

From the Desk of Director Marija Pajeska



22 April 2020

Product Regulation  
Strategic Policy  
Australian Securities and Investment Commission  
GPO Box 9827  
BRISBANE VIC 4001

By email: [product.regulation@asic.gov.au](mailto:product.regulation@asic.gov.au)

Response to Consultation Paper 325 – Product design and distribution obligations

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to ASIC in respect of Consultation Paper (CP) 325 - Product design and distribution obligations.

We note that the closing date was set as 11 March 2020 however according to the ASIC website as at 22 April 2020 this paper is still open for comment.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

Our general comments are:

1. We note that the draft Regulatory Guide states that Issuers and Distributors of financial products will need to comply with the design and distribution obligations in Pt 7.8A of the Corporations Act 2001 (Corporations Act) from 5 April 2021. We note that this is just under 1 year away however taking into consideration the recent events relating to COVID-19 and its impacts on consumers, industry and ASIC we are of the view that ASIC should consider delaying the implementation of the design and distribution obligations to give consumers, industry and ASIC time to assess and recover from this crisis.
2. We struggle to understand how the design and distribution obligations, in particular the target market determination, would apply to derivatives, especially Exchange Traded Derivatives and OTC Derivatives (such as Contracts for Difference (CFDs) and Margin FX). We note that none of the examples or explanations cover derivatives so ASIC should either issue an

exemption or clarify how the product design and distribution obligation will apply to derivatives.

3. ASIC needs to ensure that in defining the product governance framework that consumers need to remain responsible for their decisions and their actions. The product issuer should as part of the product governance framework define the target market as an indicator to potential consumers as to who the product is suitable for. Provided that an issuer and/ or distributor comply with their obligations, if a consumer who does not fit within the target market decide to invest in the product then the consumer should be held accountable and responsible for their actions.
4. ASIC has suggested that to define a target market an issuer should use a consumers objectives, needs and financial situation. These parameters are almost impossible to quantify as there are so many variables and thus the whole process becomes redundant.

Furthermore, if you take extreme circumstances such as what we are in now as a result of COVID-19, what happens when a consumers circumstances change such that they don't fit into the definition of the target market.

A more appropriate and stable approach would be to risk profile financial products and set the target market based on the risk associated with investing in that product. Once the risk is defined then consumers and financial advisers should be able to use the financial product risk rating to assess whether they fit within the target market.

If ASIC's and the Government's main priority is to protect consumers then ASIC and the Government have a duty of care to all Australians to educate and make available, on the Moneysmarts website, tools and information that consumers can use to determine their risk profile and/ or what target market they fit into.

5. Consumers have the right to retain their freedom of choice and in retaining that right it must be understood that they bear the consequences of their choices. ASIC and the Government should not be creating laws which remove the freedom of choice from a consumer by inadvertently moving the responsibility of consequences resulting from decisions made by a consumer from the consumer to the issuer and/ or financial adviser. In doing so, ASIC and the Government are sending the message to consumers 'you can take a gamble but don't worry the AFS Licensee will wear the cost as long as you remember to say I am a victim and did not understand, even though you may have understood that if you take the gamble (i.e. risk) you may win big, forget about the fact you may lose.'
6. Nothing in the Regulatory Guide discusses how an issuer may stop the issue of a financial product when the financial product is listed on an Exchange or traded through an Exchange or Trading platform. Issuers need to comply with the Exchange listing rules and Exchange Operating Rules so ASIC needs to provide guidance as to how it expects an issuers obligation to stop issuing the financial product to work with the product design and distribution obligations.

Our general comments in regards to the draft Regulatory Guide are:

1. Draft RG 000.17 makes reference to 'secondary sales of products', however nowhere in the draft regulatory guide ASIC explains what a secondary sale is. ASIC should clarify and/ or define what 'secondary sale of products' means.
2. The first sentence of draft RG 000.28 states

'Distributors are prohibited from distributing a product unless a target market determination has been made.'

This statement appears to be incorrect and inconsistent with the statement made in Table 2 which states

'A distributor must not engage in retail product distribution conduct in relation to a product unless it reasonably believes (after making all reasonable inquiries) that a target market determination has been made, or a target market determination is not required.'

The first sentence in draft RG 000.28 needs to be amended to correctly reflect the issuers right not to make a target market determination.

3. We are of the view that it is impractical, if not impossible, to design a financial product by starting with the target market and that the use of quantitative criteria and qualitative factors should be optional as such data may not be available for all products. In our opinion Draft RG 000.45(a) should be revised to read

'identifying the target market of a product as part of the design of the product (and if possible having considered relevant quantitative criteria and qualitative factors).'

4. Draft RG 000.59 states that promotional material must describe the target market or specify where the target market determination is available. We note that ASIC refers to Section 1018A of the Corporations Act and note that this section makes no reference to such requirement. ASIC should consider amending this to a recommendation rather than a direction. Further, if the target market determination is not intended to be a consumer-facing disclosure document then why would consumers need to be directed to it.

Our specific comments to each of ASIC's proposals in the Consultation Paper are detailed in Annexure B of this letter.

ASDAA appreciates the opportunity to provide this Submission to Treasury on these significant proposals. We would be happy to discuss any issues arising from our submissions on this issue, or to provide any further material that may assist. Should you require any further information, please contact Brad Smoling, Director of Communications, on (07) 5532 3930 or email [brad@asdaa.com.au](mailto:brad@asdaa.com.au).

Yours Sincerely

Marija Pajeska  
Compliance Director

# ANNEXURE A: SCREEN PINT FROM ASIC WEBSITE

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## Consultation papers

Consultation papers seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

### Papers currently open for public comment

**CP 329 Implementing the Royal Commission recommendations: Advice fee consents and independence disclosure**  
Released 10 March 2020. Comments close 7 April 2020.  
[Read CP 329](#)

**CP 328 Initial public offers: Relief for voluntary escrow arrangements and pre-prospectus communications**  
Released 24 February 2020. Comments close 6 April 2020.  
[Read CP 328](#)

**CP 327 Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty**  
Released 20 February 2020. Comments close 20 March 2020.  
[Read CP 327](#)

**CP 325 Product design and distribution obligations**  
Released 19 December 2019. Comments close 11 March 2020.  
[Read CP 325](#)

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## ANNEXURE B: RESPONSE TO ASIC QUESTIONS

### Introducing a product governance framework

B1 proposal: ASIC proposes to give guidance that a robust product governance framework that fulfils the objectives of the design and distribution regime should:

- (a) focus on the identified target market across the lifecycle of the financial product;
- (b) be designed to reduce the risk of products being sold to consumers that are not consistent with their likely objectives, financial situation and needs; and
- (c) be documented, fully implemented, monitored and reported on, and regularly reviewed to ensure that it is up to date.

See draft RG 000 at RG 000.30 - RG 000.43

ASIC Question		Response
B1Q1	Is our guidance on a robust product governance framework useful? What additional matters, if any, do you think are important in ensuring that a product governance framework will be effective and support compliance with the design and distribution obligations?	We are of the view that the proposed guidance in RG 000.30 - RG 000.43 gives the required flexibility to issuers to develop an effective product governance framework. However, we suggest that further guidance is required to address the situation where the financial product is issued and/ or distributed under a general advice framework (especially in the case of Exchange Traded Derivatives, OTC derivatives and general insurance products such as home building insurance, motor vehicle insurance, etc). This further guidance needs to address how an issuer and/ or distributor can meet their obligations under the product design and distribution obligations without breaching the requirements (i.e. educational requirements and disclosure requirements) relating to the provision of personal advice.

### Delivery of good consumer outcomes

B2 proposal: ASIC proposes to give guidance that issuers and distributors should not take advantage of behavioural biases or factors that can impede consumer outcomes. In addition, issuers and distributors should consider consumer vulnerabilities and how these vulnerabilities may increase the risk that products sold to consumers do not meet their needs and lead to poor consumer outcomes.

See draft RG 000 at RG 000.52 - RG 000.56

ASIC Question		Response
B2Q1	Is our guidance on the consumer-centric approach issuers and distributors should take to deliver good consumer outcomes useful?	We agree with ASIC's proposed guidance.
B2Q2	What additional matters, if any, do you consider to be relevant?	

### Making a target market determination

C1 proposal: ASIC proposes to provide guidance that what amounts to an appropriate target market determination can differ, depending on the type and particular characteristics of the financial product to be issued, the intended distribution approach and the issuer's product governance framework.

See draft RG 000 at RG 000.64 - RG 000.65.

ASIC Question		Response
C1Q1	Do you agree with our approach to guidance on the form and content of a target market determination? In not, why not?.	We agree with ASIC's proposed guidance.

### Identifying and describing a target market

B2 proposal: ASIC proposes to provide guidance that, generally speaking:

- (a) for new products—issuers should identify the target market and design financial products that are likely to be consistent with the likely objectives, financial situation and needs of consumers in that target market; and
- (b) for continuing products—issuers should still critically assess the product (and its features) and identify the target market under the design and distribution obligations by reference to the likely objectives, financial situation and needs of consumers for whom the product would likely be consistent. If issuers already have processes directed towards these purposes, they should check that the processes meet the detailed requirements of the legislation.

See draft RG 000 at RG 000.62 - RG 000.65.

ASIC Question		Response
C2Q1	Is our guidance on the approach to identifying the target market for new products and continuing products useful?	<p>No, it seems that ASIC has lost an understanding of how products are designed and distributed.</p> <p>The issuer would usually work with various people, including but not limited to, the investment managers (i.e. the people who came up with the idea), the developers (i.e. the people who have to either code or setup the product), legal advisers (i.e. the people who have to work on consumer documentation) and AFS Licensees (i.e. the group of people that authorise the investment manager) to design and develop the financial product.</p> <p>Once the structure of the product is designed and developed then one can get a true understanding of the risks involved in investing in that product and using that information to define a target market.</p> <p>In relation to continuing products, such as Exchange Traded Derivatives and OTC derivatives we feel ASIC either needs to issue relief or provide clear guidance and examples as to how these obligations can be applied.</p>

ASIC Question		Response
C2Q2	What additional matters, if any, do you consider to be relevant?	<p>Risk profiling is the most important tool that a product issuer, financial adviser &amp; consumer can use when deciding what financial products to invest in &amp; therefore should be the process used to define the target market.</p> <p>We as a society have a duty of care to educate and provide tools to consumers which show the risk of loss and the primary focus of information given to consumers should be the real risk of loss or risk of negative outcomes which includes valid examples not just industry jargon which explains risks that nobody reads.</p> <p>If a consumer is willing to accept the risk associated with investing in a financial product, then what right does anyone have to deny them the right to invest.</p> <p>For example, a consumer wishes to invest in a managed fund however does not meet the target market determination so its application to invest is declined. The product generates a reasonable income and increases in value. Who will be responsible for the liability associated with income denied and/ or foregone as they were not permitted to invest. What protections does the issuer and/ or distributor have against such a claim?</p>

Our examples for different product sectors

C3 proposal: While ASIC does not propose to give any definitive formulation of how a target market should be described in a target market determination, ASIC proposes to give guidance that explains the process and key considerations for identifying and describing the target market by reference to examples across different product sectors.

See draft RG 000 at RG 000.66–RG 000.89.

ASIC Question		Response
C3Q1	Do you have any comments on our approach to guidance on identifying and describing the target market?	<p>ASIC has given a definitive formulation of how a target market should be described and that is stated in draft RG 000.67 as 'This involves identifying a class of consumers based on the common aspects of their objectives, financial situation and needs...'. Effectively ASIC is saying that the parameters that should be used to define an appropriate target market are common factors relating to consumer objectives, financial situation &amp; needs that are applicable to a group of people.</p> <p>This whole scenario is missing one critical factor &amp; that is, how does the product relate to the rest of a consumer's circumstances and investments. This on its own is different between all consumers as every consumer's circumstances are different.</p> <p>It would be unjust and to the detriment of a consumer to group a consumer based on their objectives, financial situation and needs without taking into consideration how a particular product would interact with a consumer's other investments.</p> <p>This may then result in the provision of personal advice, however if a consumer feels they are capable of making the decision themselves then what right does anyone have to deny their right to decide.</p>

ASIC Question		Response
C3Q2	Do you have any comments on the following examples, which we have used in our guidance to illustrate key principles set out in RG 000.66–RG 000.89: (a) Example 1: Credit cards; (b) Example 2: Reverse mortgages; (c) Example 3: Cash options in superannuation; (d) Example 4: Consumer credit insurance; (e) Example 5: Low-value products; and (f) Example 6: Basic banking products?	We have no specific comments in this regard and note that none of the examples apply to investment products or derivatives that are subject to the issue of a PDS.
C3Q3	What additional matters, if any, do you consider to be relevant?	When it comes to investment products and diversification, what ASIC does not seem to recognize is that the economic climate can have a huge impact on the performance of an investment product. Take for example the situation we are currently facing with COVID 19. So if an investment product does not perform as expected due to market conditions which are outside the control of the issuer or distributor how does this impact an issuer's and distributor's responsibilities under the product design and distribution obligations?

### Diversification

C4 proposal: ASIC proposes to give guidance that when an issuer considers it appropriate to contemplate consumers in the target market acquiring the financial product as part of a diversified portfolio, the reasonable steps obligation will require the issuer to manage the risk of the product being sold to consumers who do not have a diversified portfolio.

See draft RG 000 at RG 000.78–RG 000.79.

ASIC Question		Response
C4Q1	Do you have any comments on our proposed guidance for issuers considering the role of diversification as it relates to their identification of the target market?	We feel that a key area that the Product design and distribution obligations will impact is consumers seeking to acquire an investment product (refer to draft RG 000.76 – RG 000.77) and diversification (refer to draft RG 000.78 – RG 000.79). We feel that ASIC's attempt to provide guidance in this area is of no help what so ever and the lack of examples clearly shows that not even ASIC knows how to apply these requirements when it comes to investment products and diversified investment portfolios.

### Consumer understanding

C5 proposal: ASIC proposes to give guidance that we do not consider a target market for a product should be predominantly based on consumer understanding of a product.

See draft RG 000 at RG 000.80

ASIC Question		Response
C5Q1	Do you agree that consumer understanding of a product does not necessarily equate to the product being likely to be consistent with the likely objectives, financial situation and needs of consumers in the target market? If not, why not?	We feel that consumer understanding is relevant and should be part of the consideration along with risk profiling financial products.

### Considering the 'Negative target market'

C6 proposal: ASIC proposes to provide guidance that in making a target market determination, it will also be useful for the issuer to consider, in addition to the target market, those for whom the financial product is clearly unsuitable (the 'negative target market').

See draft RG 000 at RG 000.90–RG 000.92.

ASIC Question		Response
C6Q1	Do you agree that it may also be useful for an issuer to describe the negative target market for its financial product? If not, why not?	Defining a negative target market does not work in the case of investment products, derivatives and diversified portfolios.
C6Q2	Is our guidance on the role of describing a negative target market adequate and useful? If not, please explain why, giving examples.	How an investment product or derivative is integrated into a diversified portfolio may mean that consumers who fit within the definition of the negative target market have invested in the investment product or derivative. Just because they fit into this definition should not prohibit them from investing in the product.

## Product-specific issues

C7 proposal: ASIC proposes to give guidance on how the target market determination applies for certain products when the application of the obligation is not straightforward, including:

- (a) to superannuation and investor directed portfolio services (also known as 'platforms' or 'IDPS');
- (b) when products are offered and acquired as a 'package' or 'bundle'; and
- (c) when products are customisable by the consumer at point-of-sale, including through choices or options (e.g. selecting a waiting period for an income protection insurance product).

See draft RG 000 at RG 000.98–RG 000.106 and Examples 7–8.

ASIC Question		Response
C7Q1	<p>In relation to our guidance on how a target market determination should be approached for superannuation products, as set out in Example 7:</p> <p>(a) Do you agree with our proposed guidance that if investment options are suitable for different groups of members, then the trustee should account for this in undertaking its target market determination for the Choice superannuation product? If not, why not?</p> <p>(b) What factors do you consider relevant to the grouping of investment options in making a target market determination? Why?</p> <p>(c) Do you agree with our proposed guidance to consider insurance as part of the target market determination for a Choice product? If not, why not?</p> <p>(d) How should a trustee take into account insurance in making a target market determination for a Choice product?</p>	<p>We feel that the guidance and example provided by ASIC highlights the complexities associated with defining a target market when the product is complex and has multiple financial products and/ choices associated with the financial product.</p> <p>ASIC needs to realise that all these complexities increase the ultimate fees paid by the consumer and therefore in itself causes consumer detriment as increased fees reduce the returns achieved by the consumer.</p> <p>The process needs to be practical and as there is an obligation to make the target market determination available to the public then the document needs to be clear, concise and written in a language that can be understood by a consumer.</p> <p>Otherwise, what is the point, another legal document that confuses the end consumer that nobody reads?</p>
C7Q2	Do you agree with our guidance on the application of the target market determination obligation to IDPS?	
C7Q3	Do you agree with our guidance on how a target market determination should be approached for a bundled product? If not, why not?	
C7Q4	Do you agree with our proposed approach to the application of the design and distribution obligations to products that can be customised at point-of-sale? If not, why not?	
C7Q5	Are there any particular options or choices, or types of options or choices, that you consider would affect the product's suitability for a consumer if selected? Please give examples.	

Taking reasonable steps in relation to distribution: Issuers

C8 proposal: ASIC proposes to give guidance on the reasonable steps obligation for issuers, and set out our view on the factors that may be relevant to the obligation. These factors include:

- (a) the distribution conditions that are specified in the target market determination;
- (b) the issuer’s marketing and promotional materials;
- (c) the selection of distributors;
- (d) the supervision and monitoring of distributors;
- (e) the issuer’s ability to eliminate or appropriately manage conflicts of interest; and
- (f) whether issuers have provided distributors with sufficient information to help them ensure that distribution is consistent with the target market determination.

See draft RG 000 at RG 000.107–RG 000.120, Examples 9–11 and Table 3.

ASIC Question		Response
C8Q1	Do you have any comments on the following examples, which we have used in our guidance to illustrate key principles set out in RG 000.107–RG 000.120: (a) Example 7: Superannuation products; (b) Example 8: Investor directed portfolio services; (c) Example 9: Superannuation; (d) Example 10: Mortgage fund; and (e) Example 11: Listed investment companies?	We do not have any comments in relation to Example 7, Example 9 and Example 10. Example 8 - We do not feel that Example 8 serves any purpose as it re-iterates the requirements rather than providing a real life example of how the target market determination would be made for an IDPS and the underlying financial product offered through the IPDS and how the two classifications would interact with each other. If this is the best example ASIC can come up with then why bother including it. Example 11 - We are of the view that the example is reasonable.
C8Q2	Do you agree with the factors listed in Table 3 of draft RG 000 that we expect will be relevant when considering whether an issuer has met the reasonable steps obligation? If not, why not?	We have no comment.
C8Q3	What additional factors, if any, do you consider should be included in Table 3 of draft RG 000?	We have no comment.

### Specifying review triggers and reasonable maximum review periods

C9 proposal: ASIC does not propose to set out in guidance standard review triggers and maximum review periods for issuers to adopt. Instead, its draft guidance sets out examples to illustrate what review triggers may be appropriate for certain types of financial products.

See draft RG 000 at RG 000.127–RG 000.134 and Examples 12–13.

ASIC Question		Response
C9Q1	Do you have any comments on our guidance on setting appropriate review triggers and maximum review periods?	ASIC needs to provide guidance on how it expects these responsibilities to interact with the requirement to maintain an orderly and fair market, especially where the review trigger results in a requirement to stop issuing a financial product.
C9Q2	Do you have any comments on the following examples, which we have used in our guidance to illustrate key principles set out in RG 000.127–RG 000.130: (a) Example 12: Insurance; and (b) Example 13: Managed fund?	We have no comments for Example 12. Example 13 - A review trigger should be an analysis of the consumers actually acquiring the financial product to assess whether the target market determination is appropriate. We understand that the intent of making the target market determination is to ensure that people within the target market acquire the financial product. However as a managed fund is an investment product and in most cases forms part of a diversified portfolio the actual consumers of the financial product will differ from the target market. We understand that the intent is not to include consumers of the financial product who have invested in a diversified portfolio however as this will account for the majority of investors then it almost feels like setting a target market for managed funds is redundant, and ultimately causes detriment and harm to consumers as it will lead to increased product fees.

Specifying required information from distributors and reporting periods

C10 Proposal: ASIC proposes to give guidance on the issuer’s obligation to specify in the target market determination:

- (a) any information that it considers is necessary to require from its distributors in order to promptly decide that a target market determination may no longer be appropriate; and
- (b) the reporting period for the information the distributor must provide to the issuer about the number of complaints about the financial product.

See draft RG 000 at RG 000.135–RG 000.142.

ASIC Question		Response
C10Q1	Do you have any comments on our guidance on the issuer’s obligation to specify information it requires from its distributors?	An issuer should not have the right to use these laws in order to acquire information about consumers which it can then use for other purposes such as marketing other financial products it issues. The guidance needs to be clear that the sole purpose of collecting that information and use of the information is restricted to issuers review of the target market determination. If an issuer uses that information for any other purpose it should be considered a breach of the law.
C10Q2	What existing information collected by distributors would be relevant to an issuer’s consideration of the ongoing appropriateness of its target market determination?	We do not have specific comments in this regard as the role of a financial adviser is to act in the best interest of the consumer and the information they obtain is diverse and subject to Privacy Laws. The information that is made available to the issuer should be limited to information that the distributor collects on behalf of the issuer in forms and questionnaires passed onto consumers from time to time to ensure that the distributor does not breach in Privacy Laws.
C10Q3	In addition to the information set out at RG 000.139, are there other types of information an issuer should collect from distributors? If so, please describe the type of information you think would be relevant.	We feel that the information listed in draft RG 000.139 is not reasonable on the basis that: <ul style="list-style-type: none"> <li>• Not every distributor maintains recorded sales calls and/ or engages in sales calls. There is no law that obliges an AFS Licensee to record telephone lines and therefore by listing this as an option will force some AFS Licensees to implement telephone recording systems along with storage servers which will then inadvertently increase costs and fees to consumers and hence cause consumer detriment.</li> <li>• Web analytics relating to the distributor would cover a larger scope than just the distribution of the financial product issued by a particular issuer and therefore requesting such information from a distributor would be of no benefit for the review.</li> </ul>

ASIC Question		Response
C10Q4	What potential effects on competition may occur as a result of the issuer's right to set the information the distributor must provide?	The system relies on issuers and distributors working together honestly and fairly. Provided that this happens there should be no impact on competition. However, issuers are placed in an interesting position as they can use the review triggers to stop the issue of a financial product which can cause harm to another person's business. Whether or not the issuer's actions are justified is the question as those actions will have a direct impact on where consumers can invest their funds and or whether or not they can withdraw their investment in a financial product.
C10Q5	Do you have any comments on our guidance on the issuer's obligation to specify the reporting period in relation to the number of complaints?	ASIC needs to take into consideration how these review triggers and review periods will work with Exchange Traded Derivatives. As Exchange Traded Derivatives are novated as the broker with whom the consumer holds their account is deemed the issuer then does responsibility fall upon the broker or the Exchange?

### Conducting a review of a target market determination

C11 Proposal: ASIC proposes to give guidance that, in reviewing a target market determination, we expect the issuer will take into account all available information on its financial product, using multiple data sources.

See draft RG 000 at RG 000.143–RG 000.145.

ASIC Question		Response
C11Q1	Do you consider our guidance on the types of information issuers should have regard to (described at RG 000.143) to be useful? If not, why not?	ASIC's note in relation to Consumer satisfaction, reference to Report 279: Shadow shopping study if retirement advice (issued in 2012 and based on a study conducted in 2011) and reference to Report 69: Shadow shopping survey on superannuation advice (issued in 2006 and based on a study conducted in 2005) is not relevant as those reports were conducted at a time where the regulatory environment was very different to what is currently in place. By not contextualising when the reports were issued and/ or studies were conducted ASIC is being misleading and deceptive. Instead it should make reference to more relevant and applicable data (if it exists) or remove the note all together.
C11Q2	In addition to the data sources described in draft RG 000 at RG 000.143(a)–RG 000.143(d), are there other sources of information that you think an issuer should take into account in reviewing a target market determination?	We have no comment.

ASIC Question		Response
C11Q3	Do you have any other comments on our guidance on conducting a review of a target market determination?	We have no comment.

Notifying ASIC of 'significant dealings'

C12 Proposal: ASIC proposes to provide guidance that the factors an issuer should consider when determining whether there has been a significant dealing in a financial product that is not consistent with the product's target market determination include:

- (a) the proportion of consumers who are not in the target market acquiring the financial product;
- (b) the actual or potential harm to consumers; and
- (c) the nature and extent of the inconsistency of distribution with the target market determination.

See draft RG 000 at RG 000.147–RG 000.148.

ASIC Question		Response
C12Q1	Are there any additional factors that issuers should consider? If yes, please provide details.	<p>We do not feel that the proportion of consumer who are not in the target market acquiring the financial product should be deemed a significant dealing as this will occur on a regular basis when it comes to investment products.</p> <p>The main, if not only, criteria that should be a trigger for a significant dealing should be the actual or potential harm to consumers.</p> <p>Realistically if consumers outside the target market have acquired the financial product this could be an indicator that the target market determination is incorrect and needs to be reviewed and amended. In such circumstances this should not be deemed a significant dealing.</p>

Factors relevant to out administration of the reasonable steps obligation

D1 Proposal: ASIC proposes to give high-level guidance on the reasonable steps obligation for distributors of financial products by setting out our view on factors that may be relevant to this obligation, including:

- (a) the distribution method(s) used;
- (b) compliance with distribution conditions;
- (c) the marketing and promotional materials circulated by the distributor;
- (d) the effectiveness of the distributor's product governance framework;
- (e) the steps taken to eliminate or appropriately manage the risk that incentives for staff or contractors may influence behaviours that could result in distribution being inconsistent with the target market determination;
- (f) whether reliance on existing information about the consumer is appropriate;
- (g) whether the distributor has given staff involved in distribution operations sufficient training; and
- (h) how the distributor forms a reasonable view that a consumer is reasonably likely to be in the target market.

See draft RG 000 at RG 000.154–RG 000.163 and Table 5.

ASIC Question		Response
D1Q1	Do you agree with the factors listed in Table 5 of draft RG 000 that we will take into account when considering whether a distributor has met the reasonable steps obligation? If not, why not?	We agree with the factors however think that ASIC should make it clear in the guidance that in circumstances where a distributor has drawn a conclusion that a consumer no longer fits into the target market for a financial product that the distributor is not deemed to be providing personal advice to the consumer by making an alternate recommendation or providing to the consumer details of other available options. Further, the distributor should provide, to the consumer, details as to why they no longer fit the target market determination and a comparison between the financial product that they currently hold and the alternatives, so that the consumer can understand the difference. This whole process should be promoting informed decision making by consumers.
D1Q2	What additional factors, if any, do you consider should be included in Table 5 of draft RG 000?	

## Renewal of general insurance policies

D2 Proposal: ASIC proposes to include an example to illustrate, at the time of renewal for general insurance policies, how insurers (in their role as distributor) can approach the reasonable steps obligation to ensure that the renewal process results in outcomes that are consistent with the target market determination. Our guidance suggests that, at the time of renewal, an insurer should:

- (a) analyse information it holds, such as:
  - (i) information it gathered when the customer initially acquired the product; and
  - (ii) updated details that have been provided, or through claims that have subsequently occurred; and
- (b) consider a number of factors, including the likelihood that a class of consumers is no longer in the target market for the policy.

When an insurer assesses that it is likely that a consumer is no longer in the target market for an insurance policy, this should not result in an insurer declining to offer a renewal of the policy without contacting the consumer.

See Example 14 of draft RG 000.

ASIC Question		Response
D2Q1	Do you have any comments on our proposed guidance for distributors in Example 14 of draft RG 000?	Time is a critical factor when it comes to renewing an insurance policy and if a consumers current insurer does not give sufficient notice to a consumer that the policy they currently hold will not be renewed then this could cause harm to the consumer as they will not have enough time to find and or source a suitable alternative.
D2Q2	What other steps or controls, if any, do you consider would be appropriate for a distributor to consider what reasonable steps should be taken at renewal?	The choice of policy acquired by a consumer should not be restricted to the policies their current insurer has available on the basis that the consumer did not have enough time to review all their options, including those made available by other insurers.

Reasonable view on whether a consumer is reasonably likely to be in the target market - Asking additional, specific questions of consumers

D3 Proposal: ASIC proposes to provide guidance:

- (a) that, in most cases, a distributor should have sufficient information about a consumer through its existing sales processes to form a reasonable view on whether the consumer is reasonably likely to be in the target market for a financial product;
- (b) that the ways a distributor's processes could assist it to form a reasonable view that a consumer is reasonably likely to be in the target market for a financial product include:
  - (i) the inclusion of 'knockout questions' within application processes;
  - (ii) analysis of data held on the consumer or a class of consumers; and
  - (iii) in some cases, asking the consumer direct questions to determine whether they are reasonably likely to be in the target market (see draft RG 000 at RG 000.168(a)–RG 000.168(c)); and
- (c) on the steps that a distributor can take to reduce the likelihood that a consumer will be left with the impression that their personal circumstances have been considered, including:
  - (i) not having a relevant provider (i.e. an individual authorised to give personal advice to consumers on relevant financial products) involved in the distribution process to ask specific questions of a consumer and communicate the view that the consumer is in the target market to the consumer; and
  - (ii) only asking specific questions of a consumer (when required) in the later stages of the sales process after the consumer has already made the decision to acquire the financial product

(see draft RG 000 at RG 000.169(a)–RG 000.169(b)).

ASIC Question		Response
D3Q1	Do you agree that, in most cases, a distributor would have sufficient information about a consumer through its existing sales processes to form a reasonable view on whether the consumer is reasonably likely to be in the target market for a financial product?	A distributor should be able to acquire the relevant information through the documentation that the issuer requires the consumer to complete. This way both the issuer and distributor will have access to the required information without breaching any Privacy Provisions.
D3Q2	What data do you consider would help distributors reasonably conclude that a consumer is reasonably likely to be in the target market for a financial product?	It's difficult to say as the data they will need will be dependent on how the target market is defined.

ASIC Question		Response
D3Q3	Do you consider our guidance should identify (in draft RG 000 at RG 000.168) other ways that a distributor's sales processes can assist it to form a reasonable view that a consumer is reasonably likely to be in the target market for a financial product? What other approaches can be taken?	We refer you to our response to D3Q1. The issuer and distributor should be working together to achieve the best outcome for all parties involved, i.e. the consumer, the distributor and the issuer.
D3Q4	Do you have any comments on our proposed guidance (in draft RG 000 at RG 000.169) on how a distributor could reduce the likelihood of leaving a consumer with the impression that their personal circumstances have been considered?	<p>Both the issuer and the distributor should be able to rely on a written acknowledgement signed by the consumer that information obtained to assess whether the consumer is within the target market is only used for that purpose. The consumer should also acknowledge they understand that neither the distributor nor issuer will provide personal advice unless advised in writing otherwise.</p> <p>In Note 1 ASIC indicates that the law provides an exemption however whether or not a person is given personal advice is dependent on what type of advice the person who received the advice believes they received.</p> <p>This is even more difficult for financial advisers that are subject to the FASEA Code of Ethics which requires them to effectively provide personal advice to a consumer if they feel that the consumer should be given personal advice. By having access to the information used to assess whether a consumer meets the target market determination, it will be difficult, if not impossible, for a representative of a distributor or issuer that is a financial advisor to argue that general advice was appropriate in the circumstances.</p> <p>This becomes even more difficult when you take into consideration Exchange Traded Derivatives and OTC Derivatives.</p>

Reasonable view on whether a consumer is reasonably likely to be in the target market - Consumers outside the target market

D4 Proposal: ASIC proposes to provide guidance that the reasonable steps a distributor should take when selling a financial product to consumers who are outside the target market for the product depends on the circumstances of the interaction, the nature and degree of harm that might result, and the steps that can be taken to mitigate the harm.

See draft RG 000 at RG 000.170–RG 000.175.

ASIC Question		Response
D4Q1	Do you have any comments on our proposed guidance on the content of the reasonable steps obligation in these circumstances?	<p>We refer to draft RG 000.175 and are of the view that where a distributor contacts the issuer to inform them that consumers outside the target market are regularly seeking the financial product this should be a review trigger rather than a significant dealing. The reason being is a significant dealing is reportable to ASIC and this type of action results in micro-management by ASIC which is unnecessary especially when consumers are trying to exercise their freedom of choice.</p> <p>If after the review the issuer has determined that the target market determination is appropriate then the issuer should consider whether a significant dealing has occurred.</p> <p>If after the review the issuer has determined that it needs to change the target market determination then it should take appropriate action to change it.</p>
D4Q2	Are there any specific methods that you consider our guidance should identify for distributors seeking to meet the reasonable steps obligation in the context of interacting with consumers who are outside the target market for a financial product?	

Interaction with personal advice obligations

D5 Proposal: ASIC proposes to provide guidance that a target market determination for a financial product should be considered by a financial adviser in providing the advice and meeting their best interests duty.

See draft RG 000 at RG 000.180–RG 000.183.

ASIC Question		Response
D5Q1	Do you agree that a target market determination for a financial product should be considered by a financial adviser in providing the advice and meeting their best interests duty? If not, please explain.	<p>Where the target market determination is based on risk profiling the financial product then we believe it is relevant.</p> <p>However, if the target market determination is based on other factors then taking the target market determination into consideration may cause consumer harm especially if a consumer uses that information to exclude the product from their diversified portfolio when in actual fact they would benefit from its inclusion.</p>

### Interaction with responsible lending obligations

D6 Proposal: ASIC proposes to provide additional guidance on aspects of the interaction between the responsible lending obligations and the design and distribution obligations, including that:

- (a) information gathered as part of the responsible lending obligations may help the distributor form a reasonable view on whether the consumer is reasonably likely to be in the target market for a product; and
- (b) the reasonable steps obligation does not require further steps to be taken by a distributor when assessing, for responsible lending purposes, whether the consumer can comply with their financial obligations under the contract.

See draft RG 000 at RG 000.184–RG 000.189.

ASIC Question		Response
D6Q1	Do you have any comments on our proposed guidance on using information gathered for the purpose of meeting responsible lending obligations in order to assist a distributor to form a reasonable view on whether a consumer is reasonably likely to be in a target market for a financial product?	We have no specific comments
D6Q2	Are there any further issues you consider are raised by the interaction of the two regimes that should be dealt with in our guidance? Please explain.	

### Provision of information to issuers

D6 Proposal: ASIC does not propose to provide specific guidance on the practical aspects of the relationship between the issuer and the distributor regarding information exchange.

ASIC Question		Response
D7Q1	Do you think it would be useful to provide guidance on the following arrangements between the issuer and the distributor: (a) whether there is a need for information requirements to be set out in an agreement between the issuer and the distributor; (b) the format of information exchange; and (c) the mode of delivery and communication of information? If so, what considerations are relevant to these factors?	We feel that issuers and distributors are best placed to determine what is appropriate under these circumstances.
D7Q2	Are there other considerations that need to be taken into account in the collection and exchange of information between an issuer and a distributor?	We feel that ASIC needs to provide further guidance on how information can be collected and shared between an issuer and a distributor to ensure that the Privacy Act is not inadvertently breached.

Factors relevant to out administration of the reasonable steps obligation

E1 Proposal: ASIC proposes to give guidance on the factors that we will take into account when considering whether to provide an exemption from, or modification to, the design and distribution obligations. These factors include:

- (a) whether the objects of Ch 7 are being promoted, including the provision of suitable financial products to consumers (see s760A(aa));
- (b) the policy intention underlying the design and distribution obligations to:
  - (i) improve consumer outcomes; and
  - (ii) require financial services providers to have a consumer centric approach to making initial offerings of products to consumers; and
- (c) Parliament’s intent (as reflected in the law) for these obligations to apply to a broad range of financial products.

See draft RG 000 at RG 000.232.

ASIC Question		Response
E1Q1	Do you agree with the factors that we will take into account when considering whether to provide an exemption from, or modification to, the design and distribution obligations? If not, why not?	Another factor would be whether the implementation of the Product design and distribution obligations causes consumer harm such as: <ul style="list-style-type: none"> <li>• restricts and/ or limits a consumers freedom to choice</li> <li>• limits a consumers access to investment products thus causing loss or damage as a result of income forgone</li> <li>• prevents a consumer from acquiring insurance as there are no insurance policies for which it meets the target market determination</li> <li>• increased fees and costs reduce the pool of investment products available</li> <li>• whether the financial product is offered through an Exchange or is a Derivative Contract</li> </ul>
E1Q2	Are there any additional factors that you consider we should take into account?	

Interaction with disclosure relief

E2 Proposal: ASIC proposes to give guidance that, if we grant disclosure relief for a financial product, relief from the design and distribution obligations will not automatically follow. If requested, we will consider whether to grant relief from the design and distribution obligations as a separate matter to our consideration of the disclosure relief.

See draft RG 000 at RG 000.233.

ASIC Question		Response
E2Q1	Do you agree with our proposed approach to providing relief from the design and distribution obligations when disclosure relief has been granted in relation to a financial product? If not, why not?	No, as the two issues should be considered at the same time to avoid unnecessary additional costs and time.