



13 March 2020

Product Regulation

Strategic Policy

Australian Securities and Investments Commission

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BRISBANE QLD 4001

By email to product.regulation@asic.gov.au

ASIC CP325 – Product design and distribution obligations

Thank you for the opportunity to make a submission on the proposals in CP 325 and the draft Regulatory Guide relating to the new product design and distribution obligations.

ASX notes that it is not subject to any obligations under the new product design and distribution regime. However, as the operator of Australia's primary financial market, ASX does have an interest in how the new regime is applied to entities listed and products quoted and traded on a licensed exchange. The nature of how such products are traded, and so are accessed by end-investors, differs from other non-exchange traded financial products covered by the new regime. This raises important, practical, threshold questions where more targeted regulatory guidance would assist affected parties to understand and comply with their obligations and to achieve a greater degree of uniformity in approach to compliance across the sector.

ASX is concerned that if uncertainty remains about how the obligations will be interpreted and implemented for exchange traded products this may affect the willingness of issuers to offer quoted products where they may also offer an alternative unlisted product – noting that, with the latter, they are better able to manage the relationship with product distributors. ASX submits that such an outcome would ultimately be detrimental to retail investors.

ASX understands that there is currently considerable confusion and uncertainty amongst issuers and distributors (ASX participants) of quoted products about the intended application of the new obligations to listed products. While the new obligations do not apply to fully paid ordinary shares of a company (including a foreign company) they do apply to a range of other products including: Exchange Traded Products (ETPs); Listed Investment Companies (LICs); Listed Investment Trusts (LITs); warrants; options; hybrid securities; listed bonds; and managed funds settled through the mFund service.

While the draft Regulatory Guide provides some examples of how the new obligations would apply in specific circumstances, these examples provide only very limited insight into how the obligations are expected to apply to other products, particularly traded products. To illustrate, while the discussion of LICs (Example 11) sets out how the obligation operates in the circumstances of a primary capital raising, the example does not explain how the relevant obligations then apply to purchases made through secondary trading.

Given that regulators have highlighted that the new design and distribution framework represents a significant departure from the previous approach, ASX submits that:

1. it would be beneficial if ASIC were to provide:
 - a) greater detail in the example that relates to a traded product;
 - b) additional examples that cover other kinds of traded products (e.g. to demonstrate the policy rationale as it applies to closed-ended vs open-ended products, see below for further detail); or
 - c) separate, sector specific regulatory guides; and

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2. in any event, more specific and targeted policy guidance in relation to the practical application of the new obligations to traded products would assist, to a degree, in alleviating the current uncertainty surrounding the interpretation and implementation of the new requirements as they relate to exchange traded products.

As noted above, the nature and structure of exchange traded markets are very different to many other services/products covered by the new regime. Issuers generally have little or no direct engagement or contractual arrangements with the ASX trading participants through which consumers acquire their products. These participants have existing regulatory obligations with regards to their customers, including through Know Your Customer (KYC) requirements and the responsibility to act in their client's best interests.

One specific area where we understand there is significant residual uncertainty is around the interpretation of what constitutes a 'secondary sale' of products, particularly noting that issuers and distributors do not have to comply with the design and distribution obligations for such transactions.

While for many products that are listed/quoted on a licensed market the distinction between a primary and secondary sale is clear, for others such as open-ended funds (eg ETFs) the distinction is not as straightforward, particularly where market makers are interposed between the consumer and issuer. If interpreted broadly every trade in an ETF could trigger the distribution obligations (including record keeping and reporting) as each purchase could potentially be considered a primary issue. We do not believe such an outcome would contribute to achieving the policy objective of improving consumer outcomes.

When combined with the large number of participants who may facilitate these transactions for end customers, this could create a complex administrative burden in relation to the need to collect information, analyse trends and potentially report back information to issuers. It is not clear that this additional compliance burden (including establishing system to collect and transfer data) will contribute to better consumer outcomes than those that are currently delivered under the existing investor protections. These protections include both the requirements ASX participants have in relation to dealing with their clients and the rules-based framework which governs the listing of financial products on the exchange.

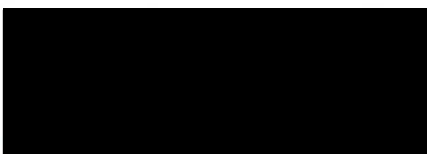
ASX would recommend that the proposed regulatory guide more clearly state what ASIC considers as constituting a secondary sale for the purpose of these new obligations. This would facilitate the application of a consistent interpretation across industry and to enable stakeholders to establish systems and processes with confidence that they are complying with their statutory obligations and regulatory expectations.

ASX submits that a preferred approach to producing regulatory guidance that achieves its objectives in an efficient and effective manner would be to convene a group of relevant industry stakeholders (issuers, distributors, and listing market operators) to discuss solutions and identify the costs and impacts of different interpretations.

ASX would welcome the opportunity to participate in such an open exchange of views involving regulators, market operators, participants, and issuers of listed/quoted financial products.

Thank you again for the opportunity to comment and ASX is available to expand on any of the points made in this submission.

Yours sincerely



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