

Self managed super funds qualifying as wholesale clients and sophisticated investors

Executive Summary

SMSF's can be classified as wholesale clients and sophisticated investors for the purpose of investing in securities (including bonds), if the trustee or the trust provides an accountant's certificate which states that the trustee or the trust:

1. holds net assets of at least \$2.5 million or has income for the past 2 years equal to or greater than \$250,000; or
2. is controlled by a person that holds net assets of at least \$2.5 million or has income for the past 2 years equal to or greater than \$250,000.

Background

Section 761A¹ defines a retail client as having the meanings given by sections 761G and 761GA. Section 761G provides that a financial product or financial service is provided to a person as a retail client unless subsection (5), (6), (6A), (7) or section 761GA provides otherwise. Section 761G(4) confirms that a financial product or financial services is provided to a person as a wholesale client if it is not provided to the person as a retail client.

None of the financial services or products offered by FIIG to its clients (which include clients which are SMSF) relate to or are superannuation products², general insurance, RSA products or traditional trustee company services. This means that sections 761GA(5), (6) and (6A) are not determinative of the issue.

Section 761G(7)

Question: Can a SMSF be a wholesale client for the purpose of purchasing securities (including bonds)?

Answer: Yes

Reason:

The relevant conditions to determine if a SMSF is a wholesale client are those set out in section 761G(7). If one of those provisions applies then it removes the 'person' who is being provided with the financial product or financial service from being a retail client. The applicable provision in relation to SMSF's is section 761G(7)(c).

Section 761G(7)(c) applies where:

"the financial product, or the financial service, is not provided for use in connection with a business, and the person who acquires the product or service gives the provider of the product or service, before the provision of the product or service, a copy of a certificate given within the preceding two years by a qualified accountant (as defined in section 9) that states that the person:

1. (i) has net assets of at least \$2.5 million³; or
2. (ii) has a gross income for each of the last 2 financial years of at least \$250,000⁴;"

Therefore a SMSF will meet the requirements to be a wholesale client provided it can give FIIG, before the provision of the product or service, a copy of a certificate prepared by a qualified accountant within the proceeding two years that states the trustee:

- has net assets of at least \$2.5 million; or
- has gross income for each of the last 2 financial years of at least \$250,000.

The 'person' referred to in section 761G(7)(c) is the trustee of the SMSF and not the trust. This is because the trust itself is not a legal entity. The trustee is the owner at law of the assets of the trust which it holds for the benefit of the beneficiaries. Therefore the trustee holds the assets of the trust. If the trust has assets of at least \$2.5 million then the trustee (and consequently the trust) becomes a person who can be a wholesale client within the meaning of section 761G(7)(c).

In addition, regulation 7.6.02AB inserts sub-section 761G(7)(ca) into the provisions of section 761G(7):

"the financial product, or the financial service, is acquired by a company or trust controlled by a person who meets the requirements of subparagraph (c)(i) or (ii)."

As a result, a trust (such as a SMSF) can also be classified as a wholesale client if the trust is controlled by a trustee who has net assets of at least \$2.5 million or has gross income for each of the last 2 financial years of at least \$250,000.

¹ All references in this document are references to the Corporations Act and the Corporations Regulations (Cth) 2001

² Superannuation product is defined as a beneficial interest in a superannuation entity which is a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust, Superannuation (Supervision) Act 1993 (Cth).

³ Regulation 7.1.28.

⁴ Regulation 7.1.28.

Section 708(8)

Question: Can a SMSF be a sophisticated investor and therefore be given an offer of securities (corporate bonds) without a disclosure document being required under Part 6D?

Answer: Yes

Reason:

Sections 708(8)(c) and (d) are similar to sections 761G(7)(c) and (ca) with the investor, being the person to whom the offer is made, being required to have a minimum net assets of \$2.5 million or a minimum gross income of \$250,000 for the last 2 financial years or being controlled by a person who has net assets of \$2.5 million or a minimum gross income of \$250,000 for the last 2 financial years.

The test being met in section 708(8)(c) is by the person to whom the offer is made. By contrast, the test being met in section 708(8)(d) is satisfied where the offer is made to a trust and the trustee (being the person who controls the trust) is a person who meets the requirements in sub-section (c).

Therefore if a trustee or a trust is given an accountant's certificate which states that the trust or trustee:

- has net assets of at least \$2.5 million; or
- has gross income for each of the last financial years of at least \$250,000,

the trust (such as a SMSF) can be classified as a sophisticated investor and therefore be given an offer of securities without a disclosure document.

The trust can also be classified as a sophisticated investor where it is given an accountant's certificate which states that the trust is controlled by a person who:

- has net assets of at least \$2.5 million; or
- has gross income for each of the last financial years of at least \$250,000.

Conclusion

SMSFs can be classified as wholesale clients and sophisticated investors for the purpose of investing in securities (including bonds), where the trustee or the trust provide an accountant's certificate which states that the trustee or the trust:

1. holds net assets of at least \$2.5 million or has a minimum gross income of \$250,000 for the last 2 financial years; or
2. is controlled by a person that holds net assets of at least \$2.5 million or has a minimum gross income of \$250,000 for the last 2 financial years⁵.

⁵ Consistently, the National Australia Bank (NAB) in promoting its Access Bond Service states that in order to classify as a wholesale client and sophisticated investor a trustee or trust (including SMSF's) must have either net assets of \$2.5million or income for the last 2 financial years of \$250,000 or be controlled by a person who meets those requirements.



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