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Get ready for new ATO penalties

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Next month, self-managed superannuation fund (SMSF) trustees face a new penalty regime under the Australian Taxation Office (ATO).

While official statistics note that only 2 per cent of SMSFs are currently in breach of various prudential rules, the figure could be as high as 15 per cent, according to a recent speech by ATO assistant deputy commissioner Stuart Forsyth.

With SMSF members now totaling 1 million and over $550 billion now invested in the sector, the legislative spotlight is well and truly on SMSFs.

In fact, the bulk of staff in the ATO's superannuation department is now geared for enforcement activities.

The ATO commissioner has always had powers to deal with SMSFs, Perpetual head of strategic advice Chris Balalovski says.

He says such powers gave the commissioner the ability to: issue SMSFs with an enforceable undertaking; declare funds as non-complying; appoint, remove or suspend trustees; and/or freeze a fund's assets.

"Unfortunately, these measures available to the commissioners were fairly benign or draconian. The new regime gives the ATO greater flexibility to deal with non-complying SMSFs," Balalovski says.

He likens the ATO's new administrative penalties to speeding fines.

"The commissioner can automatically apply them in the event of a breach of the various provisions under the *SIS Act,* which are based on a schedule of penalty units," he says.

Administrative penalties administered by the ATO will be based on a sliding scale as outlined in an earlier article, 4 key themes for SMSFs.

Failure to provide statistical information in an approved form will incur five penalty units at $850. Failure to prepare financial accounts and keep records will incur 10 penalty units at $1700, while not adhering to investment rules will incur 60 penalty units at $10,200.

The important aspect to note here is that these fines will apply to each trustee of the fund, not just the fund itself.

For example, if an SMSF failed to adhere to investment rules, each trustee would have to pay $10,200. Therefore, if that SMSF had four trustees -- well, you do the sum!

Another important aspect of the new penalty regime is that one single transaction could result in multiple breaches.

For example, not adhering to investment strategy could breach: borrowing rules; the rules governing dealing with parties at arm's length; and the sole purpose test. This could result in fines totaling more than $30,000 -- just from one single transaction.

Balalovski warns that the commissioner will be acting on every single audit contravention. According to Balalovski, the commissioner could do at least three things:

1) If the breach is not severe and the fund does not have a history of non-compliance, the ATO can issue a letter of caution that will go on record. The ATO will also continue to monitor the fund.

2) Trustees of funds who have committed more serious offences and who have a history of non-compliance could actually receive a telephone call directly from the commissioner. By directly contacting the trustee (not the fund's auditor and accountant), Balalovski says the commissioner will be looking for cooperation.

3) If the commissioner feels the fund is cooperative, then he/she could simply issue an education directive or a rectification direction. Under a rectification direction, trustees will need to act to rectify the breach within a specific timeframe and provide the ATO with evidence of the trustee's compliance with that direction. The ATO could issue a court action if the trustees failed to comply with the rectification direction.

"If the commissioner believes the nature of the offence is at the higher end and there is lack of cooperation from the trustees then the ATO will move into a full audit of the fund, which could result in the suspension of the trustees and the freezing of the fund's assets," he says.

Get on the front foot

For now, trustees can breathe a little easier as it is believed the ATO could give the sector one year's grace.

Balalovski reckons that in the first year of the penalties regime the commissioner will be inclined to remit on some breaches, depending on the severity. Moreover, the commissioner is also unlikely to issue multiple penalties resulting from one breach.

As noted earlier, the regime also gives the commissioner greater flexibility to deal with non-complying funds. However, Balalovski recommends trustees start to take action if they feel they are in breach of any ATO rules.

"I recommend trustees get on the front foot and issue their own enforceable undertaking if they believe they are in breach of the *SIS Act* with their SMSF," he says.