



Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2015

I, Kelly O'Dwyer, Assistant Treasurer, make the following Guidelines under sections 426-103 and 426-110 in Schedule 1 to the *Taxation Administration Act 1953*.

Dated: *[insert date]*

EXPOSURE DRAFT – NOT FOR SIGNATURE

Kelly O'Dwyer
Assistant Treasurer

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1 Name of Instrument

This instrument is the *Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2015*.

2 Commencement

This instrument commences on 1 July 2016.

3 Authority

This instrument is made under sections 426-103 and 426-110 in Schedule 1 to the *Taxation Administration Act 1953*.

4 Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments to the Private Ancillary Fund Guidelines 2009

Private Ancillary Fund Guidelines 2009

@1 Guideline 8 (the 2nd dash point)

Omit “Commissioner”, substitute “Commissioner and the Commissioner of the Australian Charities and Not-for-profits Commission (if a *registered charity)”.

@2 Guideline 8 (note)

Repeal the note, substitute:

*Note: This does not affect either Commissioner’s obligations to protect the confidentiality of a *private ancillary fund’s information under privacy, and secrecy and disclosure laws.*

@3 Guideline 12 (note)

Repeal the note.

@4 Guideline 14 (at the end of the Guideline)

Insert:

- 14.2. An individual with a degree of responsibility to the Australian community as a whole includes an individual before whom a statutory declaration may be made.

Example: An individual before whom a statutory declaration may be made includes those who are licensed or registered to practise in a range of occupations such as a dentist, legal or medical practitioner; a nurse, a pharmacist, a bailiff, a bank officer or officer of a building society or credit union with 5 or more continuous years of service; a clerk of the court; a justice of the peace, a judge, a magistrate; a member of various professional associations including a member of Engineers Australia, a member of Chartered Secretaries Australia; a member of the various professional accounting associations in Australia; a marriage celebrant, mayors, town clerks and members of Parliament; a government employee with 5 or more years of continuous service; a teacher employed on a full-time basis at a school or tertiary education institution.

- 14.3 This guideline does not apply to the Public Trustee of a state or territory.

@5 Guideline 17 (at the end of the Guideline but before the penalty)

Insert:

17.1 However, the trustee does *not* need to notify the Commissioner under this guideline if the trustee is required to notify the Commissioner of the Australian Charities and Not-for-profits Commission of the same information under Division 65 of the *Australian Charities and Not-for-profits Commission Act 2012*.

@6 Guideline 19

Omit “5 per cent”, substitute “the ***minimum annual distribution percentage***”.

@7 Guideline 19.1

Before Guideline 19.1, insert:

19.1A The ***minimum annual distribution percentage*** is the lesser of:

- the average of the Reserve Bank of Australia’s target for the cash rate, which is the overnight money market interest rate, over the previous *financial year (expressed as a percentage); or
- the rate calculated using the following method statement (the result of which is to be expressed as a percentage):

Method statement

- | | |
|----------------|---|
| <i>Step 1.</i> | Work out the *market value of the fund’s net assets as at the end of the previous *financial year. |
| <i>Step 2.</i> | Subtract from the amount worked out under step 1, the market value of the fund’s net assets as at the end of the financial year before the previous financial year. |
| <i>Step 3.</i> | Add to the result of step 2, any expenses the trustee has been notified of that Commissioner is satisfied do not comply with these Guidelines. |
| <i>Step 4.</i> | Divide the result of step 3 by the market value of the fund’s net assets as at the end of the previous *financial year. |

Note: The result of step 3 will generally be the fund's net investment earnings or returns (according to accounting concepts) for the previous financial year less any reasonable expenses. It is this amount that will need to be distributed under this method.

@8 Guideline 19.1 (not including the note)

Omit all the words after “year” (first occurring), substitute “if any expenses of the fund in relation to that financial year are paid directly or indirectly from the fund’s assets or income.”

@9 Guideline 19.1 (note)

Omit all the words after “minimum annual distribution is”, substitute “the amount calculated under Guideline 19. If any of a fund’s expenses are paid out of the fund’s assets or income, its minimum distribution is \$11,000 or the amount calculated under Guideline 19, whichever is greater.”

@10 Guideline 19.3 (at the end of the Guideline and after the examples)

Insert:

Example 3: If a private ancillary fund invests in a social impact bond issued by a deductible gift recipient with a return that is less than the market rate of return on a similar corporate bond issue, the fund is providing a benefit whose market value is equal to the interest saved in the financial year by the deductible gift recipient from issuing the bond at a discounted rate of return.

@11 Guideline 20 (note)

Omit “section 22”, substitute “section 2B”.

@12 Guideline 20.1 (note 3)

Omit “(through the Australian Valuation Office)”.

@13 Guideline 21.1

Omit “(through the Australian Valuation Office)”.

@14 Guideline 21.1.1 (note)

Omit “(through the Australian Valuation Office)”.

@15 Guideline 22 (note)

Omit “(through the Australian Valuation Office)” (wherever occurring).

@16 Guideline 23

Omit “Esimates”, substitute “Estimates”.

@17 Guideline 26.1 (at the end of the Guideline)

Insert:

Note: A financial report prepared in accordance with Subdivision 60-C of the Australian Charities and Not-for-profits Commission Act 2012 meets this requirement.

@18 Guideline 27

Omit “request.”, substitute “request, unless the financial statements have already been given to the Commissioner of the Australian Charities and Not-for-profits Commission.”

@19 Guideline 28.1

Repeal the Guideline, substitute:

28.1. The auditor must be a registered company auditor (within the meaning of the *Corporations Act 2001*).

28.1.1. The Public Trustee of a state or territory may have the Auditor-General of that state or territory undertake the audit.

28.1A. Unless the Commissioner, by written notice, provides otherwise, a *private ancillary fund with both revenue and assets of less than \$500,000 in relation to a particular financial year, may instead have its financial statements and compliance with these guidelines reviewed rather than audited.

28.1A.1 A reviewer must be a registered company auditor (within the meaning of the *Corporations Act 2001*). However, an individual who is taken to be a registered company auditor under section 324BE of the *Corporations Act 2001* is taken to be a registered company auditor for the purpose of this guideline.

Note: This has the effect of widening the class of individuals who can undertake a review.

@20 Guideline 28.2

Repeal the Guideline, substitute:

28.2 The auditor or reviewer must undertake the audit or review, and provide the fund with a report, in accordance with the *auditing standards.

@21 Guideline 28.3

Omit “audit”, substitute “audit or review”.

@22 Guideline 29

Omit “audit”.

@23 Guideline 29

Omit “request.”, substitute “request, unless the report has already been given to the Commissioner of the Australian Charities and Not-for-profits Commission.”

@24 Guideline 30.2

At the end of the guideline, insert:

- status of the fund as a *registered charity (where applicable); and
- perceived or actual material conflicts of interest in holding particular investments (including those relating to individuals involved in the decision-making of the fund).

@25 Guideline 31 (the penalty amount)

Omit “10”, substitute “15”.

@26 Guideline 32

Omit “an auditor”, substitute “an auditor, a reviewer,”.

@27 Guideline 35.1

Repeal the Guideline, substitute:

35.1 However, this guideline does not apply to:

- the acquisition of a financial instrument excluded by the Commissioner from that guideline; or
- a loan guarantee entered into for the sole benefit of one or more *deductible gift recipients.

@28 After Guideline 37 (at the end of the Guideline)

Insert:

- 37.1 However, this guideline does not prevent a licensed trustee company or the Public Trustee of a state or territory from operating common funds for investment purposes.

@29 After Guideline 40 (but before the note)

Insert:

- 40.1A However, a fund does not contravene this guideline merely because its investment activities, because of repetition, volume and regularity, mean that it is *carrying on a *business.

@30 Guideline 42 (last dot point)

Omit, “entities.”, substitute “entities (other than a *deductible gift recipient).”.

@31 Guideline 43 (at the end of the Guidelines)

Insert:

Note: A trustee incurs reasonable expenses on behalf of a fund when providing reasonable remuneration benefits to some of the individuals listed in guideline 42 (including providing benefits of a minor or incidental nature to an employee).

@32 At the end of Part 2

Insert:

PORTABILITY

51A. With the agreement of the Commissioner, a *private ancillary fund may transfer assets to another *private ancillary fund if:

- it transfers all of its net assets to that ancillary fund; and
- it has already complied with guidelines 19 to 19.6 for that financial year (about minimum annual distributions); and
- any of the assets of the fund have not been received from another ancillary fund during the 2 previous financial years.

@33 Guidelines 53 to 55

Repeal the Guidelines (including the headings).

@34 Guidelines 56 to 58

Repeal the Guidelines (not including the heading).

EXPOSURE DRAFT

Schedule 2—Amendments to the Public Ancillary Fund Guidelines 2011

Public Ancillary Fund Guidelines 2011

@1 Guideline 8 (the 2nd dash point)

Omit “Commissioner”, substitute “Commissioner and the Commissioner of the Australian Charities and Not-for-profits Commission (if a *registered charity)”.

@2 Guideline 8 (note)

Repeal the note, substitute:

*Note: This does not affect either Commissioner’s obligations to protect the confidentiality of a *public ancillary fund’s information under privacy, and secrecy and disclosure laws.*

@3 Guideline 12 (note)

Repeal the note.

@4 Guideline 14.1 (excluding the example)

Repeal the guideline, substitute:

- 14.1. An individual with a degree of responsibility to the Australian community as a whole includes an individual before whom a statutory declaration may be made.

@5 Guideline 17 (at the end of the Guideline but before the penalty)

Insert:

- 17.1 However, the trustee does *not* need to notify the Commissioner under this guideline if the trustee is required to notify the Commissioner of the Australian Charities and Not-for-profits Commission of the same information under Division 65 of the *Australian Charities and Not-for-profits Commission Act 2012*.

@6 Guideline 19

Omit “4 per cent”, substitute “the ***minimum annual distribution percentage***”.

@7 Guideline 19.1

Before Guideline 19.1, insert:

19.1A The ***minimum annual distribution percentage*** is the lesser of:

- the average of the Reserve Bank of Australia's target for the cash rate, which is the overnight money market interest rate, over the previous *financial year (expressed as a percentage); or
- the rate calculated using the following method statement (the result of which is to be expressed as a percentage):

Method statement

- Step 1.* Work out the *market value of the fund's net assets as at the end of the previous *financial year.
- Step 2.* Subtract from the amount worked out under step 1, the market value of the fund's net assets as at the end of the financial year before the previous financial year.
- Step 3.* Add to the result of step 2, any expenses the trustee has been notified of that Commissioner is satisfied do not comply with these Guidelines.
- Step 4.* Divide the result of step 3 by the market value of the fund's net assets as at the end of the previous *financial year.

Note: The result of step 3 will generally be the fund's net investment earnings or returns (according to accounting concepts) for the previous financial year less any reasonable expenses. It is this amount that will need to be distributed under this method.

@8 Guideline 19.1 (not including the note)

Repeal all the words after "year" (first occurring), substitute "if any expenses of the fund in relation to that financial year are paid directly or indirectly from the fund's assets or income."

@9 Guideline 19.1 (note)

Repeal all the words after "minimum annual distribution is", substitute "the amount calculated under Guideline 19. If any of a fund's expenses are

paid out of the fund's assets or income, its minimum distribution is \$8,800 or the amount calculated under Guideline 19 whichever is greater."

@10 Guideline 20.1 (note 3)

Omit "(through the Australian Valuation Office)".

@11 Guideline 21.1

Omit "(through the Australian Valuation Office)".

@12 Guideline 21.1.1 (note)

Omit "(through the Australian Valuation Office)".

@13 Guideline 22 (note)

Omit "(through the Australian Valuation Office)" (wherever occurring).

@14 Guideline 26.1 (at the end of the Guideline)

Add:

Note: A financial report prepared in accordance with Subdivision 60-C of the Australian Charities and Not-for-profits Commission Act 2012 meets this requirement.

@15 Guideline 27

Omit "request.", substitute "request, unless the financial statements have already been given to the Commissioner of the Australian Charities and Not-for-profits Commission."

@16 Guideline 29

Omit "request.", substitute "request, unless the report has already been given to the Commissioner of the Australian Charities and Not-for-profits Commission."

@17 Guideline 30.2

At the end of the guideline, add:

- status of the fund as a *registered charity (where applicable); and
- real or perceived material conflicts of interest in holding particular investments (including those relating to individuals involved in the decision-making of the fund).

@18 Guideline 31 (the penalty amount)

Omit “10”, substitute “15”.

@19 Guideline 32

Omit “an auditor”, substitute “an auditor, a reviewer,”.

@20 Guideline 35.1

Repeal the Guideline, substitute:

35.1 However, this guideline does not apply to:

- the acquisition of a financial instrument excluded by the Commissioner from that guideline; or
- a loan guarantee entered into for the sole benefit of one or more *deductible gift recipients.

@21 Guideline 44 (note)

Omit “Note”, substitute “Note 1”.

@22 Guideline 44 (at the end of the Guideline)

Insert:

Note 2: Due to the public nature of the fund, it is good practice for a trustee to review, amongst other things, the purpose(s) of the fund and any non-binding preferences indicated by donors, before making distributions.

@23 Guideline 50

Omit “*ancillary fund”, substitute “public ancillary fund”.

@24 Guideline 50 (last dot point)

Omit “the net assets”, substitute “any asset of the fund”.

@25 Guideline 50 (last dot point)

Omit “transferred to”, substitute “received from”.

@26 Guidelines 52 and 53

Repeal the Guidelines (including the headings).

@27 Guidelines 54 and 55

Repeal the Guidelines (not including the headings).

EXPOSURE draft