

1 September 2014

General Manager
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: superannuation@treasury.gov.au

Dear Sir/Madam,

Re: SuperStream – Pass Through of Employee Details Exposure Draft Regulation and Explanatory Statement

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds who manage the superannuation accounts of nearly two-thirds of the Australian workforce.

As the principal advocate and peak representative body for the \$600 billion not-for-profit superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training, consulting services and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

AIST strongly supports the SuperStream reforms, and we are pleased to enclose our submission regarding the pass through of Employee Details Exposure Draft Regulation and Explanatory Statement.

If you have any further questions regarding this submission, please contact Karen Volpato, Senior Policy Adviser on 0419 127 496 or at kvolpato@aist.asn.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Garcia', is written over a light blue horizontal line.

Tom Garcia
Chief Executive Officer

Regulation 2014 exposure draft

Why mandatory pass through is too early to consider

The industry continues to undergo significant change on the back of introducing MySuper and SuperStream for rollovers and are on the cusp of implementing whole of economy change in SuperStream contributions. Based on feedback from the industry, the government delayed the implementation timetable for SuperStream contributions which affect over 850,000 employers. These are now being phased in between 3 November 2014 and 1 July 2016.

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In its Interim Report, the Financial Services Inquiry considers it too early to assess whether the SuperStream reforms will achieve their objectives. Whilst AIST is supportive of the overall objective of making it easy for employers to do business with the superannuation industry, AIST believes it is too early to introduce yet another change to how contributions data and payments are distributed between employers and funds. AIST suggests at this late stage of the implementation, that the proposed exposure draft regulations could potentially introduce unnecessary and unacceptable risks to the overall success of SuperStream.

The industry has been - or is - in the business of building and implementing their SuperStream compliant solutions for their employers, an important distribution channel for the superannuation industry. AIST is encouraged by the industry's response to SuperStream contributions, with employers likely to have a plethora of commercial SuperStream compliant solutions available including no or low cost options provided by the superannuation industry.

AIST would support the ATO, in collaboration with the industry, developing a best practice 'pass through' standard which would be available for the superannuation industry to adopt on a voluntary basis during the implementation phase. Once the industry has completed the implementation of SuperStream and closed or upgraded any bridging solutions (which in turn assist employers transitioning into becoming SuperStream compliant) to enduring solutions by the required date of 1 July 2017, the government should review the effectiveness of SuperStream with an option to introduce a mandatory pass through policy at that time. Such consideration of a mandatory introduction of the best practice pass through standards should occur at the earliest in the 2016 2017 year.

Should government adopt mandatory pass through regulations AIST believes the following issues need to be considered.

1. Operating in members' best interest

Throughout the SuperStream implementation process, ultimate responsibility lies with superannuation funds and employers, notwithstanding the critical importance of intermediaries.

The Interim Report of the Financial System Inquiry (FSI) has identified that vertically integrated banking models may operate in ways that are anti-competitive and result in higher fees than would otherwise apply. Combined data and payment clearing services can be part of such models, and so can operate to increase anti-competitive behaviour.

Intermediaries not using privileged position

AIST is concerned that the contribution pass-through requirement operates so that intermediaries, such as gateways or payroll service providers, cannot use their privileged position and market dominance to act in a way that might not be in super fund members' best interests. The choice of default fund for pass-through must be made by an employer in pursuit of members' best interest without constraint or conditions.

The selection of the default fund should not be conditional on the use of other services (which may be third-line forcing). The selection of a particular default fund should not result in benefits for exclusive dealing, such as preferential access or discounted pricing for other services, particularly non-superannuation related services. Such behaviour could be motivated by a desire to direct employers to super funds that use a provider's gateway, and so maximise that provider's revenue from those super funds. The anti-competitive nature of this behaviour can also be magnified by the offering of incentives.

AIST is particularly concerned that intermediaries do not act together in a way that is not in the interests of employers and super funds – and, most importantly, super fund members.

For example, a clearing house acting as an agent of employers could select the pass-through super fund. Therefore, a clearing house could select any default fund it considers in its own interests. For example, a clearing house could have a preferred arrangement with a gateway or own a gateway through which any transactions would generate income.

Only one fee where multi services owned by one entity

Where clearing houses and gateways are owned by one entity, there should be only one fee applied where a member transaction is channelled through the clearing house and then the gateway. We would prefer to see only one fee per member transaction enshrined in legislation to remove the potential for multiple charges. This step does not remove the potential for multiple fees per member: an example is where a member's salary sacrifice component is channelled through a different service provider from the SG component.

A similar scenario could occur with a payroll bureau or service provider. This could be an unintended and detrimental consequence unless protections are in place. The regulations should recognise this scenario and require that the selection of a pass-through super fund is in members' best interests.

Recommendation

In addition to system-wide measures that AIST is recommending to the FSI, AIST recommends that a range of measures be put in place to discourage anti-competitive behaviour. These should include:

- Full disclosure of each element of services provided and the fees associated with each.
- A clear explanation that an employer can simply choose data services if they wish.
- One fee per member transaction to be given regulatory recognition.

2. Combined data and payment clearing services

The regulation will establish an obligation on a default fund to pass on contribution data, but does not require that clearing services must automatically be provided. Notwithstanding there being commentary in the Explanatory Statement intended to clarify this, there is still a widespread view that clearing services will be offered as a consequence of the regulation.

Recommendation

AIST believes that the Explanatory Statement should further emphasise the point that data services can be offered without clearing services. Including an example of a fund which (a) is not using a clearing house and (b) is continuing to not use a clearing house in meeting this obligation would assist in clarifying this scenario.

3. Terms of service – fund portals

Compliance and funds may set normal commercial conditions

AIST seeks clarification in the Explanatory Statement about whether or not the obligation will be unconditional. For example, in line with normal business practice, it is anticipated that fund web portals will include a requirement to abide by rules that are a condition of using the service (e.g. non-disclosure of passwords, no transmission of viruses) and that this may also include a disclaimer – and making pass through conditional on such matters. This requirement to agree to the terms of service exists now and terms are typically set up as a tick box acceptance.

This then leads to consideration of whether or not the details of the terms of service, and any associated requirements imposed by the super fund – or their service provider - are compliant with the requirements of the regulation.

It seems self-evident that super funds will be able to require employers to send data in the prescribed form and meet other regulatory requirements. However, the terms also routinely require an employer to acknowledge respective roles and responsibilities, and to comply with the normal things to protect the system. The regulation should clarify that such requirements can be made by a super fund on an employer.

Cannot force use of other services

AIST submits that that the rules of service cannot require an employer to use a super fund's full clearing service or other value-adding services if they not want to, or require the employer to send all of their contributions data through this fund (although an employer can decide to do this where the fund can accommodate all contributions).

Legacy portals

AIST also submits that there may be circumstances where legacy fund portals remain open to accommodate non-complying or transitional employers through to July 2017. We anticipate that some funds will choose to route all complying Data Standard contributions through a gateway or clearing house, but will not be able to accept choice contributions through a legacy portal, whether for an interim transitional period or in perpetuity.

Publish routing methods

We recommend that funds be required to publish on their websites how pass-through contributions are to be routed, whether via the fund portal, a gateway or clearing house, and how these services will be paid for. This will provide greater clarity for employers.

Handling and timing of contributions

We are concerned that the legislation should also prevent funds from 'misinterpreting' choice contributions as new default members for the fund providing the pass through.

We understand that, unless there is an award or industrial agreement prescribing it, neither the fund portal nor any other fund requirement can require an employer to submit contributions monthly rather than the statutory requirement of quarterly. Notwithstanding this, AIST strongly supports monthly contribution payments as this is in members' best interest, and would support a super fund's ability to impose such a requirement.

The ATO should consult with industry and develop standard or minimum terms and conditions.

Recommendations

- That the Explanatory Statement be clarified ensuring that the terms of service are compliant with the regulation and that funds may set normal commercial conditions (e.g. non-disclosure of passwords).
- The regulation should clarify that requirements such as requiring employers to send data in the prescribed form can be made by a super fund on an employer.

- It be made very clear that the rules of service cannot require an employer to use a super fund’s full clearing service or other value adding service if they do not wish to, or require the employer to send all of their contributions through the fund.
- There may be circumstances where legacy fund portals remain open to accommodate non-complying or transitional employers through to 2017 and this should be recognised.
- Funds be required to publish on their websites how pass-through contributions are to be routed.
- No employer should be forced to submit contributions monthly.
- That consideration be given to including in a Code of Practice behaviours which are unacceptable, e.g. not being able to require an employer to sign-up to other services.

4. Cost of service

The Explanatory Statement notes that a number of super funds already provide contribution pass through services as part of a data and payment clearing service, and that “These services are often offered to employers at a very low or zero cost.”

While the commentary usefully confirms both that the regulation will not change these arrangements and that combined data and payment services will not be compulsory, it nonetheless creates ambiguity about charging for pass through and the nature of the service that is required to be offered.

There does not appear to be a prohibition on super funds charging for either a stand-alone contribution pass through service or a combined data and payment clearing service. In particular, it appears that a super fund can charge for a contribution pass through service but that there is an “expectation” that the cost will be “very low”.

Presumably, the expectation is that it will be on the basis of cost recovery, especially if a fund would otherwise be subsidising costs associated with the processing of other funds’ members. AIST supports the ability to charge on this basis and submits that the Explanatory Statement should further clarify this.

Recommendations

That the Explanatory Statement clarify that charging on a low or cost recovery basis is acceptable.

5. Separation of data and payment services

It is unclear if a super fund offering a combined data and payment services must also offer a stand-alone data service as an alternative for employers to choose. This could be of interest to an employer with established payment arrangements or to an employer that finds it more cost-effective to use separate services.

AIST submits that a super fund should be required to offer a stand-alone service. If this was not a requirement, it will be much harder for an employer to understand that they do not have to use all of the value-added services offered by the super fund or their service provider. AIST notes that this is not implying funds must offer a fund portal for pass through, as this may add to costs to those funds which are moving to make the gateway their portal.

Recommendations

- Those funds offering combined data and payment services should also offer standalone data services.
- Funds should not have to offer a fund portal for pass through.
- Any costs associated with data and payment services charged to an employer must be fully disclosed and not be bundled. Each element to be separately identified and priced.

6. Format of data

The draft regulations do not currently permit a trustee to prescribe the method or format of providing contribution data for clearing house purposes. The draft regulations expressly link the contribution data to that provided by an employer pursuant to regulation 7.07E(2) of the SIS Regulations, but not to the standards prescribing how information is to be given to the fund.

Regulation 7.07E(2) requires that employers provide full name, residential address, tax file number (if held by the employer) and phone number to the super fund. Other requirements of regulation 7.07E that are not within 7.07E(2) include same day payments & unique payment reference numbers. The ATO should issue a Legislative Instrument providing clarity and consistency. It is suggested that mobile numbers and email addresses could also be mandatory as this is now the dominant phone number, especially for younger members. This – together with AIST’s recommendation to the FSI that there should be a regulatory review to remove any barriers to using e-commerce with members (e.g. members having to opt-in to receiving e-commerce notices) – would greatly assist with reducing costs.

Recommendations

- The draft regulations should be clarified to outline how information is to be given to the fund, and should include mobile numbers and email addresses.

7. Gateway splitting

AIST has asked a number of existing gateway providers how they would process SuperStream contribution files under the proposed Pass through regulations when they receive such files from an employer or an agent of an employer (e.g. clearing house, payroll services provider etc.):

Some gateways advised that if they are the agent on behalf of the employer, they would take responsibility for the ‘splitting’ and routing of any ‘pass through’ files:

- The main reason given was that as an agent of that employer (or in some cases payroll services provider), the gateway wanted to provide a complete service to that employer rather than passing it on to the ‘default’ fund that might have no or little interest in managing non-member data. In particular, it was the handling of the return error messaging that convinced these gateways to take on the responsibility to ‘split’ and route.
- Conversely, AIST is aware of other gateway providers who will pass the files on to the ‘default’ fund for ‘splitting’ and routing on the basis that it is the ‘default’ fund’s responsibility - which appears consistent with the explanatory draft regulations.

AIST proposes that this be carefully considered by Treasury as to the unintended consequences of gateways adopting such a services model. Gateways might be motivated to adopt such a model as it would be able to receive fees twice (once from the employer as the agent and once from the fund for routing SuperStream files) if the ‘default’ fund uses the same gateway as the employer or its agent. Given that such files would be routed through the gateway network, unlike a portal where employers must log on using login and password, the default fund would have no method of stopping these files from entering their appointed gateway.

One way to ensure a better service model that is in the best interest of both employers and members is to put the obligation of splitting, routing and servicing on the first gateway provider that receives the file. This could be easily self-monitored by the industry as the ABN of the sender can be found in the “FROM” field of each SuperStream file sent through the Gateway Network.

Recommendation

That the obligation to split and route SuperStream compliant files from employers be on the first gateway that receives such file. This could potentially be covered as a Business Improvement Process adopted by all accredited gateway service providers.

8. Transaction processing requirements

Super funds have a three day obligation in relation to transacting contributions. The Regulations should clearly identify and state that this requirement includes the time a transaction is transmitted through a pass through fund (or a gateway engaged by the fund).

The time for processing by a pass-through fund to receive and pass-through the data file from the employer to the target super fund should be the shortest possible period, with the fund

being required to demonstrate that it is not unreasonably holding onto monies for the purpose of deriving a commercial benefit. The Explanatory Statement should state this.

In order to complete the appropriate regulation and guidance around the provision of data clearing services, guidance should be provided by the ATO about the responsibilities and liabilities of the respective parties where a target super fund returns a contribution payment on the grounds that it did not receive the associated data and members incur a loss, and in relation to error handling.

We note that the regulation is silent on the role of other third party service providers, including payroll bureaux, software as a service providers, and salary packagers. Many of these service providers manage money and data disbursements through a range of channels, and many are not ready for SuperStream compliance. Some of these entities also charge fees to employers and / or employees and may have their own clearing arrangements.

Recommendations

- The three day obligation on super funds regarding transacting contributions should clearly state that this requirement includes the time a transaction is transmitted through a pass through fund or a gateway engaged by the fund.
- Guidance should be provided by the ATO about the responsibilities and liabilities of parties where a contribution is returned.
- The Regulation should deal with the role of other third party service providers.

9. Induction Process

AIST is pleased to note that there will be flexibility in the final step of the induction process so that Trustees of funds complete the induction process only once certification has occurred and the fund has indicated that it is ready to receive contributions via pass through.

10. Consultation Processes

AIST has greatly appreciated the consultation processes to date. The various working groups – including the Contributions Implementation Working Group (CIWG) – have provided an outstanding forum for both the dissemination of information to a wide group of stakeholders and the resolution of practical issues. AIST has been very pleased to be a part of these processes.

AIST will continue to be actively involved in SuperStream consultations, and we are hopeful that the very useful role played by the CIWG in informing a very wide range of stakeholders will be replicated. AIST submits that this role cannot be played by the SuperStream Reference Group, since that Group has the upstream role of advising Government and the ATO, but does not have the role of representing industry views. While superannuation funds can liaise directly with the ATO or use their representative bodies to make representations on their

behalf, there are many other stakeholders who rely on the CIWG for accurate, consistent and up-to-date information. We recognise that there is an important role for bilateral engagement between the ATO and stakeholders, wider forums such as the CIWG can ensure comprehensiveness, consistency and timeliness.

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