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General Manager
Personal and Retirement Income Division
The Treasury
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RE: SuperStream – Pass through of employee details

The purpose of this submission by the Association of Superannuation Funds of Australia (ASFA) is to respond to the request for comments on the exposure draft regulations and the explanatory statement concerning the passing through of employee details under the SuperStream Data Standards.

About ASFA

ASFA is a non-profit, non-politically aligned national organisation. We are the peak policy and research body for the superannuation sector. Our mandate is to develop and advocate policy in the best long-term interest of fund members. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

General comments

At the outset, ASFA would like to raise its concern about the manner in which the policy around this measure has developed, the uncertainty this has raised in the industry and the unnecessary cost this has imposed on some trustees.

For more than two years, and despite no Government announcement on the matter, the ATO has been advising attendees at SuperStream related consultations and events that as part of the SuperStream data standards implementation arrangement all superannuation funds would be required to provide a contributions data pass through service to all employers for whom the fund was the employer's default fund.

We note, however, that the mandating of the pass through of contributions data has never been formally announced as government policy and it was not included in the list of 92 announced but unlegislated tax and superannuation measures identified for review by the Government in November 2013.

We also note that the earliest statements made by the ATO on this matter were made following the announcement that data standards for superannuation contributions would be mandated but prior to resolving how the associated data would be delivered to the destination funds.

The release of the draft regulations is the first public indication that the government is giving serious consideration to regulating such a requirement.

ASFA is strongly opposed to the ATO's proposal that all funds must provide a contribution data pass through service to their default employers. We are concerned that the rationale for mandatory pass through of contributions data has not been clearly established and that there would appear to have been no revision of the ATO's thinking on this topic as the implementation of the data standards has unfolded and has taken a different path to that originally envisioned.

Absent such a rationale, the unanswered question is: What is achieved by forcing all funds to pass through the data, but not the money, that the data standards themselves do not achieve? The ATO's stated reason for the requirement has been the delivery of the SuperStream goal of enabling employers to use a single method of delivering superannuation contributions and data to any fund, however, we note that this issue has been resolved through the creation of the SuperStream Transaction Network of gateways in 2013 and a range of associated ATO and commercially offered services.

In recent discussions with Treasury officials on the proposed scope of the regulations it appeared that, from Treasury's perspective, there is no intent to require funds to provide a contributions data pass through service beyond that which occurs naturally within the operation of the SuperStream Transaction Network. The advice of Treasury officials is that the purpose of the regulations is to ensure that a fund trustee cannot, from 1 July 2015, offer to a default employer an electronic contributions data handling service that will only accept contributions data for that fund.

It is not apparent to ASFA why, as a matter of policy, a fund trustee is unable to agree with an employer to provide an adjunct service, to enable them to contribute to the fund efficiently and effectively, in addition to the "one stop shop" services which may be available to that employer through the Small Business Superannuation Clearing House (SBSCH), if fewer than 20 employees, or via a commercial provider, such as a payroll bureau or a clearing house. If the convenience of a "one stop shop" is of paramount importance to the employer then these options are available to it. On the other hand, should an alternate method of contributing to that fund be made available to that employer, we fail to see the harm that this represents.

Furthermore, if the purpose of the regulations is to ensure that a fund trustee cannot offer a contributions data handling service that will only accept contributions data for that fund then ASFA considers that, as drafted, the regulation does not achieve that objective and that the draft explanatory statement gives broader scope to the regulation than that proposed by Treasury.

Additionally, ASFA is concerned that, if that is the proposed scope, then those fund trustees who did not offer a contributions clearing solution but have now implemented one on the basis of ATO statements that pass through would be mandatory have incurred an unnecessary expense that will need to be met out of the benefits of existing members.

Since the early pronouncements by the ATO ASFA has given consideration to the need for the proposed regulation. We have revised our position as the data standards have been implemented and the SuperStream Transaction Networks of gateways has evolved, to arrive at a position where we believe that such a regulation is unnecessary. In arriving at our position ASFA has taken note of the following:

- The data standards themselves solved the fundamental problem of employers having to use multiple methods when paying employees' superannuation contributions. With data standards mandated, the task for an employer became one of which method/channel to use.
- For small employers (those with fewer than 20 employees) the Department of Human Services' free Clearing House (SBSCH), now operated by the ATO, solves the contributions problem as it acts as an agent for the employer.
- Many employers currently use a clearing service, either a commercial service or a fund provided service. Under transitional arrangements, from 1 July 2014 until 30 June 2017, such services will be deemed to be data standards compliant where the transaction data can be mapped to the mandated fields in the contributions data standard. For employers using these clearing services the transitional arrangement solves the employer's data standards compliance problem.
- Increasingly, providers of payroll services are offering, or intend to offer, a contributions clearing service. The offering of such services has been made simpler and cheaper by the creation of the mandated standards and the establishment of the SuperStream Transaction Network of gateways. It is anticipated that this increasingly will become part of a standard payroll services offering.
- Payroll software providers are also incorporating, or intend to incorporate, into their software the facility for an employer to self-direct contributions in the mandated format. Once again this change has been made possible by the creation and mandating of the data standards themselves.

The availability of such a broad range of options means that employers now do have access to a single contributions data and payments solution.

Additionally, it is unclear why is it considered necessary to mandate that funds must provide a solution for employers with respect to all of their employees when fund trustees have previously considered and rejected the voluntary provision of such services because the incremental cost incurred would only go towards the benefit of non-members of their fund (the employer's choice employees)?

Recommendation

ASFA recommends that the Government reconsider the need to regulate the passing through of contributions data by default funds to chosen funds.

Specific comments

Proposed regulation 7.08A

Proposed regulation 7.08A, as drafted, states that

For subsection 31(1) of the Act, a trustee of a default fund that receives information from an employer under subregulation 7.07E(2) must pass on that information to each chosen fund (if any) of the employee."

Subregulation 7.07E(2) deals with the information which must be provided to a fund about the employee in respect of whom a contribution is being made.

However regulation 7.07E **Employee details for contributions** itself provides as follows:

7.07E(1) This regulation applies to an employer who makes a contribution for an employee to a regulated superannuation fund, unless:

- (a) the fund is a self managed superannuation fund; and*
- (b) the employer is a related party of the fund.*

7.07E(2) The employer must give the following information to the fund in relation to the contribution:

- (a) the employee's full name;*
- (b) the employee's residential address;*
- (c) the employee's tax file number;*
- (d) the employee's telephone number*

7.07E(3) However, the employer is not required to give the information mentioned in subregulation (2) to the fund if:

- (a) the employee has not given the information to the employer, and the employer has made reasonable efforts to obtain the information from the employee; or*
- (b) the fund is a self managed superannuation fund and the employer is a related party of the fund*

7.07E(4) The employer must give the information to the fund on the same day as the employer makes the contribution to the fund. (emphasis added)

The above regulation is unambiguous in its requirement that if an employer pays a contribution to a fund it must, on the same day, give specified information about the person the contribution is for **to that same fund**.

That is, 7.07E **does not permit** an employer to pay a contribution to one fund and give the associated data to another fund. Specifically regulation 7.07E does not permit an employer to give the details in respect of a chosen fund contribution to the employers default fund. As a result, regulation 7.08A has no effect as it applies to a situation which is not permitted by regulation 7.07E.

Further, a trustee is unable to accept from an employer a contribution this is in respect of an employee who is a member of another fund as that would represent an intermingling of trust monies, which is not permitted under trust law.

If the regulation is targeted at the circumstance where a superannuation fund offers a contributions payment clearing service to employers then in delivering such a service the contribution is not made to the fund but to the fund's separate clearing service and the fund is acting as an agent of the employer. The fund offering the service is under both a contractual (either express or implied) obligation and a trust obligation to deliver contributions data in accordance with the requirements of regulation 7.07E. It is because

of this principal/agent contractual relationship that a fund is not breaching privacy requirements when delivering such services to employers.

Should, as Treasury advises, the aim be to prevent a fund from offering to an employer a service of only accepting contributions and data for their fund then an amendment will be required to draft regulation 7.08A **and** the current operation of regulation 7.07E will also need to be addressed. Additionally, the regulation will need to consider the impact of relevant privacy laws.

Recommendation

ASFA recommends that the regulation be redrafted to give consideration to the operation of regulation 7.07E and its obligation on an employer to provide the contributions data to the fund to which the contribution is made.

The Explanatory Statement

The following comments are based on the regulation as it is drafted, not on the Treasury advice as to the intended operation of the regulation.

The draft explanatory statement does not reflect the current operation of the law as set out in regulation 7.07E. The stated purpose of the regulation, as set out on page 1 of the explanatory statement, is in conflict with the operation of the existing law.

The paragraph following the statement of purpose also needs to be amended. Currently it states that each fund that offers a MySuper product must offer a service. However proposed regulation 7.08A states that 'a default fund **that receives** information from an employer under subregulation 7.07E(2) must pass on that information to each chosen fund (if any) of the employee'. The draft regulation does not provide that a default fund 'must provide a service'. The clear implication of the wording of regulation 7.08A is that it remains a trustee decision as to whether such a service is provided to employers and such information is received.

The purpose of the regulation will also need to be reworded.

Specifically, the paragraph on page 4 that commences with the words 'a default fund offering a 'transitional portal', as well as the paragraph following, should be removed as their statement as to the effect of the regulation are factually incorrect.

Recommendation

ASFA recommends that the explanatory statement be reviewed and revised to ensure that the wording accurately reflects the scope of the proposed regulation.

Additional comments

The proposed mandating of a requirement that all employer funds must offer a contributions data pass through service has long been contentious.

Based on the manner in which the contributions data standards are designed and the creation of the SuperStream Transaction network of gateways ASFA strongly rejects the proposal that such a regulation is required and would recommend that the operation of market forces be observed for a period of time prior to making a final decision on regulation in this space.

Recommendation

ASFA recommends that a decision on the need for regulation of the passing through of contributions data be deferred until 30 June 2016 by which time any deficiencies in market provided solutions for employers will be apparent.

Should the Government determine that regulation be required in this space, ASFA strongly recommends that implementation with respect to funds that are offering an employer portal that meets the transitional arrangements (as set out in paragraph 4.2 of Schedule 1 to the Data and Payment Standards legislative instrument) be exempt from the arrangements until 30 June 2017, the end date for the use of transitional arrangements.

Recommendation

ASFA recommends that, should the Government resolve to regulate in this space, that the commencement date be 1 July 2017, following the expiry of the period during which alternate contribution arrangements may be used.

A separate matter that needs resolution is the ongoing use of the alternate solution that may be used until 30 June 2017. ASFA will seek to discuss this matter with Treasury at a later date.

I trust that the information contained in this submission is of value.

If you have any queries or comments regarding the contents of our submission, please contact ASFA's Principal Policy Adviser, Robert Hodge, on (02) 8079 0806 or by email rhodge@superannuation.asn.au.

Yours sincerely

A handwritten signature in blue ink, which appears to read 'Fiona Galbraith', is positioned below the 'Yours sincerely' text.

Fiona Galbraith
Director, Policy