general and incomplete statements and should not be relied on without specific professional advice

Questions/discussion