File Name: 2014/39

10 November 2014

Manager
Benefits and Regulation Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: superannuation@treasury.gov.au

RE: Updated SuperStream – Pass through exposure draft and explanatory statement

The purpose of this submission by the Association of Superannuation Funds of Australia (ASFA) is to respond to the request for comments on the most recent exposure draft regulations and the associated 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 restate its opposition to the proposal to mandate that an employer's default fund must accept and pass through to the destination fund contributions information that relate to a sponsoring employer's chosen-fund contributions.

ASFA acknowledges the benefits to funds and employers that can flow from the provision of a pass-through service and the right of a fund trustee to provide such a service. However, the provision of a contributions data pass-through service involves the use of members' monies to provide services to non-members of the fund. As a result, ASFA considers that providing such a service should be a trustee decision taken in full consideration of costs and benefits to the fund and its members.

Additionally, we consider that through the mandating of both the contributions data and payment data standards and the message transport protocol the government has solved the basic problem of providing employers with a single method of delivering contributions data to any fund.

Whilst mandating contributions data pass-through may facilitate the early adoption of electronic contributions processes by employers, it is not essential to the adoption of the standards or to the delivery of SuperStream more generally. That there are many existing providers of contributions data and payment clearing services in the market and that many more similar services are being developed off the back of the data standards adds weight to the argument that mandating pass-through is not essential to the implementation and adoption of the data standards.

We note that, as recommended in our submission on the earlier draft regulation, the regulation has been 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. However, it is our view that the current draft is still deficient in that:

- While it enables an employer to send the contributions to the employer's default fund, it does not impose a requirement on the recipient trustee to, in all circumstances, on-forward the contributions to the destination fund.

- By not addressing the situation where an employer has multiple default funds or does not have a default fund, it fails to meet the stated policy objective to ensure that each employer will be able to deliver all of its contributions data to a single location and be certain they will be routed to the right destination.

We further note that, although the objective of SuperStream is to provide an employer with a single process for delivering contributions to any fund, the effect of the draft regulations is that an employer will be able to deliver all of its data to a single destination. That is, contrary to the overarching philosophy of SuperStream, an employer wishing to take advantage of the provision may still find they are required to use multiple processes when delivering contributions data.

The above matters are addressed in more detail below.

Finally, the delay in finalising the actual requirements has shortened the application development and implementation time frame for funds. Critically, for funds whose SuperStream contributions implementation involves a direct employer portal for contributions with respect to default fund members (Channel B) and/or a fully compliant Channel A solution through a gateway services provider, the following matters will need to be addressed and resolved before 1 July 2015:

- *Gateway Connectivity – Integrity issues*
  The underlying requirement to enable an employer to connect direct to the fund's Gateway will require detailed analysis to ensure that those direct connections do not compromise the Network.
- *Commercial Issues*
  Current gateway agreements do not facilitate 'interchange fees' (the fee for receiving and passing-through data).
  Finalisation of these commercial arrangements will take time, particularly in the absence of any information on anticipated volumes, and will therefore impact on a funds ability to implement the arrangements by 1 July 2015
  To facilitate the selection and use of the default fund gateway by an employer, commercial agreements need to be developed and approved by Trustees
- *Legal Issues*
  Provision of a pass-through service to employers introduces new commercial risks for trustees. These risks will need to be identified, analysed and mitigated through the inclusion of appropriate provisions in commercial agreements between funds and default employers.

In summary, the shortened implementation timeframe poses significant implementation risks for funds, particularly around implementing new commercial arrangements.

Based on the manner in which the contributions data standards have been designed, the creation of the SuperStream Transaction Network of gateways and the abundance of compliant solutions that will be available to employers by 1 July 2015, ASFA considers that mandating the pass-through of employee data is not required and recommends 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 1

ASFA recommends that the need for a pass through regulation be reconsidered.

Recommendation 2

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.

However, 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. Doing so will facilitate the integration of the pass through requirement into the replacement, SuperStream compliant, data capture facility.

Recommendation 3

ASFA recommends that, should the Government resolve to regulate in this space, that the commencement date for funds providing an employer portal for default fund only contributions be 1 July 2017, following the expiry of the period during which alternate contribution arrangements may be used.

Specific comments

The Regulations

Proposed regulation 7.07EA

Regulation 7.07E stipulates that where 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. Proposed regulation 7.07EA provides an exception to this requirement by permitting an employer to instead give the data associated with the payment to another fund. To ensure delivery of the data to the final destination, regulation 7.07EA imposes an obligation on the recipient fund to pass the data to the ultimate employee's chosen fund.

However, as drafted, there remain circumstances in which the regulation, from an employer perspective, will either not be fully effective or will not deliver to the employer the stated policy outcome.

The deficiencies exist as the regulation, as drafted, appears to be premised on an employer only having one default fund. That is, it fails to recognise the circumstances in which an employer is not required to have a default fund or may be required to have more than one default fund.

In Part 3A of the *Superannuation Guarantee (Administration) Act 1994 (SGAA)*, the circumstances are set out in which employer superannuation contributions are made in compliance with the choice of fund requirements. Failure to comply with the choice of fund requirements may result in an employer's individual superannuation guarantee shortfall for an employee for a quarter being increased. Broadly, employer contributions are made in accordance with the requirements of Part 3A where they are made to the employee's chosen fund or, where there is no chosen fund for the employee; they are made to a fund that is an eligible choice fund for the employer (the employer default fund).

While the SGAA defines the requirements for a fund to be an employer's default fund, it does not prescribe the number of default funds an employer may have. This is necessary as an employer:

- may be required to comply with the requirements of a number of industrial agreements each of which may prescribe the eligible choice fund(s) for a class of employees covered by the agreement, or
- the employer may have employment arrangements in place that obviates the need to provide a choice form to an employee and thus nominate a default fund. Such a circumstance is where an employer will not permit a new employee to commence employment until such time as the employee's chosen fund details have been supplied. Part 3A of the SGAA contemplates such employment processes.

In the first circumstance, subregulation 7.07EA(1) only supports the giving of chosen fund contributions data to an employer's default fund for passing on. That is, the regulation does not appear to contemplate the giving of contributions destined for a default fund other than the default fund that is specific to the employee. This interpretation is supported by subregulation 7.07EA(2) which only requires (supports) the passing on of chosen fund contributions data. Where an employer gives to the default fund contributions data destined for another of the employer's default funds, subregulation 7.07EA(2) does not impose an obligation on the recipient fund to pass on that data. Thus, the employer has no certainty that the obligation under regulation 7.07E will be met, on the employer's behalf, by the default fund.

In the second circumstance, the absence of a default fund for an employer means the employer must use their own resources to select an arrangement for the delivery of contributions under the data standards. This should not be difficult for an employer to arrange, as there are many service providers who can deliver a single contributions data delivery solution for employers including,

for small employers, the ATO's Small Business Superannuation Clearing House. Other providers range from payroll bureaux and accounting software providers to contribution clearing houses.

The ready availability of solutions for employers that do not have a default fund highlights that mandating a contributions data pass through requirement is not essential to the delivery of the policy objective that each employer is able to deliver all of its contributions to a single location and be certain that it will be routed to the right destination.

> Recommendation 4
> Should the intent be to mandate the passing through of all of an employer's contributions data by any one of an employer's default funds then ASFA recommends that regulation 7.07EA be rewritten to give effect to such a requirement.

ASFA has previously raised its concern with the prospect that, in the circumstances where an employer has multiple default funds, an unfair burden may be imposed on one of those funds with respect to the volume of transactions received and which it is required to pass on to the destination fund. This will be a potential outcome should Recommendation 2 above be adopted.

Previous advice on this matter has been that default funds should monitor the flow of contributions data from employers and take their own steps to address the issue should such a situation become apparent. Whilst this appears at first to be a reasonable solution, such action is not supported by the Superannuation Data and Payment Standards as the contributions message implementation guide does not capture information as to whether the destination of a transaction is an employer's default fund or an employee's chosen fund. Should recommendation 2 above be adopted, then this issue will need to be addressed so as to afford default funds the opportunity to monitor employer behaviour with respect to which default fund contributions are being directed.

> Recommendation 5
> Should it be determined necessary that default funds are required to pass through both default and chosen fund contributions data, ASFA recommends that at the first available opportunity the contributions data standard be amended to include for each contribution whether the contribution is being made to an employer's default fund or the employee's chosen fund.

Definition of default fund

The definition of 'default fund' in subregulation 7.07EA(4) links back to the SGAA. In essence, the SGAA defines the employer 'default fund' as the 'eligible choice fund for the employer' that is specified under section 32P in the 'standard choice form' provided to the employee as the fund to which the employer will contribute for the benefit of the employee if the employee does not make a choice. We note that the choice of funds requirements (Part 3A of the SGAA) predate, and hence do not address, the Corporations Act requirements with respect to the issuing of a financial interest.

Where an employee does not exercise choice (a reasonably common occurrence among new employees) the employer, in order to make contributions to the default fund, must first enrol the member in the default fund. This requires the fund to issue an interest to member in conformance with the requirements of the Corporations Act. In part those requirements include the provision of a product disclosure statement to the prospective member before the issuing of the interest and acceptance of monies.

The Corporations Act contains specific provisions to address the tension that arises between the need to provide disclosure material prior to the issuing of an interest and the obligation to make superannuation contribution payments on behalf of employees who do not choose a fund. The provisions enable the necessary product information disclosures to be first made to the employer and, once the employee has been issued the interest, to the new member. The disclosures to the employer are made by way of a formal arrangement between the (fund product issuer) and the employer.

Under the data standards, an employer may, in the one data file, both enrol an employee in the employer default fund and make the first contribution.

However, information from ASFA members reveals a lack of awareness among employers of the subtleties of the Corporations Act. That is, there is evidence of employers advising employees on a choice form of an employer default fund arrangement that has not

been formally established as required by the Corporations Act. This appears to be a natural outworking of the SGAA definition which speaks only in terms of the fund being a complying APRA regulated entity.

Many funds currently have processes in place to facilitate compliance with the Corporations Act. Generally, these arrangements involve direct dealings between the employer and the fund prior to establishing an electronic transacting relationship. However, the move to the new SuperStream transacting arrangements has created challenges with respect to Corporations Act compliance. ASFA is concerned that, as worded, the regulation will give an employer the impression they can simply nominate on the choice form any complying APRA regulated fund as their default fund and thus access the pass-through provisions without the superannuation provider's knowledge. ASFA is concerned that, where there is an inability of a superannuation provider to determine whether a SuperStream transaction is from an employer who is not a standard employer sponsor of the fund, the pass-through regulation will expose that fund to breaches of the Corporations Act with respect to new member enrolments. It will also increase fund costs in circumstances where contributions data is passed-through for employers who have no entitlement to such a service.

ASFA recommends that the situation be ameliorated by the inclusion of a third limb to the definition of a default fund that refers to the presence of a formal arrangement between the employer and the fund.

Recommendation 6

ASFA recommends that:

- The definition of 'default fund' in the Superannuation Guarantee (Administration) Act 1994 (SGAA) be amended to ensure that an employer is only able to nominate a fund(s) under Section 32P of the act in respect of which they are a standard employer sponsor, and
- Until such time as the SGAA can be amended, the definition of 'default fund' in proposed regulation 7.07EA of the SIS regulations should be amended to confine the concept of a default fund to those funds in respect of which the employer is a standard employer sponsor by including wording along the lines of:

  (c) to which the employer mentioned in subregulation (1) has made an eligible application under subsection 1016A(2) of the Corporations Act 2001.

Single method for delivering contributions

The fundamental goal of SuperStream has been to improve the efficiency of superannuation administration. One of the methods of achieving this is to introduce mandated data standards for the processing of rollovers and the making of contributions. From an employer perspective, the introduction of data standards is intended to solve the problem of having to provide differing data sets and use differing processes when dealing with different funds. By mandating data standards and the transport protocol an employer is able to use a single method to deliver contributions data to any fund.

We note that under the proposed contributions pass-through arrangements this policy has been subtly changed to one of employers being able to send the contributions data to a single destination. As set out in the explanatory material, a fund may comply with the pass through regulations by providing a Channel B solution for an employer's default fund contributions data complemented by a Channel A solution for the employer's chosen fund contributions data.

This change in policy objective permits a fund to reintroduce into the system an inefficiency the data standards were designed to overcome.

Recommendation 7

ASFA requests that Treasury confirm that the shift of policy from one of providing employers with a single process for sending contributions data to one of enabling employers to send contributions to a single destination is intended and appropriate in the context of the overarching SuperStream design principles.

Interrogating pass-through data

Flowing from the mandating of the passing-through of contributions data is a requirement for funds and other intermediaries to handle a significant volume of data for which they are not the ultimate destination. This raises questions as to the right of the first recipient default fund, or any party in the transaction chain, to interrogate that data other than for the purpose of ensuring the data can be sent to the ultimate destination.

While this issue is covered more fully in the section below on the explanatory statement, it is raised here as there may be a need for a regulation that either restricts access to data or expands the rights to access the data, depending on the Government's view on the scope of existing regulations in this area.

The Explanatory Statement

The following comments on the explanatory statement are based on the regulation as it is drafted.

Page 1of 5 – Pass-through of contributions data

The draft explanatory statement states, on page 1, that the purpose of the regulation is to ensure that where an employer has a default relationship with a fund and provides to that fund data with respect to another fund, the default fund must pass on the contributions data to that other fund whether that is a default fund or any other fund.

As set out earlier in this document, the actual requirement, as drafted, is only that the recipient default fund must pass on the employer's chosen fund data.

> Recommendation 8
>
> ASFA recommends that, unless the draft regulation is amended, the stated purpose of the regulation in the explanatory statement be amended to reflect the actual requirement.

Page 3 of 5 – Pass-through contributions

The first full paragraph on page 4 of 5 of the explanatory statement repeats the assertion that where a fund is provided with contributions data relating to another fund by an employer with which it has a default relationship, then it must pass that contribution data to the correct fund. However, as stated above in the comments on the draft regulation, the actual obligation to pass on data, as set out in 7.70EA is to only pass on data that would otherwise be required to be given to an employee's chosen fund.

> Recommendation 9
>
> ASFA recommends that, unless the draft regulation is amended, then wording of this paragraph in the explanatory material be amended to reflect the actual requirement in the regulation.

Page 5 of 5 – Employer/fund default arrangements

The section of the explanatory statement deals with the employer/fund default arrangements. It contemplates the situation where an employer has more than one default fund. Whilst the paragraph states that it is expected that in most cases the employer will choose to use the data and payment service provided by its largest default fund, it acknowledges that this is a commercial decision which an employer in this situation will need to consider.

As set out above in our comments on the draft regulations, if an employer is permitted to send the contributions data relating to all of its default funds to a single default fund, then default funds will be exposed to the possibility of receiving all of an employer's contributions data even though, from the employer's perspective, they are the smallest default fund by contribution numbers.

> *Recommendation 10*
>
> ASFA recommends that, should the regulation be amended to permit an employer to with multiple default funds to send all of those contributions to a single default fund, that this should be specifically acknowledged in the explanatory statement.

Further to this, the explanatory statement should recognise that the data standard does not provide a mechanism for a fund to determine that this is occurring or to determine the volume of contributions that it is passing through and which relate to another of the employer's default funds.

Interrogation of pass-through data

As mentioned in the section above on the regulations, flowing from the mandating of the passing-through of contributions data is a requirement for funds and other intermediaries to handle a significant volume of data for which they are not the ultimate destination. As it will be a standard and necessary part of the process that the first default fund will be required to capture and retain the data that it passes on for disaster recovery and other purposes, this raises questions as to the right of the first recipient default fund, or any party in the transaction chain, to interrogate that data other than for the purpose of ensuring the data is successfully sent to the ultimate destination.

Because of this, and as regulation 7.07EA provides an exception to the basic principle in regulation 7.07E that an employer is required to send the contributions data to the fund to which the associated contribution was sent, ASFA considers there is a need for clear guidance either by way of regulation or in the explanatory material as to the right of an intermediary party to access the data.

ASFA is concerned that a fund may wish to access the pass-through data for a range of non-essential reasons, including determining the percentage of an employer's contributions that are flowing through to a competing default fund, detecting high income employees (for marketing purposes) or matching pass-through employee details to the fund's existing membership base etc. Funds may be of the view that as they have collected and own the data going through it, even though a portion of this data is information about non-members of the fund, it has a right to use that data for business intelligence purposes.

Such a right-to-access is supported by an underlying expectation that funds will be able to monitor the data so as to determine service pricing etc. and also to monitor the behaviour of employers with multiple default funds, an employer's default fund will be able to monitor transaction volumes related to that employer's other default funds.

ASFA considers that, due to the wealth of information that may be extracted from the contributions data and the variety of non-superannuation fund parties that may access the data, the explanatory statement should, as a minimum, clearly set out the existing rights, obligations and constraints that apply to accessing the data. Should the existing rights be found to deficient then ASFA recommends that the matter be addressed through regulation.

Recommendation 11

ASFA recommends that the issues around access to the pass-through data be examined and:

- guidance included in the explanatory statement on the rights of intermediaries to interrogate the pass-through data, and, if necessary
- regulations be made restricting access to that required for the purpose of the provision - determining the ultimate destination of the data.

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

Glen McCrea
Chief Policy Officer