



Private Ancillary Fund and Public Ancillary Fund Amendment Guidelines 2016

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: 29 April 2016

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 2016*.

2 Commencement

This instrument commences the day after registration.

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Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.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 “per cent”, substitute “per cent (*minimum annual distribution rate*)”.

7 Guideline 19 (note)

Omit “Note:”, substitute “Note 1:”.

8 Guideline 19 (after note 1)

Insert:

Note 2: The minimum annual distribution rate may be lowered under Guidelines 19.2 and 19.7 for a financial year.

9 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.

10 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.”

11 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.

Example 4: If a private ancillary fund lends money to a deductible gift recipient at a discount to the interest rate which would be charged on a comparable loan sourced from a financial institution at arm's length, the fund is providing a benefit whose market value is equal to the discount.

Example 5: If a private ancillary fund guarantees a loan provided by a financial institution to a deductible gift recipient, the fund is providing a benefit whose market value is equal to the discount to the interest rate which would be charged on a comparable arm's length unsecured loan sourced from that financial institution.

Example 6: Continuing example 5, if the deductible gift recipient defaults on the loan and the fund is called on under the guarantee to make a payment to the financial institution on behalf of the deductible gift recipient, the payment is a distribution (being the provision of money, property or benefits).

Note 1: The Commissioner may approve safe harbour valuation methodologies to assist trustees in calculating the market value of a benefit provided to a deductible gift recipient – see Subdivision 960-M of the Income Tax Assessment Act 1997.

12 After Guideline 19.6

Insert:

Accessing a lower minimum distribution rate for a financial year

- 19.7. Upon application, in the *approved form, the Commissioner may reduce (but not to zero) the minimum annual distribution rate for a fund for a *financial year. The reduction may be subject to any conditions the Commissioner thinks fit.
- 19.7.1. Recognising the purpose and object of the fund, the Commissioner must only reduce the minimum annual distribution rate if the Commissioner is satisfied that there are circumstances that warrant the Commissioner reducing the rate.
- 19.7.2. The Commissioner may reduce the minimum annual distribution rate at any time, including after the relevant financial year has finished.
- 19.7.3. In determining whether to reduce the rate and what the reduced rate should be, the Commissioner must have regard to:

- the general market conditions in Australia; and
- the past, current and expected levels of returns from the fund's investments; and
- the long-term impact on the assets of the fund from not reducing the rate for a *financial year; and
- the level of distributions made by the fund in previous financial years; and
- the investment strategy and distribution strategy of the fund; and
- the size of the fund; and
- the compliance history of the fund and the trustee; and
- the fees and expenses of the fund; and
- the terms and other circumstances relating to any gift to the fund under a will; and
- any other matter the Commissioner considers relevant.

*Note 1: Having regard to the general market conditions in Australia, could include reviewing the Reserve Bank of Australia's target for the cash rate (which is the overnight money market interest rate), the *base interest rate, current returns of other ancillary funds, and the performance of *approved stock exchanges. It could also include examining changes in conditions over time.*

13 Guideline 20 (note)

Omit "section 22", substitute "section 2B".

14 Guideline 20.1 (note 3)

Omit "(through the Australian Valuation Office)".

15 Guideline 21.1

Omit "(through the Australian Valuation Office)".

16 Guideline 21.1.1 (note)

Omit "(through the Australian Valuation Office)".

17 Guideline 22 (note)

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

18 Guideline 23

Omit “Esimates”, substitute “Estimates”.

19 Guideline 26.1 (at the end of the Guideline)

Insert:

Note: If a fund is required to prepare, and does prepare, a financial report in accordance with Subdivision 60-C of the Australian Charities and Not-for-profits Commission Act 2012, it will meet this requirement.

20 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.”

21 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 \$1 million 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.

22 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.

23 Guideline 28.3

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

24 Guideline 29

Omit “audit”.

25 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.”

26 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); and
- the terms and other circumstances relating to any gift to the fund under a will.

27 Guideline 31 (the penalty amount)

Omit “10”, substitute “15”.

28 Guideline 32

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

29 Guideline 34

Omit “basis.”, substitute “unless another guideline allows otherwise.”

30 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
- an agreement to guarantee the repayment of any money lent by a creditor for the sole benefit of one or more *deductible gift recipients.

31 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.

32 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.

33 Guideline 42 (last dot point)

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

34 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).

35 At the end of Part 2

Insert:

PORTABILITY

51A. With the agreement of the Commissioner, a *private ancillary fund may transfer assets to another * 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
- the net assets of the fund have not been received from another ancillary fund during the 2 previous financial years.

36 Guidelines 52 to 55

Repeal the Guidelines (including the headings).

37 Guidelines 56 to 58

Repeal the Guidelines (not including the heading).

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 “per cent”, substitute “per cent (***minimum annual distribution rate***)”.

7 Guideline 19 (note)

Omit “Note:”, substitute “Note 1:”.

8 Guideline 19 (after note 1)

Insert:

Note 2: The minimum annual distribution rate may be lowered under Guidelines 19.2 and 19.7 for a financial year.

9 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.”

10 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.”

11 Guideline 19.3 (at the end of the Guideline and after the examples)

Insert:

Example 4: If a public ancillary fund lends money to a deductible gift recipient at a discount to the interest rate which would be charged on a comparable loan sourced from a financial institution at arm’s length, the fund is providing a benefit whose market value is equal to the discount.

Example 5: If a public ancillary fund guarantees a loan provided by a financial institution to a deductible gift recipient, the fund is providing a benefit whose market value is equal to the discount to the interest rate which would be charged on a comparable arm’s length unsecured loan sourced from that financial institution.

Example 6: Continuing example 5, if the deductible gift recipient defaults on the loan and the fund is called on under the guarantee to make a payment to the financial institution on behalf of the deductible gift recipient, the payment is a distribution (being the provision of money, property or benefits).

Note 1: The Commissioner may approve safe harbour valuation methodologies to assist trustees in calculating the market value of a benefit provided to a deductible gift recipient – see Subdivision 960-M of the Income Tax Assessment Act 1997.

12 After Guideline 19.6

Insert:

Accessing a lower minimum distribution rate for a financial year

19.7. Upon application, in the *approved form, the Commissioner may reduce (but not to zero) the minimum annual distribution rate for a fund for a *financial year. The reduction may be subject to any conditions the Commissioner thinks fit.

19.7.1. Recognising the purpose and object of the fund, the Commissioner must only reduce the minimum annual distribution rate if the Commissioner is satisfied that there are circumstances that warrant the Commissioner reducing the rate.

19.7.2. The Commissioner may reduce the minimum annual distribution rate at any time, including after the relevant financial year has finished.

19.7.3. In determining whether to reduce the rate and what the reduced rate should be, the Commissioner must have regard to:

- the general market conditions in Australia; and
- the past, current and expected levels of returns from the fund's investments; and
- the long-term impact on the assets of the fund from not reducing the rate for a *financial year; and
- the level of distributions made by the fund in previous financial years; and
- the investment strategy and distribution strategy of the fund; and
- the size of the fund; and
- the compliance history of the fund and the trustee; and
- the fees and expenses of the fund; and

- the terms and other circumstances relating to any gift to the fund under a will; and
- any other matter the Commissioner considers relevant.

*Note 1: Having regard to the general market conditions in Australia, could include reviewing the Reserve Bank of Australia's target for the cash rate (which is the overnight money market interest rate), the *base interest rate, current returns of other ancillary funds, and the performance of *approved stock exchanges. It could also include examining changes in conditions over time.*

13 Guideline 20.1 (note 3)

Omit "(through the Australian Valuation Office)".

14 Guideline 21.1

Omit "(through the Australian Valuation Office)".

15 Guideline 21.1.1 (note)

Omit "(through the Australian Valuation Office)".

16 Guideline 22 (note)

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

17 Guideline 26.1 (at the end of the Guideline)

Add:

Note: If a fund is required to prepare, and does prepare, a financial report in accordance with Subdivision 60-C of the Australian Charities and Not-for-profits Commission Act 2012, it will meet 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 29

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

20 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); and
- the terms and other circumstances relating to any gift to the fund under a will.

21 Guideline 31 (the penalty amount)

Omit “10”, substitute “15”.

22 Guideline 32

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

23 Guideline 34

Omit “basis.”, substitute “unless another guideline allows otherwise.”

24 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
- an agreement to guarantee the repayment of any money lent by a creditor for the sole benefit of one or more *deductible gift recipients.

25 Guideline 44 (note)

Omit “Note”, substitute “Note 1”.

26 Guideline 44 (at the end of the Guideline)

Insert:

Note 2: Due to the public nature of the fund, it will generally be 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, unless the governing rules of the fund provide otherwise.

27 Guideline 50

At the end of the guideline, add:

- 50.1. The Commissioner must not agree to the transfer of assets between *ancillary funds if the transfer involves moving assets contributed, either directly or indirectly, by the general public from a public ancillary fund to a private ancillary fund.

28 Guidelines 52 and 53

Repeal the Guidelines (including the headings).

29 Guidelines 54 and 55

Repeal the Guidelines (not including the headings).