

Design and distribution obligations and ASIC's product intervention powers



Following the consultation paper released in December 2016, the Government has released draft legislation (released 21 December 2017) which looks to improve consumer protection in relation to financial and credit products.

The draft legislation is in response to the Financial System Inquiry recommendations, which introduced design and distribution obligations for financial products and product intervention power for ASIC in order to:

- create new accountability obligations for entities that issue or distribute financial products
- strengthen consumer protection by introducing financial product intervention powers.

The legislation will apply to new financial products 12 months after the legislation is passed. Existing financial products first offered before the new law commences will become subject to the new regime 24 months after the law is passed.

What products will be impacted under the design and distribution obligations?

Products that will be affected include financial products to retail clients - insurance, asset management, superannuation (excluding MySuper products) and derivatives. Financial products excluded are ordinary shares, securities (where an employee share scheme applies), margin lending products, personal advice (as already covered by Future of Financial Advice) and Credit Act regulated products e.g. credit cards, mortgages etc as they are covered by the responsible lending rules.

Who will it affect?

Offerors – e.g. insurers, asset managers. Those who **prepare PDS' under Part 7.9 of the Corporations Act** or prospectuses or disclosure documents under Part 6D.2 of the Corporations Act (s708 provides exceptions to the requirements).

Distributors – those who arrange for the issue of products e.g. fund managers that distribute products using a general advice model.

What are the design and distribution obligations?

Design obligations

- The draft legislation requires offerors to:
- make a target market determination in relation to the product, describing the key features and investment objectives of the product, and the circumstances of the persons within a particular market
 - review the target market determination as required to ensure it remains appropriate including identifying events and circumstances that are review triggers
 - **keep records of the person's decisions in relation to the new regime**
 - notify ASIC of any significant dealings in a product that are not consistent with the **product's target market determination.**

Distribution obligations

- The draft legislation requires offerors and distributors to:
- not deal, or provide financial product advice in relation to a product unless a target market determination has been made
 - not deal, or provide financial product advice, where a target market determination may no longer be appropriate
 - take reasonable steps to ensure that products are distributed in accordance with the target market determination
 - collect information related to the distribution of a product
 - notify the issuer of a product of any significant dealings in the product that are not consistent **with the product's target market determination.**

Implications of the design and distribution obligations

You will need to review your policies and procedures in relation to the design, distribution and review of products. Product approval processes are likely to need updating and amending. You will also need to ensure you have appropriate training, monitoring and operational controls.

ASIC's increased product intervention powers

ASIC's intervention powers will be increased and enhanced if they are satisfied that any financial product or credit product has resulted or will result in significant detriment to retail consumers. These powers include ceasing the distribution of the respective financial services product.

The draft legislation includes criminal or civil penalties for failure to comply with the obligations.

PwC can help



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