

***SPR 2021/1 -***



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## Legislative Instrument

# Superannuation Guarantee (Administration) – Choice of Fund – Written Guidelines for the Reduction of an Increase in an Employer’s Individual Superannuation Guarantee Shortfall Determination 2021

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I, Usha Narain, Acting Deputy Commissioner of Taxation, make this determination under subsection 21(1) of the *Superannuation Guarantee (Administration) Act 1992*.

### Usha Narain

Acting Deputy Commissioner of Taxation  
Policy, Analysis and Legislation  
Law Design and Practice

8 October 2021

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#### 1. Name of instrument

This determination is the *Superannuation Guarantee (Administration) – Choice of Fund – Written Guidelines for the Reduction of an Increase in an Employer’s Individual Superannuation Guarantee Shortfall Determination 2021*.

#### 2. Commencement

This instrument commences on 1 November 2021.

#### 3. Application

This instrument provides written guidelines the Commissioner of Taxation (the Commissioner) must have regard to for the purpose of subsection 19(2E) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) in deciding the level of reduction to apply to an increase in an employer’s individual superannuation guarantee shortfall under subsection 19(2A).

#### 4. Determination

- (1) Since 1 July 2005, employers who make superannuation guarantee contributions in respect of eligible employees are required to satisfy the choice of fund requirements under Part 3A of the SGAA.
- (2) If an employer does not satisfy the choice of fund requirements, the employer’s individual superannuation guarantee shortfall (including a nil shortfall) for an employee for a quarter is increased under subsections 19(2A) or 19(2B) of the SGAA. This is known as the choice shortfall.

- (3) The Commissioner has a discretion, under subsection 19(2E) of the SGAA, to reduce the amount of the choice shortfall. All decisions on the reduction of the choice shortfall will be made on a case by case basis, taking into account all of the employer's relevant facts and circumstances.

### ***Transitional compliance approach for single default accounts***

- (4) From 1 November 2021, additional choice of fund requirements will apply with the single default account (stapled fund) requirements under Division 7 of Part 3A of the SGAA. From 1 November 2021 until 31 October 2022 employers will, in the first instance of non-compliance, be provided with help and assistance to comply with stapled fund requirements.
- (5) During this transitional period the Commissioner will reduce any choice shortfall to nil if that shortfall arose due to the employer's lack of knowledge of the stapled fund requirements rather than intentional disregard. This transitional approach applies only to the stapled fund changes to the choice of fund requirements, it does not apply to existing choice rules.
- (6) From 1 November 2022 the transitional approach will no longer apply as it is expected that employers would have had sufficient time to understand and comply with the stapled fund requirements. Therefore, the Commissioner will apply the general guidelines from that time.

### ***General guidelines***

- (7) While all decisions are required to be made on a case by case basis, where it is evident that the circumstances are similar for a group of employees, the Commissioner will take the same approach to the choice shortfall for each employee in the group.
- (8) The Commissioner will use the following table as a guideline when considering the initial reduction of the choice shortfall based on the employer's attempt to comply with the choice of fund requirements:

| <b>Employer's attempt to comply</b>   | <b>Level of reduction</b> | <b>Choice Shortfall</b> |
|---|---------------------------|-------------------------|
| The employer made a genuine effort to comply with the choice of fund requirements   | 100%                      | 0%                      |
| The employer failed to exercise the care that a reasonable ordinary person would exercise to fulfil the choice of fund requirements | 75%                       | 25%                     |
| The employer's actions are careless and show indifference to the choice of fund requirements  | 25%                       | 75%                     |
| The employer knowingly decides not to comply with the choice of fund requirements   | 0%                        | 100%                    |

- (9) After making a decision on the initial level of reduction, the Commissioner will consider whether that level of choice shortfall will be maintained, or a further reduction is warranted.

- (10) The relevant factors when considering a further reduction include:
- (a) the employer made a voluntary disclosure of their failure to meet choice of fund requirements
  - (b) the failure to meet the choice of fund requirements arose due to an error or honest mistake which has since been rectified and the employer is now contributing to the employee's chosen fund, or to the employee's stapled fund if no fund was chosen
  - (c) the employer has an otherwise good compliance record
  - (d) the failure to comply with choice was due to exceptional circumstances such as ill-health or impact of a natural disaster and the employer has since taken steps to comply.
- (11) The amount of choice shortfall remaining after applying the initial level of reduction will be reduced by 20%, for any additional factors, to a minimum of nil.
- (12) The Commissioner may not reduce the choice shortfall where the following factors apply:
- (a) the employer, previously the subject of superannuation guarantee compliance action, is reasonably expected to be aware of their obligations, but has repeatedly not met the choice of fund requirements, or
  - (b) the employer has a history of not meeting choice requirements for other entities, or
  - (c) the employer took steps to obstruct the Commissioner from determining any superannuation guarantee or choice liability.

### ***New employers***

- (13) New employers, with no previous business experience, will generally have any choice shortfall reduced to nil in their first year of operation unless the non-compliance was due to the employer intentionally not complying.

### ***Other matters***

- (14) A written notice of decision made under subsection 19(2E) of the *Superannuation Guarantee (Administration) Act 1992* will be given to the employer who is liable to pay the choice shortfall. The written notice will contain the reasons why the reduction in the choice shortfall was or was not made.
- (15) The Commissioner's power to reduce the choice shortfall does not extend to any individual superannuation guarantee shortfalls which arise where the employer fails to make sufficient superannuation contributions to a complying fund or retirement savings account.

## **5. Repeals**

This instrument replaces and repeals *Superannuation Guarantee (Administration) Act 1992 – Written Guidelines for the Reduction of an Increase in an Employer's Individual Superannuation Guarantee Shortfall* (F2006L01821) registered on 15 June 2006.

## **6. Definitions**

A number of expressions used in this instrument are defined in *Superannuation Guarantee (Administration) Act 1992*, including the following:

- (a) **charge percentage**, has the meaning given by subsection 19(1)
- (b) **chosen fund**, has the meaning given by section 32F

- (c) ***complying superannuation fund or scheme***, has the meaning given by section 7
- (d) ***individual superannuation guarantee shortfall***, has the meaning given by subsection 19(1)
- (e) ***RSA (or retirement savings account)***, has the meaning given by section 6 with reference to the *Retirement Savings Accounts Act 1997*
- (f) ***stapled fund***, has the meaning given by section 32Q
- (g) ***superannuation guarantee charge***, has the meaning given by section 6.