WHAT ARE PUBLIC OFFER ENTITIES?

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<table>
<thead>
<tr>
<th>Contents</th>
<th>Paragraph</th>
</tr>
</thead>
<tbody>
<tr>
<td>Objectives</td>
<td>1</td>
</tr>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td>What is a public offer entity?</td>
<td>5</td>
</tr>
<tr>
<td>What is a public offer superannuation fund?</td>
<td>8</td>
</tr>
<tr>
<td>Standard employer-sponsored funds</td>
<td>11</td>
</tr>
<tr>
<td>Standard employer-sponsored members</td>
<td>18</td>
</tr>
<tr>
<td>Prescribed classes – former standard employer-sponsored members and spouses</td>
<td>22</td>
</tr>
<tr>
<td>Election to be a public offer superannuation fund</td>
<td>32</td>
</tr>
<tr>
<td>Declaration by APRA that a fund is a public offer superannuation fund</td>
<td>34</td>
</tr>
<tr>
<td>Declaration by APRA that a fund is not a public offer superannuation fund</td>
<td>37</td>
</tr>
</tbody>
</table>
Objectives

1. The aim of this Circular is to explain which superannuation entities are public offer entities under the *Superannuation Industry (Supervision) Act 1993* (“SIS”).

2. This Circular replaces and updates Superannuation Circular III.A.5 entitled “Which Funds are Public Offer Funds?” which was released by the Australian Prudential Regulation Authority (APRA) in September 1998. It incorporates amendments of SIS made by the *Superannuation Legislation Amendment Act (No 3) 1999* (SLAA3) which came into effect on 8 October 1999.

Introduction

3. The concept of a public offer entity is established in sections 10 and 18 of SIS. Broadly speaking the concept covers those superannuation entities offering, or intending to offer, superannuation interests to the public on a commercial basis.

4. They are subject to prudential requirements over and above those applying to entities which are not public offer entities. This is due to the nature of public offer entities and the potential diversity of their membership. These additional requirements are designed to enhance internal control systems, and to inform and protect members.

What is a public offer entity?

*Section 10*

5. The following types of funds and trusts, as defined by section 10 of SIS, are public offer entities:

- public offer superannuation funds;

- approved deposit funds (ADFs), but not excluded ADFs; and

- pooled superannuation trusts (PSTs).

Small APRA supervised superannuation funds (SAFs) are capable of being public offer superannuation funds, that is, superannuation funds with fewer than 5 members that are not self managed superannuation funds but which do meet the definition of a public offer superannuation fund in subsection 18(1) of SIS.
6. An excluded ADF is an ADF that has only one beneficiary and either:

• was established before 1 July 1994; or
• was established on or after 1 July 1994 with an eligible termination payment of at least $400,000.

7. ADFs (except for excluded ADFs) and PSTs are public offer entities by definition whereas a superannuation fund (including a SAF) may or may not be a public offer fund, depending on the circumstances. This Circular discusses the circumstances peculiar to public offer superannuation funds.

What is a public offer superannuation fund?

Section 18

8. A public offer superannuation fund is defined in section 18 of SIS. Basically, a superannuation fund (including a small APRA supervised fund) is a public offer superannuation fund if any of the following apply:

• the fund is a regulated superannuation fund which is not a standard employer-sponsored fund; or

• the fund is a standard employer-sponsored fund that has at least one member who:
  ➢ is not in a prescribed class (see paragraphs 22 to 31 below); and
  ➢ is not a standard employer-sponsored member; or

• the trustee of the fund has elected for the fund to become a public offer superannuation fund; or

• APRA has declared the fund to be a public offer superannuation fund; and

• the fund is not a self managed superannuation fund (SMSF); and

• APRA has not declared the fund not to be a public offer superannuation fund.

A fund can be both an employer-sponsored fund and a public offer fund simultaneously. When this occurs, the fund must have an approved trustee regardless of the fact that the fund is a standard employer sponsored fund with equal representation on the trustee board.
9. In simple terms, public offer superannuation funds market themselves to the general community. They generally have at least one member who joined the fund by his or her own choosing.

10. The exceptions to this general rule are set out in paragraphs 37 to 43. They include superannuation funds which APRA declares not to be public offer superannuation funds (under subsection 18(7) of SIS) and small supervised APRA funds (SAFs) that do not meet the definition of a public offer superannuation fund under subsection 18(1), for example SAFs that have only standard employer-sponsored members.

**Standard employer-sponsored funds**

*Section 16*

11. The concepts of a standard employer-sponsored fund and a standard employer-sponsored member are relevant to the identification of public offer funds.

12. A “standard employer-sponsored fund” is defined in section 16 of SIS. It is a regulated superannuation fund that has at least one standard employer-sponsor. In broad terms, a standard employer-sponsor is an employer which contributes to the fund (or has ceased only temporarily to contribute) wholly or partly pursuant to an arrangement between the employer and the trustee of the fund.

13. An arrangement for these purposes may be formal (written or oral) or informal. An arrangement would occur where there has been some communication between the trustee and an employer which intentionally raises an expectation in both parties that the other will act in a particular way in relation to superannuation contributions. If the members and the employer are effectively the same people (eg. if the members are also the directors of the employer company) an arrangement between the members and the trustee is also an arrangement between the employer and the trustee.

14. Typically, “company funds” and “industry funds” are standard employer-sponsored funds. That is, membership is restricted to employees of a particular employer or associated employers who have entered into an arrangement with the trustee to contribute on behalf of their employees.

15. An arrangement where an employee automatically joins a fund of the employer’s choosing would normally involve a standard employer-sponsored fund.
16. Employer contributions pursuant to a salary sacrifice arrangement between the employer and the member will satisfy the definition of a standard employer-sponsor if they are made under an arrangement entered into between the employer and the trustee. This would not be the case if the contributions are made under a personal superannuation arrangement set up by the member and where no arrangement exists between employer and trustee.

17. The Government has foreshadowed changes, under proposed Member Choice legislation, to allow employees greater choice in nominating a fund for receipt of superannuation contributions made by their employer. A nominated fund will continue to be a standard employer-sponsored fund if contributions are made pursuant to an arrangement made between the employer and the trustee. The mere fact of a member being able to choose a fund to which contributions must be paid does not of itself mean the fund will not be a standard employer-sponsored fund.

**Standard employer-sponsored members**  
*Subsection 16(5), regulation 3.01*

18. A “standard employer-sponsored member” is a member in respect of whom an employer contributes wholly or partly under an arrangement between the trustee of the fund and the employer.

19. Where an employer has made arrangements with the trustees of a number of superannuation funds and offers employees a choice of fund, those employees will still be standard employer-sponsored members of the superannuation funds they choose. The deciding factor is the arrangement between the employer and the trustee of the particular fund.

20. Once an employee has become a standard employer-sponsored member of a superannuation fund this status will not alter, provided the employee (even despite changing employment) is a continuous member of the fund. A continuous member of a fund is one who does not leave the fund (for example by withdrawal, transfer or rollover). A member of a prescribed class (as explained below) will be a continuous member of the fund.

21. However, where a standard employer-sponsored fund has at least one member who is not a standard employer-sponsored member and who is not in a prescribed class, then the fund will, unless it falls within the following exceptions, be a public offer superannuation fund.

**Prescribed classes – former standard employer-sponsored members and spouses**  
*Regulation 3.01*
22. The definition of a “public offer superannuation fund” provides for an otherwise standard employer-sponsored fund to not be treated as a public offer fund when it contains some members who, while not strictly standard employer-sponsored members, nevertheless meet the definition of a “prescribed class”.

23. “Prescribed class” is defined in regulation 3.01 of SIS. A member belongs to a prescribed class if:

- he or she was a former standard employer-sponsored member of the fund who, since ceasing to be standard employer-sponsored member of the fund, has remained in the fund at all times; or

- he or she is a spouse or former spouse of an existing or former standard employer-sponsored member of the relevant fund on whose behalf the fund has accepted eligible spouse contributions (see paragraphs 28-30); or

- he or she is a spouse or former spouse of an existing or former standard employer-sponsored member of another fund which has the same standard employer-sponsor as the relevant fund that accepted the eligible spouse contributions.

24. Without regulation 3.01, the existence or change in circumstances of such members in a fund might cause a standard employer-sponsored fund to be a public offer superannuation fund.

25. Accordingly, a fund may accept contributions on behalf of a standard employer-sponsored member:

- from an employer who is not a standard-employer sponsor;

- from the member;

- or as eligible spouse contributions;

without causing the fund to become a public offer superannuation fund.

26. Once a person has legitimately become a standard employer-sponsored member, they are entitled to remain so regardless of any subsequent changes in their employer-sponsorship. The source of any subsequent contributions will never be contentious in respect of employer-sponsorship, even if there is no standard employer-sponsored element in the superannuation contribution. This is, of course, subject to the condition that membership of the fund remains
continuous from the time the person ceased to be a standard employer-sponsored member.

27. This provides flexibility for members upon change of employment. Where permitted by the fund’s rules, a member may consolidate superannuation benefits with one fund or leave benefits in an existing standard employer-sponsored fund upon termination of employment with the employer-sponsor.

28. A fund may also accept eligible spouse contributions without becoming a public offer superannuation fund if, at the time the contributions were accepted, the contributing spouse was an employer-sponsored member of that fund, or of a fund with the same employer sponsor. Employer sponsored members also include former employer sponsored members who have retained membership of their funds. Refer to Superannuation Circular No. I.A.1 entitled “Contribution and Benefit Accrual Standards for Regulated Superannuation Funds” issued September 2000. Reference may also be made to the Australian Taxation Office (telephone 13 10 20 or www.ato.gov.au) for information on eligible spouse contributions.

29. Where a spouse member is admitted to a standard employer-sponsored fund on the basis of eligible spouse contributions, a connection must exist between the contributing spouse and the fund otherwise the fund will be treated as a public offer superannuation fund.

30. A fund which has admitted a spouse member on the basis of eligible spouse contributions does not become a public offer superannuation fund by virtue only of:

- accepting contributions directly from the spouse member; or
- from a contributing spouse who has ceased to be a member of the fund; or
- the continued presence of a spouse member after the departure from the fund of the original (standard employer-sponsored) member.

31. A member of a prescribed class will retain that status while their fund membership is continuous, regardless of changes to the circumstances of their admittance eg. changing employment, ceasing to be a spouse.

**Election to be a public offer superannuation fund**

*Subsections 18(2) and 18(5)*

32. Subsection 18(2) of SIS provides that the trustee of a standard employer-sponsored fund may elect in writing to become a public offer superannuation
fund. For example, a standard employer-sponsored fund which does not wish to comply with the trustee equal representation rules may elect to become a public offer superannuation fund. Of course, the additional legislative requirements for public offer superannuation funds must be met.

33. Subsection 18(5) provides that the election to be a public offer fund is irrevocable. The trustees of superannuation funds wishing to elect to become a public offer superannuation fund may obtain the election form from APRA.

Declaration by APRA that a fund is a public offer superannuation fund
Subsections 18(6) and 18(10)

34. APRA may declare in writing under subsection 18(6) of SIS that a superannuation fund is a public offer superannuation fund. This provides a means of overcoming what might otherwise be an inappropriate imposition of standard employer-sponsor requirements, eg. where trustee equal representation is not necessary due to the particular circumstances of the fund. Subsection 18(10) also provides APRA with the power to revoke such a declaration if it is no longer appropriate.

35. The power can only be used to declare individual funds (as opposed to classes of funds) to be public offer superannuation funds.

36. Equal representation requirements are explained in Superannuation Circulars III.A.2 – “Equal Representation for Non- Public Offer Funds”, and III.A.3 – “Equal Representation for Public Offer Superannuation Funds”.

Declaration by APRA that a fund is not a public offer superannuation fund
Subsections 18(7), 18(10) and Regulation 4.08A

37. Under the SIS definition of a public offer superannuation fund, some funds which are not, in practical terms, making offers to the community at large, may nonetheless meet the definition.

38. To accommodate these funds APRA has the power under subsection 18(7) of SIS to declare a fund not to be a public offer superannuation fund, even if it may have previously elected to be one. Funds declared not to be public offer funds must either establish arrangements to ensure compliance with the trustee equal representation requirements or establish an arrangement for the management and control of the fund that has been agreed to by a majority of the fund members and is approved by APRA. Members or potential members must
not be disadvantaged by the change. SIS also provides APRA with the power to revoke such a declaration if it is no longer appropriate.

39. Any decision to declare a fund not to be a public offer superannuation fund will be made in relation to the specific circumstances of the fund concerned. Some types of funds where it may be considered appropriate to give a declaration include:

- Funds that have previously elected to be public offer superannuation funds under subsection 18(2) and now wish to meet trustee equal representation requirements.

- Funds which only have immediate family as members (ie. mother, father, children and grandchildren). This is provided that the trustee does not receive remuneration, trustee equal representation requirements can be achieved and there are a limited number of members.

- Funds operated by a professional practice (eg. that are open to partners of a legal firm) where membership can be likened to an employer-sponsored fund in that membership is a condition of becoming a partner in the firm.

40. The following are some general factors which would be taken into consideration when considering whether a fund should be declared not to be a public offer superannuation fund. These include, but are not limited to:

- the nature of the fund (ie. a small APRA supervised fund etc);

- the number of members in the fund;

- the nature and level of remuneration, if any, received by directors of the trustee company for a non-family fund (remuneration for trustee duties would be viewed as a characteristic of an approved trustee of public offer entities);

- the type of members (ie. standard employer-sponsored members, self employed members);

- the likelihood of those features which make the fund a public offer superannuation fund continuing or increasing in the future (eg. is the fund closed);

- the action the trustee has taken, or proposes to take, to negate the circumstances which give rise to the fund being regarded as a public offer
superannuation fund (ie. transferring members out or steps to ensure appropriate trustee representation);

• special circumstances which make it inappropriate to treat the fund as a public offer superannuation fund for the purposes of the SIS Act.

41. These are general factors only and are provided for guidance purposes only.

42. Subsection 18(7A) provides APRA with the power to impose conditions on subsection 18(7) declarations. APRA normally imposes conditions such as:

• the membership of the fund remain closed to new members; or
• the membership of the fund is limited to members within a specified narrow range such as family members and their spouses or partners;
• the trustee receive no remuneration directly or indirectly for performing trustee duties for the fund;
• the arrangement for member representation approved by APRA under regulation 4.08A(2)(e) of SIS must apply.

43. In making declarations in relation to certain funds APRA may also require trustees to comply with the member representation requirements under Regulation 4.08A. Additional conditions are normally imposed (or can be varied) under this regulation for these funds such as the following examples:

• all members of the fund are to become trustees of the fund and remain trustees of the fund for the duration of their membership; and
• any new members become trustees upon joining the fund.