

ASIC CONSULTS ON DRAFT REGULATORY GUIDE FOR DESIGN AND DISTRIBUTION OBLIGATIONS

20 December 2019 | Australia

Legal Briefings - By **Fiona Smedley and David Curley**

ASIC has released Consultation Paper 325 *Product design and distribution obligations (CP 325)*, on its proposals for guidance on the design and distribution obligations in Pt 7.8A of the *Corporations Act 2001* (Cth) (**DDO**).

ASIC is seeking public input on CP 325 by 11 March 2020 with a view to releasing the final regulatory guide during 2020. The regulatory guide, once published will explain ASIC's interpretation of the obligations, its expectations for compliance, and its general approach to administering the DDO for issuers and distributors of financial products who must comply with the DDO.

In the draft regulatory guide (**Draft RG**) attached to CP 325, ASIC has taken the approach of providing broad guidance on its expectations for the content of the target market determination (**TMD**), in lieu of a market standard template. ASIC maintains that 'a one-size-fits-all approach would not be appropriate, given the broad number of products the obligations apply to'.

ASIC has also not set out standard review triggers or a maximum review period for issuers to adopt in fulfilling their obligation to review the TMD.

PRODUCT GOVERNANCE FRAMEWORK

In the Draft RG, ASIC has introduced the concept of the 'product governance framework' (**PGF**) for issuers and distributors to build effective product governance processes across the lifecycle of financial products having regard to the nature, scale and complexity of an issuer's or distributor's business.

Although a Framework is not obligatory, the Draft RG comments that in the absence of a PGF it would be more difficult for issuers and distributors to comply with, and demonstrate compliance with, the DDO.

TMD GUIDANCE

The Draft RG does not provide any examples of the content and form of a TMD. Instead it offers broad guidance on areas the issuer needs to consider in preparing the TMD.

Although the TMD is not required to specify a 'negative target market' (contrary to the European rules), the Draft RG notes that it will be useful for the issuer, when making the TMD, to consider those for whom the financial product is 'clearly unsuitable' (i.e. the negative target market).

ISSUER'S REASONABLE STEPS

The Draft RG notes that ASIC expects that issuers, in meeting their obligation to take reasonable steps (that will, or are reasonably likely to, result in distribution being consistent with the TMD), to implement controls that are likely to direct distribution of the financial product to the target market.

In the Draft RG ASIC has identified the following factors which it expects to be relevant when determining if the issuer has taken those reasonable steps:

- distribution conditions;
- marketing and promotional materials;
- selection of distributors;
- supervision and monitoring;
- conflicts of interest (including those arising from remuneration and incentives for the distribution of a financial product); and
- information sharing with distributors.

REVIEWING THE TMD

The Draft RG does not provide any standard review triggers or maximum review periods for issuers to adopt.

With respect to the requirement for the issuer to specify in the TMD what information the issuer needs from a distributor, to determine if a TMD is still appropriate, ASIC has provided some examples, including complaints data, consumer feedback, consumer feedback (including on the performance of the product), percentages of sales to consumers not in the target market, samples of recorded sales calls, conversion rates, volume of sales and web analytics (e.g. click data and website paths).

DISTRIBUTORS' REASONABLE STEPS

A distributor must take reasonable steps that will, are or are reasonably likely to, result in the distribution of a financial product being consistent with the TMD.

In the Draft RG, ASIC has identified the following factors which it expects to be relevant when determining if the distributor has taken those reasonable steps:

- distribution method;
- compliance with distribution conditions;
- marketing and promotional materials;
- effectiveness of the product governance framework;
- inappropriate incentives;
- reliance on existing information about the consumer;
- training; and
- assessment of whether a consumer is in the target market.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



FIONA SMEDLEY
PARTNER, SYDNEY

+61 2 9225 5828
Fiona.Smedley@hsf.com



DAVID CURLEY
SOLICITOR, SYDNEY

+61 2 9225 5136
david.curley@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2021