Submission to Treasury with respect to the Superannuation Legislation Amendment (MySuper Measures) Regulation 2013

15 May 2013

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About ASFA

ASFA is the peak policy, research and advocacy body for Australia's superannuation industry. It is a not-for-profit, sector-neutral, and non-party political national organisation whose aim is to advance effective retirement outcomes for members of funds through research, advocacy and the development of policy and industry best practice.

ASFA's focus is on whole of system issues and its core strategies are aimed at encouraging industry best practice, advocating for a system that plays a productive role in the Australian economy and ensuring the industry delivers on its primary purpose of delivering decent retirement incomes.

Our membership - which includes superannuation funds from the corporate, industry, retail and public sectors, and, through its service provider membership, self-managed and small APRA funds - represents over 90 per cent of Australians with superannuation.

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Should you have any queries regarding the contents of this submission, please do not hesitate to contact me on (03) 9225 - 4021 or 0431 490 240 or fgalbraith@superannuation.asn.au.

Yours sincerely

Fiona Galbraith
Director, Policy

1. OVERALL COMMENTS

ASFA welcomes the opportunity to provide a submission on the *Superannuation Legislation Amendment (MySuper Measures) Regulation 2013.*

The limited time available to implement the various legislative requirements prior to their respective effective dates will be problematic.

These exposure draft regulations were released extremely late – 2 months before 1 July – and will not be finalised and registered until late May at the earliest. At the time of writing the *Superannuation Legislation Amendment (Service Providers and Other Governance Measures) Bill 2012* has not yet been passed through the House of Representatives, let alone received Royal Assent. APRA's Superannuation Reporting Standard 700.0 ("SRS") has not yet been released, and the exposure draft regulations indicate that the SRS will contain further details essential for trustees to be able to implement solutions.

This leaves RSEs with very little time to implement solutions and changes to comply with the obligations and requirements imposed under the legislation, especially with respect to producing and publishing a MySuper Product Dashboard, issuing PDSs and producing periodic statements.

We have divided this submission into 3 parts as follows: -

1. Substantive \ Policy Matters
2. Drafting Issues; and
3. Portfolio Holdings Disclosure generally.

2. SUBSTANTIVE \ POLICY MATTERS

2.1. Corps SubDivision 2E.1 – Obligation to make information publically available (Page 2)

As per our introductory comments, the limited time available time to implement a MySuper Product Dashboard prior to 1 July 2013 will be problematic.

As SRS 700.00 has not been released, it is impossible for industry to understand the scope of these obligations and to evaluate the implications of any references to it in the draft regulations.

Until the regulations and SRS 700.0 are finalised and released it will prove extremely difficult for providers to prepare to implement these changes. Funds which have received their authorisation to offer a MySuper product may be offering MySuper from as early as 1 July – only six weeks away.

It is unrealistic, and unreasonable, to expect trustees to be in a position to produce a MySuper product dashboard with effect from 1 July 2013.

ASFA submits that the obligation to produce a MySuper product dashboard should be deferred until 1 July 2014.

Specifically, with respect to the definition of "representative member" - as a MySuper product must offer death and permanent incapacity insurance on opt-out basis it stands to reason that a "representative member" would hold insurance cover.

ASFA submits that – with respect to "representative member" - consideration should be given to including a third aspect - the default level of life and permanent incapacity cover offered to a MySuper member. Consideration may need to be given to specifying a particular age for the member, so that the relevant premium can be identified.

2.2. Corps Regulation 7.9.07P - Net return target (Page 3)

While it is possible that SRS 700.00 may shed light on this, further guidance and clarification may be required with respect to how to calculate this, in particular the CPI component and at what times it is measured. It would be helpful to have a detailed worked example of how this is to be calculated and disclosed.

If the intention is for funds to utilise the "representative member" to determine the net return target then this will need to be made explicit in the regulations.

It should be noted that the deduction of administration fees will be inconsistent with

- previously disclosed returns; and
- other methodology used for disclosure to members, for example in PDSs.

ASFA submits that the "representative member" methodology needs to be made explicit. Depending on SRS 700.00, further guidance and clarification may be required with respect to how to calculate the net return target.

Further to this, we have concerns that the use of the "representative member" methodology – as it utilises a single, somewhat arbitrary measure (net return for a member with a $50,000 opening account balance and $5,000 contributions in a year) – is not terribly meaningful and, depending on the fee structure within the fund, may even be misleading. This is especislly the case where there is a "fixed fee"component to admininstration fees. Generally, the net return for every member in a fund will be different, depending on their account balance and contributions. This is the case even with modelling which is not performed on a time or money weighted basis. Once the timing of contributions and returns is taken into account, the variation in net return between members is even greater.

Accordingly, we submit that consideration should be given either to: -

- adopting the proposal by the Actuaries Institute to utilise two prescribed examples, in order to illustrate the variation produced by having different account balances \ level of contributions; or
- doing away with the concept of deducting administration fees to determine "net return".

ASFA submits that consideration should be given to adopting the "2 example" proposal by the Actuaries Institute or to doing away with the concept of deducting administration fees to determine "net return".

2.3. Corps Regulation 7.9.07R – Statement of fees and other costs (Page 4)

It is not readily apparent what the underlying policy rationale is for the product dashboard.

It appears the prime purpose of the product dashboard is to enable comparisons between products to decide whether to enter into, continue, vary or discontinue an investment. If this is the case then, unlike investment returns, it is possible – and would be more meaningful - to disclose future fees and costs. In this context, *historical* fees and charges information is not necessarily useful as an indicator of future fees and charges. Unlike investment returns, however, as fees and charges are set by the trustee and are known in advance, information about *future* fees and charges can sensibly and prudently be included in the product dashboard.

From the wording of regulation 7.9.07R it appears as though fees are to be provided on an annualised historical basis, not on a forward looking basis. As such, it is unclear what should be disclosed where, for example, the management fee on a MySuper product is to be reduced from 1.5% to 1% on 29 June. Which percentage is the appropriate percentage to be reported?

ASFA submits that consideration be given to the disclosure of fees on a forward looking basis.

Further, if the reporting of fees is to be on an historical basis, then under paragraph 1017BA(1)(c) this would require a superannuation fund to have calculated costs and have them disclosed on the dashboard within 14 days of the end of the year.

As we have not yet seen SRS 700.00 it is not clear how this fees and costs information is to be calculated. In any event, as many superannuation funds are invested in external investment vehicles through custodians, this information may simply not be available within the prescribed time.

Accordingly, as raised previously by ASFA, 14 days will not be sufficient time to update the fees and costs information.

ASFA submits that paragraph 1017BA(1)(c) be amended such that the dashboard must be updated within 28 days after the end of the relevant period.

Finally, if the definition of "representative member" is amended to include insurance, the statement of fees and costs should be based on the assumption that a representative member of a prescribed age holds the MySuper default level of insurance cover, and should include the insurance premium.

ASFA submits that - if the definition of "representative member" is amended to include insurance - the statement of fees and costs should include an insurance premium.

2.4. Corps Regulation 7.9.07T – Prescribed information – lifecycle products (Page 5)

The regulation requires that the investment comparison period must be based on the time (e.g. 5 or 10 years) that an investor may be invested in a lifecycle cohort.

There are funds intending to have a smooth glide path with reductions in "growth" assets occurring each year over an extended period For example, growth assets would reduce from 70% growth\30% defensive to 30% growth\70% defensive over 20 years from age 40 to age 60, reducing in 2% increments each year.

It appears as though the proposed regulation would require 21 different dashboards, with 19 of them showing only one year return. In other words, the

- 68% growth\32% defensive cohort;
- 66% growth\34% defensive cohort, etc, down to the
- 32% growth\68% defensive cohort

would disclose one year, while the other 2 cohorts

- 70% growth\30% defensive (below age 40); and
- 30% growth\70% defensive (above age 60)

would be able to show 10 year periods.

This is clearly unworkable.

Further, if the additional lifecycle factors are used, there may be different subclasses for members of the same age but with, for example, different account balances or contribution rates.

It is not apparent whether the requirement to work out the information in relation to each age based sub-class applies irrespective of whether a fund provides additional subclasses within an age based cohort.

If this is the case then the information in the product dashboard for lifecycle members will largely be irrelevant.

ASFA submits that the product dashboard disclosure with respect to lifecycle products should be the subject of further consultation.

2.5. Corps - Subdivision E.2 – Obligation to make information relating to investment of assets publically available Portfolio Holdings Disclosure (Page 6)

It is critical that the disclosure is meaningful to consumers and advisers. It is not apparent how useful the Table 1 \ Table 2 approach may be to members.

Further, we have received feedback from a number of members that a number of investment managers, custodians and trustees will face tremendous difficulties in complying with the proposed disclosure in its current format.

Further, there are a number of issues with the draft regulations.

By way of one example, the draft regulations make the distinction between "investing products" (which invest RSE assets in other financial products or property) and "final products" (which do not). The Explanatory Memorandum states that in some circumstances a managed investment scheme may be a final product (e.g. an offshore managed investment scheme), because the trustee will not have information about the underlying products in which that scheme invests, whereas in other circumstances it will be an “investing product”.

This will lead to inconsistency of treatment of essentially similar investments. This will be confusing to members and will not aid in understanding.

ASFA strongly submits that the regulations with respect to portfolio holdings disclosure be omitted from the final regulations when made, to enable further consultation with the industry.

2.6. Corps Paragraph 7.9.20(1)(n) and 7.9.20(1)(o) – Long-term return \ dashboard included in periodic statement
(Page 11)

ASFA endorses this information being provided to members annually.

This information, however, is more appropriately located not in the member's statement but in the fund’s annual report to members.

The periodic statement already calculates and discloses information for the member, on both fees and performance, specifically customised at a member level. Including the product dashboard in the member's statement implies a degree of personalisation whereas, in fact, the calculations of returns are not time or money weighted and instead represent a kind of “average” measure across the investment. This will be more apparent to members if the information is located in a fund generic document, such as the fund’s annual report or website, than in the member’s periodic statement, which contain information specific, and particular, to that member’s experience in the fund. Inclusion of the product dashboard in the periodic statement is both confusing and wasteful.

Further to this, there is an existing requirement, under regulation 7.9.20AA, to include information with respect to long term (actual, gross) returns in periodic statements with respect to the options in which the member is invested. Provision of product dashboard information as well is likely to be very confusing for members.

In addition, the members’ periodic statement is already long and becoming longer. There is a considerable risk, and anecdotal evidence, that members are overwhelmed with the content and, at best, read the information with respect to the transactions on the account – from opening balance to closing balance - and disregard the rest of the information provided.

It should be noted that this has never been announced as Government Policy.

ASFA submits that the information with respect to product dashboard is more appropriately located in the fund's annual report to members.

If this requirement is to remain, it will affect exit statements issued from 1 July 2013. This requirement was not previously known. Due to development timeframes, funds choosing to offer their MySuper product from 1 July are unlikely to be able to provide complying exit statements within the remaining timeframe.

One member has indicated that compliance with this requirement would result, for their business, in excess of 6 million additional inserts to statements. It would need to be inserts as there is insufficient time to code and test multiple versions of member statements.

An alternative approach would be to reference the product dashboard in the periodic statements, advising members of: -

- the link to the relevant fund website \ web page; and
- the 'phone number to call to request a hard copy of the product dashboard.

This approach is consistent with that employed with respect to fund annual reports.

ASFA submits that an alternate approach would be to refer to the product dashboard in the periodic statements and advise members of the link to the website and the 'phone number to request a hard copy.

If the requirement is to remain, compliance realistically would not be achievable until 1 January 2014. This would align with the date employers must make SG contributions for default members to a fund offering MySuper.

ASFA submits that – if the obligation to disclose long term returns \ product dashboards in periodic statements is to remain - the effective date should be 1 January 2014.

Further, this requirement would apply to exit statements issued from 1 July 2013. Not only would this be impossible for funds to achieve, it serves no policy purpose as the member is exiting the fund. This lack of policy purpose with respect to disclosing long term returns in exit statements, as currently required under regulation 7.9.20AA, is recognised by the rolling class order relief from having to comply with this regulation with respect to exit statements until regulations are made to rectify this.

ASFA submits that – if the obligation to disclose long term returns \ product dashboards in periodic statements is to remain – exit statement should be excluded – ideally indefinitely but in any event at least until 1 January 2014.

The regulation appears to require that the periodic statement must include only the latest product dashboard for the investment option(s) in which the particular member is invested. This will necessitate considerable personalisation of periodic statements, which is complex to collate and adds considerable expense.

A simpler and less expensive alternative would be to allow trustees to include the latest product dashboard for all investment options. The costs of including a personalised product dashboard would ultimately need to be passed on to members and would seem to provide little benefit over including the dashboard for all investment options.

ASFA submits that - if the obligation to disclose long term returns \ product dashboards in periodic statements is to remain - trustees should be able to include the latest long term returns \ product dashboard for all investment options.

2.7. Corps Clause 3 of Schedule 10D – PDS – Contents of section 1 (Page 19)

Members have provided feedback that, in a number of instances, their PDSs as at 1 July 2013 have already been finalised and are going to print.

At this late stage: -

- mid May, with only six weeks until 30 June;
- only draft, not even final, regulations having been released
- SRS 700.00 not finalised;

and bearing in mind the necessary preparation, review, approval and printing - it is unrealistic, and unreasonable, to expect changes to be made to PDSs with effect from 1 July 2013.

The mooted changes to PDSs are significant, with information still not finalised, and we believe a mandatory start date of 1 July 2013 will risk the majority of products being off the market until their PDS can be updated.

ASFA submits that a similar approach be adopted as when the incorporation by reference regime was introduced and that the regime facilitates: -

- voluntary adoption from 1 July 2013;
- mandatory compliance if issuing or supplementing a PDSs after 1 July 2014;
- mandatory disclosure for all PDSs from 1 July 2015.

2.8. Corps Clause 3 of Schedule 10D – PDS – Contents of section 1 – ADAs (Page 19)

From 1 January 2014 at the latest, (and possibly earlier if a fund offers a MySuper product from an earlier date), information on accrued default amounts will be irrelevant to new members. Under section 29WA contributions will have been allocated either to a MySuper product or as per the member's direction and, as a consequence, they will not have any accrued default amounts.

It is extremely onerous to require that a PDS be amended for - at most - a six month period, especially as such information can be provided by means of a regulation 9.46A \ section 1017B significant event notice, in periodic statements and in the fund's annual reports.

It should be noted that the shorter PDS requirements were introduced to make PDSs more concise and aid consumer engagement and, as such, they are confined to eight pages. Including a description of the ADA transition process will unnecessarily lengthen the PDS to provide information which is only potentially relevant between now and 1 January 2014 and which will, in any event, be disclosed to members through significant event notices.

The vast majority of members of superannuation funds will have joined prior to 1 July 2013 and will not receive s revised PDS. All members will be receiving significant event notices or notices under regulation 9.46A with respect to ADA attribution or transfer.

Information about transitioning accrued default amounts needs to be provided under new regulation 9.46A or in a significant event notice. This is the more appropriate mechanism for providing this information.

ASFA submits that there is no need for PDSs to be amended to reflect the ADA transition process.

2.9. Corps – Schedule 10D - Subclause 8(3)

Given that Eligible Roll-over Funds ("ERF"s) generally do not accept contributions, it would be less confusing for members if ERF providers were able to modify their fee table to reflect this or if ERFs were exempted from complying with the fee table.

ASFA submits that Eligible Roll-over Funds which do not accept contributions should be able to modify the fee table to reflect this.

2.10. SIS Regulation 2.37 – Remuneration and systemic transparency – prescribed details (Page 24)

The commencement date of these obligations is unclear.

If it is to be 1 July 2013 then, as it is mid May and these are only draft regulations, and given the time necessary to compile the information, and to develop and test enhancements to fund websites to facilitate disclosure, it is unreasonable, and unrealistic, to expect this information to be disclosed by 1 July 2013.

ASFA submits that these requirements should apply from 1 July 2014.

The proposed remuneration and disclosure requirements are onerous and extend significantly beyond what is required to be disclosed by a director of a listed company under section 300A of the Corporations Act, including large financial institutions, where the disclosure regime only applies to a small number of individuals.

The Act does not require that disclosure must be made of payments by related bodies corporate, yet this would appear to be required under the regulations.

There is a substantial concern with respect to the treatment of a person who is a director or other officer of an RSE licensee, but an employee of another entity, not of the RSE licensee. It is not uncommon for a person to act as a director of an RSE licensee or in some other capacity (such as a member of a policy \ investment committee) as a function of their employment with another entity, such as an employer or member organisation. A strict reading of the new disclosure requirements in Division 2.6 may necessitate disclose all the benefits they receive from the organisation under the terms of their employment, even though they are not paid these benefits by the RSE licensee. Further, we query the ability of the RSE licensee to obtain that information from the officer as a matter of law.

Remuneration should not be disclosed when it does not relate to the management of the RSE. Any disclosure for key management personnel should be on a proportional basis, that is, it should be with respect to the proportion of time spent by that person that is relevant to directing or managing the RSE.

ASFA submits that payments by related bodies corporate should be disclosed on a proportional basis.

Further, the phrase "executive officer" in SIS section 10 and 29QB is potentially extremely wide. The scope of persons covered needs to be clarified in the regulations.

Obviously it includes the CEO and the directors but it is not readily apparent who else may be covered by regulation 2.37.

The definition needs to be greatly improved and tightened. Ideally It should be confined to those performing directorship\trusteeship duties with respect to the RSE. If the definition is to be extended to key management personnel this should be defined: -

- narrowly – such that disclosures are reasonable and do not capture a broad range of personnel for whom such disclosures would be inappropriate; and
- precisely - to ensure that disclosure operates strictly and consistently across the industry.

From the definition - "a person, by whatever name called and whether or not a director of the body, who is concerned, or takes part, in the management of the body" - it appears that potentially the entire executive team may be captured, together with the directors. There could even be other senior management roles, or even lesser roles, depending on how broad a view is adopted as to who "takes part in management".

It should be noted in this context that the Prudential Standards utilise the terms "responsible officer" and "senior manager". Further, for accounting purposes, companies have often taken the view that its executive officers are only the CEO, CFO and CIO.

ASFA submits that "executive officer" needs to be defined with a degree of specificity and detail, to ensure consistency of interpretation and reporting.

The disclosure information will change on a regular basis. A reasonable period of time after changes occur must be allowed to update the website.

ASFA submits that a period of at least 14 days must be allowed for the trustee to update the website.

Item 6 – it is not apparent whether this intended to be benefits payable on termination, as opposed to the value of an executive officer's superannuation benefit at any given time or as at the end of the financial year. It should be noted that this information would not be known to the RSE licensee, in their capacity as an employer, in any event. Conversely, is it intended that this be the amount contributed to superannuation and therefore the executive officer's salary at Item 5 should be disclosed net of super?

ASFA submits that item 6 and the definition of "post-employment benefits" needs to be defined.

Item 11 – it is unclear as to whether the performance based bonus is intended to refer to a short term incentive scheme or a variable reward scheme.

Item 11c) – it is unclear how much detail is proposed here. By way of example, the short term and long term incentive schemes for executive officers can be lengthy and complex. As well as quantitative metrics, payments may also be influenced by separate staff performance appraisal processes of a qualitative nature. How is it proposed that these be disclosed?

Item 11d) - the schemes may change in some form every financial year. The wording of the item appears to necessitate the detail of every change since the commencement of a person's employment. This should be confined to changes in the last financial year;

At item 11e) - bonuses are calculated and paid during the course of a financial year, but are generally not paid as at 1 July. Is it intended that these figures be left blank until the bonus has actually been paid? Furthermore, the bonus or grant paid during a financial year is generally not

"for the financial year" but typically relates to performance in the previous financial year. On a literal construction, this item will never arise. Surely this is unintended?

With respect to item 11(e) and especially 11(f) - we have concerns with respect to the reporting of non-achievement of bonus. The notion of reporting about non achievement suggests that trustees would need to report on poor performance, yet forfeiting a bonus can be related to other factors. Furthermore, as this singles out individuals, it is unduly invasive, potentially damaging to reputations and could even prove problematic from a litigation perspective.

A preferable statistic would be with respect to all executive officers in total - the total percentage of eligible bonus paid out during the year could be disclosed.

ASFA submits that item 11 be disclosed on a "total" basis across all executive officers.

Further, we do not understand the need for reporting to be for the previous two financial years. This is unduly onerous for any value which may be derived.

ASFA submits that disclosure should be with respect to the previous financial year only.

2.11. SIS Regulation 2.38 – Obligation to make information publicly available (Page 30)

Again, we note that it, as it mid May and these are only draft regulations, it is unreasonable, and unrealistic, to expect changes this information to be disclosed by 1 July 2013.

ASFA submits that these requirements should apply from 1 July 2014.

Further, it is not apparent whether this information is to be with respect to the previous financial year.

Some of the documents and information specified in sub-regulation 2.38(2) should be limited in scope or clarified as follows: -

- paragraphs 2.38(2)(a) and 2.38(2)(b) - publication of a consolidated "working copy" of the trust deeds, in lieu of the trust deed and any amending or supplemental trust deeds, should be permitted;
- paragraph 2.38(2)(c) -disclosure of governing rules can be commercially sensitive and should not be made publically available
- paragraph 2.38(2)(e) - disclosure of actuarial reports can be commercially sensitive and should not be publicly available
- paragraph 2.38(2)(f) - should be exemption for non public-offer funds and should be limited to the "current" PDS;
- paragraph 2.38(2)(i) – it should be clarified that this is for SENs made in the past 12 months;
- paragraph 2.38(2)(j) - name \ ABN of each outsourced provider. This should: -
    - refer to **material** outsourced providers; and
    - as it would represent an unnecessary duplication of the investment portfolio disclosure - it should also exclude investment managers under formal agreement or mandate;
- paragraph 2.38(2)(k) – "person involved in the entity's trusteeship" – the precise meaning of this term is unclear, is potentially broad and should be defined. "Relevant person" is already defined in the SIS Act and is quite extensive (it includes the fund's auditor, actuary, custodian, investment managers etc). Presumably it is not the intention of paragraph

2.38(k) to capture these persons - this item should be limited to directors of corporate trustee and individual trustees;
- paragraph 2.38(2)(l) – we query why this is for 10 years? We submit that is should only be for the last year. If it is to be 10 years then it will need to be clarified whether this needs to be updated on a rolling or annual basis;
- paragraph 2.38(2)(p) – the exercise of voting rights by managers should be excluded from the summary of the exercise of voting rights.

ASFA submits that some of the documents and information specified in sub-regulation 2.38(2) need to be excluded, limited in scope or varied. Further, some terms used need to be defined or their meaning otherwise clarified.

2.12. SIS Regulation 9.46A – Notification - periodic statements (Page 42)

The reporting of ADA information on member statements will be confusing to members and achieve no useful purpose.

ADAs notification should only be required as part of the 90 day notification prior to transferring a member's ADA.

Requiring earlier reporting to be included with periodic statements will create significant cost for industry for no real benefit to members.

Requiring that a trustee disclose their reasons for not having moved ADA amounts and what they are doing about it, given that trustees have until 2017 to move ADAs, is irrelevant and potentially confusing for members.

ASFA submits that the obligation to include information with respect to ADAs in periodic statements should be removed.

2.13. SIS Regulation 9.48 – Limitation imposed by governing rules (Page 43)

The list of excluded contributions should be expanded to include: -

- in specie contributions;
- contributions from "family and friends";
- in respect of tailored, sec 29TB MySuper products – contributions from non associated employers.

ASFA submits that the list of excluded contributions should be expanded to include in specie contributions; contributions from "family and friends" and - for sec 29TB products – contributions from non associated employers.

3. DRAFTING ISSUES

3.1. Exposure draft regulations

3.1.1. Corps Regulation 7.9.07R – Statement of fees and other costs (Page 4)

To ensure consistency with the instructions for the PDS $50,000 fee example, it should be made clear that the dashboard fee calculation should not calculate annual or ongoing fees and costs on the $5,000 additional contribution (refer to the proposed footnote to new subclause 218(5) of Schedule 10).

3.1.2. Corps Sub-regulation 7.9.07S(11) – "Predecessor product" (Page 5)

The definition of "predecessor product" appears to be missing some words.

3.1.3. Corps Regulation 7.9.07U – Source of power for this Subdivision (Page 6)

Should the references to 7.9.07Q to 7.9.07S be to 7.9.07X to 7.9.07Y?

3.1.4. Corps Regulation 7.9.07V – Definitions - "Final Product" (Page 6)

The draft exposure explanatory memorandum, on page 5, states what should occur where the trustee does not have information about the "true" "final product" as per the 7.9.07V definition.

While the explanatory memorandum sets out what appears to be a reasonable and practical solution, the draft regulations do not reflect what is stated in the explanatory memorandum.

3.1.5. Corps Regulation 7.9.07X(1) – Table 1 – assets held on or after 30 June 2014 (Page 7)

3.1.5.1. Effective date

There is an inconsistency of drafting here between this regulation and (what should be re-numbered) sub-regulation 7.9.08X(1), with respect to Table 2.

This sub-regulation refers to the "trustee [being] required to make information publically available ... on or after 30 June 2014". (What should be re-numbered) sub-regulation 7.09.07X states that "this regulation applies on and after 1 July 2014".

Given that the "reporting dates" specified in sub-section 1017BB of the *Corporations Act 2001* are 30 June and 31 December, it would be preferable to refer to 30 June and not 1 July and for both sub-sections to be drafted in identical terms. For the avoidance of doubt a note could refer to the fact that the first disclosure would be required by 30 September 2014 with respect to assets held on 30 June 2014.

3.1.5.2. Totals

There is no apparent difference between total required by sub-regulation (7) and the total required by sub-regulation (8). They are asking for the same figure.

3.1.5.3. Example for Table 1 does not reflect the instructions in regulation 7.9.07X

The example for Table 1 does not reflect the instructions in regulation 7.9.07X. In particular: -

- paragraph 7.9.07X(2)(d) requires the of the product attributable to MySuper or choice to be expressed as a percentage, yet that percentage proportion is not included in the example;
- a row showing "the total worth of the entity's investments" (8) would be identical to "the total of the bolded figures in the fifth column of the table" referred to in paragraph (7);
- sub-regulations (7) and (8) specify that their respective totals (which will be identical, as per above) must be set out in a separate row, yet the example does not reflect this; and
- there is no requirement to provide a subtotal for each row but the example provides one.

3.1.6. Corps (Should be re-numbered as regulation 7.9.07Y) – Second 7.9.07X - Table 2 (Page 9)

3.1.6.1. Mis-numbering of regulation

The regulation with respect to Table 2 has been given the same numbering as the Table 1 regulation i.e. 7.9.07X instead of 7.9.07Y.

3.1.6.2. Double-counting

The requirement in sub-regulation (8) to add the bolded figures in the fourth column ("investing product" amount and "final product or property" amounts) results in double counting to the extent that the "final products or property" are invested in through the "investing product".

3.1.6.3. Totals

A row showing the "total worth of the entity's investments" (sub-regulation 7.9.07Y(9) would be identical to "the total of the bolded figures in the fourth column of the table" (the same as the total row referred to in paragraph (8).

3.1.6.4. Example for Table 2 does not reflect instructions in regulation

The example for Table 2 does not reflect the instructions in the regulation. In particular: -

- the (supposedly different) totals in sub-regulation (7) and sub-regulation (8) are not reflected in the example;
- sub-regulation (5) requires bolding of specified information, however, the example has not bolded information in the way required. "Commercial property holding A" is a final product or property in Table 1 and so should be in bold according to item (5), but Share A and Share B should also be in bold as they are both listed as final products in Table 1;
- the total of the bolded amounts in the example is actually $1,100,000 not $1,000,000 as stated in the example. The $1,000,000 total in the example is, in fact, the figure which would accurately represent the value of the assets invested in by the fund (i.e. that is the figure which it would make sense to disclose) but that is not the figure which would be produced by following the instructions in the regulations ("double-counting" issue referred to above).

3.1.6.5. Definition of the term "first investing product"

This should be amended to refer to a product that directly invests an asset of the RSE.

3.1.7. Corps Sub-regulation 7.9.48B(2) – Complaints – general (Page 13)

In sub-regulation 7.9.48B(2)(b) the term "'jurisdiction" is ambiguous in its application.

It is not always clear whether the Superannuation Complaints Tribunal ("SCT") or the Financial Ombudsman Service ("FOS") may have jurisdiction and in fact the courts have had to address this with respect to the SCT on a number of occasions. What would be the position where the decision maker informs the complainant that the SCT has jurisdiction to review the decision and the SCT, or a court, determines it does not have jurisdiction?

The regulations should be clarified that "external body" includes authorised external dispute resolution bodies, such as the SCT and the Financial Ombudsman Service, but does not include a court.

3.1.8. Corps Regulation 7.9.48C – Complaints – decision made (Page 13)

It is possible that the member may already have been provided with written reasons for the decision when they were notified of the decision.

The regulation will need to be amended to clarify that, in such circumstances, there is no requirement to advise the member of the right to request reasons.

3.1.9. Corps Clause 101 of Schedule 10 – definition of buy-sell spread (Page 14)

It is unclear in what circumstances paragraph (b) applies or why is refers to the "superannuation" product.

3.1.10. Corps Division 1 of Part 2 of Schedule 10 Fees and costs template: multiple fees structure presentation – Item 201 (Page 15)

The new fee template for superannuation products: -

- refers to an "investment switching fee", yet the MySuper fee provisions refer to a "switching fee";
- contains a description of "the fee for changing investment options" which is not consistent with the definition of "switching fee" in sub-section 29V(5), which refers to a change in the "class of beneficial interest";
- does not contain disclosure about contribution fees, yet the wording in new item 201, prescribed to accompany the fee template retains a reference to the investor having two different fee payment options: paying contribution fees upfront or paying contribution fees later. This will confuse investors if the prescribed table contains no reference to contribution fees and yet this wording is mandated;
- makes no reference to advice fees and insurance fees\premiums – should there be a reference as to how these are paid?

We also query why the fees and costs template for a single fee structure in item 202 of Division 2 of Schedule 10 has not been similarly amended? The operation of the regulations would mean that the template for a multiple fee structure would be substantially different in form and content to the template for a single fee structure.

3.1.11. Corps Clause 218 of Schedule 10 – Management costs, administration fees and investment fees
(**Page 18)**

Additional items have been inserted as sub-clauses (5) to (8) of clause 218 of Schedule 10 which requires the disclosure of "administration fees" and "investment fees" in the worked example to be based on certain calculations. There is no reference to "administration fees" or "investment fees" in the worked example for a superannuation product in Schedule 10 - the worked example in Schedule 10D has been changed under these amending regulations but the worked example required under Schedule 10 for funds to which Schedule 10D does not apply has not been changed.

This could be remedied by moving the new worked example that has been included in Schedule 10D to Schedule 10, and adding a new fee template into Schedule 10D to replace the current fee template.

"Investment fee" and "administration fee" should be defined by reference to section 29V of the SIS Act.

3.1.12. Corps Schedule 10D – paragraph 3(1)(b) (i)

This creates a new obligation to advise members in the PDS where to seek information on portfolio holdings disclosure, however, this disclosure will not be required to be on the fund's website until 30 September 2014.

3.1.13. Corps Schedule 10D – paragraph 3(2)(a)
(Page 19)

It would make more sense either if

- the requirement were to commence on the *later* of 1 July 2013 or the day when the ADA is attributed to a MySuper product; or
- the date were changed to 1 July 2017.

Also, the word "include" is missing at the start of paragraph 3(1)(c).

As a separate point, the proposed paragraphs (1)(b)(i) (portfolio holdings) and 1(b)(ii) (product dashboard information) would more naturally sit in section 5 of the PDS (How we invest your money) as opposed to section 1.

3.1.14. Corps Schedule 10D – sub-clause 8(3)
(Page 20)

Inclusion of mandatory wording re contribution fee payment options is inappropriate: -

- a fund may not charge contribution fees, and
- even if it does, the fund may not offer the payment options.

This wording should not be mandatory but should be conditional. In other words, there should be scope to omit the wording if it is not relevant.

In addition, both templates show percentage based investment fees and flat dollar administration fees. The investment fees and administration fees can be flat dollar, percentage based or a combination of both and this should be reflected in the templates.

It has been suggested that, instead of the table at page 20, perhaps the intention was to include the table at page 15. The Explanatory Memorandum on page 7 states that "[t]he amendment to the table at clause 8(3) will incorporate the five headline fees in relation to a MySuper product" and yet this does not appear to be the table at clause 8(3) on page 20 but instead the table on page 15 at Item 201. Instead, subclause 8(3) sets out the example for the "representative member" with a balance of $50,000.

Further, we believe that Item 14 should in fact be repealing subclause 8(7) of schedule 10D, as opposed to subclause 8(3), to incorporate the template at page 20.

Finally, in template 2 in the third column in the first row with respect to "investment Fees" the word "**And**" is not required.

3.1.15. SIS Regulation 2.37 – Remuneration and systemic transparency – prescribed details (Page 24)

The language used in the respective items is imprecise, and at times confusing, and is likely to lead to inconsistent reporting outcomes by RSE licensees.

Item 4 – "retirement" is an odd expression - in practice, an executive officer generally will terminate their employment as opposed to retire;

Item 5 – it is not apparent whether this is intended to be benefits at a given point of time, as opposed to that paid over the previous financial year;

Item 7 – it is not apparent what is meant by "long term employee benefits"? Is this with respect to those executive staff who are subject to a long term incentive scheme or is something else intended here? Further, item 7 should be amended to read "mentioned in items 5 and 6", as opposed to "mentioned in items 6 and 7".

Item 9 – it is not apparent what is meant by "termination benefits"? Is this a reference to accrued annual and long service leave, or is something else intended?

Item 10, as drafted, would appear to capture payments already disclosed under other items. If this is not the intention, this item should be amended accordingly.

3.1.16. SIS Regulation 4.02 – Covenants in governing rules of SMSFs (Page 32)

As all members of an SMSF must also be a trustee \ director, these covenants would appear to be largely irrelevant for SMSFs. Having detailed disclosure requirements for the trustee to disclose to themselves as members seems rather redundant. By way of example, the note refers to PDSs but generally, because of the exemption under sub-section 1012D(2A) of the Corporations Act, SMSFs are not required to issue PDSs.

3.1.17. SIS Paragraph 4.02A(2)(c) – Direction of investment option (Page 33)

The note with respect to this paragraph appears to relate instead to paragraph 4.02A(2)(b).

3.1.18. SIS Subregulation 9.46A(2) (Page 42)

The reference to “paragraph 29SAA(a) or (b) of the Act” should instead be to paragraph 29SAA(3)(a) or (b).

3.1.19. SIS Subregulation 9.46A(4) (Page 43)

Provision needs to be made for the circumstance where a fund has sent its 30 June periodic statements prior to 30 September (by which time ADAs need to be identified) and has attributed\transferred the ADA amounts by the time the next periodic statement is sent. In such circumstances it would be redundant to give the notice after the amounts have been transferred.

3.2. The Example of Product Dashboard based on the Exposure Draft

3.2.1. Net return performance example

It is unclear - if there are 10 years' worth of history - why the “moving average annual net return over 10” [years] only appears to commence in 2009 and not in 2002 – 10 years prior?

3.2.2. Use of terms

The product dashboard uses terms such as “actual annual net return” and “moving average actual net return over 10” (years presumably). Whilst these terms mean something to a person working in finance, they are unlikely to mean anything to an ordinary person. Perhaps the dashboard should incorporate a prescribed explanation of these terms to ensure meaningfulness to members and consistency across funds, similar to the approach which is adopted with respect to the explanation of fees in PDSs.

3.2.3. Item order is different to that specified in the regulations

The Example Product Dashboard does not appear to comply with the format required in sub-regulation 7.9.07N(2). The order of the items is different to the order specified in the regulation.

3.2.4. Net Return Target

The “net return target” is explained as being "after investment and administration fees, costs and taxes, excluding activity fees and insurance costs". This may not be easily understood by members. It may be preferable to use wording to the effect of "This target takes into account investment and administration fees, costs and taxes, but does not take into account activity fees or insurance costs".

3.2.5. “Net return target” specified as opposed to “Net return performance” graphed

The “net return target” is a rate above CPI, whereas the graphed “net return performance” is an absolute return. If this is the intended outcome then this needs to be explained prominently.

3.2.6. Explanation of “Target net return over 10 years” graphical representation

The explanation of the “target net return over 10 years” on page 2 is "a line plotting the realised value of the 10 year moving average return target using realised CPI for the relevant years". This is unlikely to assist members to understand this.

4. PORTFOLIO HOLDINGS DISCLOSURE GENERALLY

ASFA is broadly supportive of the requirements, introduced into section 1017BB of the Corporations Act through the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012* (the "Act"), that trustees of superannuation funds disclose their investment holdings twice yearly.

We are concerned, however, about

- the difficulty and expense of complying;
- the meaningfulness of the information disclosed;
- the imposition of strict liability; and
- adverse consequences which flow from complying with these obligations.

4.1. Difficult and expense in complying

The ability of the regulations to provide that investment in a financial product or other property is not a material investment and therefore, in prescribed circumstances, information relating to the investment is not required to be made publically available has the potential, if utilised well, to be an effective tool.

4.1.1. Difficulty

There will be major difficulties for trustees in obtaining this information, especially with respect to fund of fund managers and managed investment schemes, where holdings are bundled and commercially sensitive. This means that custodians generally are not aware of them and, as such, currently are not able to provide this type of reporting.

Further difficulties are created for trustees who invest through a PST or other unit trust into an unrelated underlying fund, which could result in an extremely long chain of reporting. This will necessitate the responsible entity or trustee at each level having to work out the proportion applicable to each investor the next level up in the chain.

The volume of information is also a significant issue. Funds in full disclosure would have literally tens of thousands of lines of assets and securities. Fund, administrator and custodian systems were never designed to do this and often can only offer limited "search" capability.

Collation of this information from all managed investment portfolios and collective investment vehicles will also prove difficult. It will pose a major challenge in categorising, classifying, matching, collating and reconciling files and data.

Further, many securities and other assets are held in systems using codes that are unintelligible to members. It would be a major translation task to substitute logical names for these codes.

Finally, data collection organised by investment products – MySuper and choice - will be complex and costly for many funds and \ or custodians, especially where look through to underlying managed investment schemes, derivatives etc. is required.

4.1.2. Expense

Look through represents an inordinate amount of work which will serve to increase costs significantly for little appreciable benefit, especially with respect to MySuper members who are not participating in investment choice.

The amount of information required to meet the obligation to publish portfolio holdings is extreme and the cost of collating and publishing all of the required information would appear to be prohibitive.

The compliance costs of this obligation as currently framed are likely to far outweigh any potential value it may provide for members, who ultimately will be bearing the brunt of the costs.

As such, this obligation should be subject to a rigorous cost \ benefit analysis when determining whether the regulations should provide that investment in a financial product or other property is not a material investment and therefore not required to be made publically available.

4.1.3. Meaningfulness of the information disclosed

We query the policy objectives of this measure, beyond increased transparency. Realistically, tens of thousands of lines of data is most unlikely to be used to inform consumer decision making.

In addition, there are some factors which will adversely affect the completeness, and therefore the consistency and comparability, of the information disclosed.

4.1.3.1. "Existing" versus "New" Agreements

As the obligation to provide information only applies to new contracts entered into from the day of Royal Assent, this will result in an extended period where the information published is incomplete because trustees are unable to obtain some of the information with respect to existing agreements, which will impact on the usefulness of the information.

4.1.3.2. "Foreign" versus "domestic" agreements

Investments made with foreign investment managers are beyond the jurisdiction and therefore not subject to the *Corporations Act 2001*. It is unclear as to how the offence provisions in relation to failure to notify will be effective with respect to overseas investment managers who are outside the jurisdiction – presumably they would be unenforceable.

4.1.3.3. Derivatives

Care will need to be taken derivative disclosure. While it should be on an effective exposure basis, as opposed to a raw derivative level, this will prove onerous for trustees and custodians to calculate.

4.1.4. Strict liability

If the trustee inadvertently publishes inaccurate or incomplete date it will be committing an offence punishable with a penalty of 100 penalty units or imprisonment for 2 years or both.

Imposing strict liability offences with respect to these obligations is totally inappropriate. This is especially the case as there is a limit to the extent to which the board can exercise governance oversight, particularly with respect to third parties, and having regard to the somewhat limited nature of any potential harm which may be considered to arise.

In the absence of co-operation by the investment manager the trustee will be forced to rely on the defence. Where the trustee is unable to compel a commitment from the investment manager it should not have to demonstrate that it took reasonable steps to ensure that the information would not be misleading or deceptive.

The level of penalties is too onerous, particularly as it is an offence irrespective of whether the information is known to be defective. Given the current approach, trustees are being forced to rely on their investment managers and custodians – they are not in a position to verify that the information is correct.

The liability provisions should be modified to allow trustees to reasonably rely on the information provided to them. Further, exceptions from the timing rules should be created where the data cannot be sourced in the time specified.

4.1.5. Adverse consequences

There are significant adverse consequences which are caused by the publication of investment holdings.

4.1.5.1. Disclosure of market sensitive information

With respect to unlisted (direct) assets, disclosure of the book value will put the superannuation funds at a material commercial disadvantage with respect to all other participants in the market, who do not need to disclose such information. This will have a deleterious effect upon the investment returns of members of those funds.

By way of example, one large fund recently: -

- successfully acquired an additional interest in an existing asset through the exercise of a pre-emptive right at a discount to the fund's book value. Had the fund been in a position of having had to disclose its book value, the market would have "bid up" the asset to at least an equivalent level thereby eliminating any advantage to the fund and denying its members the opportunity acquire an investment at an attractive price;

- sold an asset at a price above the fund's book value. In a difficult market, as was the case here, the likelihood of receiving an offer at or above book value was unlikely and had the fund been forced to disclose its book value to the market the opportunity of making a sale above that value would have been lost.

It is important to note in this context that no corporation active in these markets is subject to similar disclosure requirements, thereby placing superannuation funds at a considerable disadvantage. This represents a considerable distortion of the market.

Another example is a large fund which trades directly in some securities. The funds and its managers are wary of market moving sensitivity, particularly in Australia's very thin markets.

While the fund is aware that there are 90 day delays in reporting, nevertheless it is concerned as funds tend to trade in patterns and other market participants will be very interested in finding out about these patterns, generally consider to be commercially sensitive information. Investment traders would become keen students of the patterns of securities trading of various superannuation funds.

Further, as between the member and the fund, this will also open the opportunity for investment plays where members have a liquid investment in an illiquid asset option. It will be easy to determine when assets will be revalued by the trustee. Where the book value has not changed but the market value has changed the member will be able to sell out before a re valuation and then buy back in. As this is public information, there do not seem to be any legal restrictions to guard against this.

4.1.5.2. Commercial confidentiality clauses

Certain investments – especially start-up ventures and private equity - have as a condition of participation a non-disclosure clause which restricts the trustee from disclosing the underlying assets in the investment. If funds are not permitted to enter into such arrangements this will deny them the opportunity to enter into agreements to participate in legitimate, and potentially rewarding, arrangements.

4.1.6. Possible alternate approaches

4.1.6.1. Trustee disclosure at first level with direct obligation on managers to disclose

An alternative to trustees being forced to police investment manager disclosure would be for the responsible entities of managed investment schemes and fund of fund managers to be required to make full disclosure. Superannuation funds could then publish links to the investment managers' web-sites to enable the complete portfolio holdings to be available.

This is the most practical and efficient solution as the investment managers manage the asset holdings. With a link to the fund manager's holdings, the Trustee would not have to spend time and resources chasing managers for data and the listings would be likely to be more current and accurate.

This approach would provide transparency while avoiding the need for onerous contract negotiations, trustee monitoring and systems changes for superannuation funds, administrators and custodians.

4.1.6.2. Scaled back obligation

Sub-section 1017BB(4) provides for the ability to prescribe materiality thresholds.

The obligation to disclose portfolio holdings could be scaled back to something more meaningful to the member and more cost effective, such as analytical summaries of the fund's investment characteristics and risk profiles. This could include information about such matters as the asset class and location (country) of different groups of assets but stop short of dollar values \ percentages of each individual asset.

Capturing the first 80% or so of assets is easy – it is the rest which proves difficult and onerous and represents a relatively low level, insignificant level of detail.

An alternative to the current proposal is that the "look-through" is limited to assets \ investments which make up 5% or more of the option's assets (or possibly a lower figure, but no less than 1%).

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