

13 March 2020

Mr Andrew Fawcett,
Senior Executive Leader, Strategic Policy
Australian Securities and Investments Commission

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

Dear Mr Fawcett

Draft Regulatory Guide: Product Design and Distribution Obligations

The Customer Owned Banking Association (COBA) appreciates the opportunity to comment on ASIC's draft regulatory guide for the Product Design and Distribution Obligations (DDO).

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has over \$129 billion in assets, 10 percent of the household deposits market and over 4 million customers. Customer owned banking institutions account for around three quarters of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition and market leading levels of customer satisfaction in the retail banking market.

Our focus in this submission is on the regulatory treatment of retail banking products for broad consumer markets, such as transaction accounts, savings accounts, term deposits, home loans, personal loans and credit cards.

We note that the draft guidance quotes extensively from the Financial System Inquiry (FSI) report which recommended the DDO regime but does not address the FSI's view on scalability and the treatment of low-risk products:

"These requirements would be scalable, depending on the nature of the product. Compliance with this obligation should be straightforward for simple products that are likely to be suitable for most consumers. For example, simple, low-risk products such as basic banking products would not require extensive consideration and may be treated as a class, with a standard approach to their design and distribution."¹

We support recognition and accommodation of this element of the FSI's vision for the DDO regime.

ASIC's guidance on the DDO is an opportunity for the regulator to minimise the regulatory burden on providers of retail banking products and therefore keep down costs that are ultimately borne by consumers of these products.

Under the Regulator Performance Framework, ASIC has key performance indicators (KPIs) that cover reducing regulatory burden, communication, risk-based and proportionate approaches to regulation, efficient and coordinated monitoring, transparency, and continuous improvement of regulatory frameworks.

¹ FSI Final Report, p199

COBA urges ASIC to prioritise these KPIs in drafting its regulatory guidance on the DDO and its ongoing approach to the DDO regime.

Key points:

- **Clearly distinguish between guidance to licensees about meeting actual legislated obligations and suggestions about best practice approaches to meeting ASIC's view of the objectives of the DDO regime**
- **Emphasise that the DDO do not equate to an individual product suitability test that requires assessment based on an individual's circumstances at point-of-sale**
- **Provide more illustrative material about the potential content and form of target market determinations for broad market retail banking products**
- **Provide additional material about the 'significant dealing' requirement, and**
- **Keep in mind practical impacts on the customer experience.**

Guidance vs Suggestions

Suggestions by ASIC about how licensees can develop their approach to meeting the DDO are welcome but we request more clarity about the boundary between suggestions for best practice and guidance about meeting actual legislated requirements.

This boundary is not clear in the commentary in the draft guidance concerning:

- a product governance framework, subject to external review and involving the collection and analysis of consumer, product performance, value and transaction data
- consumer behavioural biases, and
- determining a negative target market.

Such material is useful for consideration by licensees but there is a risk of regulatory over-reach if licensees infer that ASIC in this material is setting out its interpretation of actual legislated obligations.

We note that some of the commentary in the draft guidance may not be relevant for simple, low-risk products. In the section on "behavioural biases" (at paragraph RG 000.53), the draft guidance says the retail financial services sector "is characterised by products that are inherently complex and that require consumers to make decisions under uncertainty." This statement is not correct in relation to many retail banking products, e.g. transaction accounts, savings accounts, term deposits, home loans, personal loans and credit cards. Everybody, other than young children, has a transaction account. There is nothing "inherently complex" about a term deposit.

We request that ASIC should exercise caution in taking a detailed prescriptive approach on certain conduct, such as reviewing a target market. For example (at paragraph RG 000.143), the draft guide says "we expect that the issuer will take into account all available information on its financial product using multiple data sources." Firstly, it may be difficult to identify "all available information" and secondly, such a requirement may not be a proportionate regulatory response to the risk the regime is intended to address.

Individual product suitability

It would be helpful for the guidance to highlight that the DDO do not equate to an individual product suitability test that requires assessment based on an individual's personal circumstances.

This important point is mentioned in the draft RG but it could usefully be emphasised to pick up some of the messages in the legislation's Explanatory Memorandum, i.e. at paragraphs 1.54 and 1.58, which address personal advice.

The DDO requirements for it to be "likely that the retail client is in the target market" and the product to "likely be consistent with the likely objectives, financial situation and needs of the retail client" are described in the Explanatory Memorandum as "objective" and "do not require an issuer to have knowledge about individual consumers."

Illustrative material

This is a novel regime and all licensees are making significant investments in compliance, including the identification and definition of target markets for the purposes of the law, new systems and processes, record-keeping, staff training and preparation of advertising and promotional material.

We accept ASIC's position that it does not propose to give definitive guidance on the content and form of a target market determination and the formulation of a target market.

However, some illustrative material covering the formulation, content and form of a target market determination would be helpful.

The guidance notes the need to identify a class of consumers based on common aspects of their objectives, financial situation and needs and mentions three factors: their ability to bear loss, their age bracket, or their income level (RG 000.67). COBA would welcome further illustrative material like these factors, particularly for retail banking products for broad consumer markets.

Additional information to assist issuers of retail banking 'everyday' products could help reduce uncertainty about the DDO regime and compliance costs that ultimately will be borne by consumers.

We note that the draft guidance (at paragraph RG 000.87) warns that "an issuer would be in breach of its obligations if it defined the target market too broadly, such that the product is not likely to be consistent with the likely objectives, financial situation and needs of some consumers in that target market."

"In all cases," the draft guidance warns, "the target market must be identified at a sufficiently granular level to avoid the inclusion of any classes of consumers for whom the financial product is not likely to be consistent with their likely objectives, financial situation and needs."

In this regard and in relation to broad target markets, COBA sees the need for ASIC to signal a proportionate approach that takes into account risk of consumer harm. ASIC should also take into account in this context that the DDO is not alone in doing all the heavy lifting of consumer protection. In the case of everyday banking products, industry codes play a significant role in consumer protection.

The requirement to specify review triggers is also challenging for issuers of broadly targeted retail banking products. COBA requests some illustrative material, such as examples, about this requirement for such products. It would also be helpful for the guidance to indicate what is a reasonable review period for simple, low-risk products.

We also note the potential for confusion and uncertainty about the 'significant dealing' concept that triggers a reporting requirement. In a very broad target market, what would ASIC consider to be significant dealing outside that target market?

Customer experience

On the question of whether a consumer is reasonably likely to be in the target market, the draft guidance notes the need for the distributor to have effective systems and processes in place to enable it to form a reasonable view.

"In some cases," the draft guidance says (at paragraph RG 000.166), "to meet the reasonable steps obligation, the distributor will need to take the additional step of asking specific questions of the consumer."

As noted above, the DDO do not equate to an individual product suitability test that requires assessment based on an individual's personal circumstances. We would add that customers do not expect to be interrogated if they wish to acquire a product, particularly a retail banking product. Sensitivity to the customer experience should be reflected in the guidance.

COBA looks forward to further engagement with ASIC to assist our members and the regulator to deliver a DDO regime that achieves its consumer protection outcomes in a proportionate and risk-based way.

Please contact Luke Lawler [REDACTED] or Esther Rajadurai [REDACTED] if you wish to discuss any aspect of this submission.

Yours sincerely



MICHAEL LAWRENCE
Chief Executive Officer