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Product Regulation Strategic Policy Australian Securities and Investments Commission
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The National Insurance Brokers Association (**NIBA**) welcomes the opportunity to provide a submission in response to the ASIC [Consultation Paper 325 Product Design and Distribution Obligations](#) and [draft regulatory guide](#)

About NIBA

There are over 450 insurance broking firms, and around 16,000 insurance brokers in Australia.

NIBA represents well over 90% of the general insurance brokers operating in cities, towns and regional areas across Australia. Our members range from large international broking firms, to the large number of medium and smaller broking firms, servicing individuals and corporate clients.

NIBA is committed to maintaining and promoting high levels of professionalism among its members, including measures to establish appropriate levels of educational qualifications, ongoing professional learning and professional development, and a world leading Insurance Brokers Code of Practice.

About insurance brokers

Insurance brokers play an integral role in helping their clients;

- Understand, manage and minimize their risk exposure;
- Identify appropriate insurance arrangements or other risk financing mechanisms;
- Obtain insurance cover from the Australian or overseas markets in accordance with the client's needs and circumstances; and
- Act as the client's advocate when an insured event occurs and the client makes a claim under the policy.

In performing these functions, insurance brokers act for and on behalf of the client, and have statutory, common law and professional duties to act in the best interests of the client at all times. It is important to note that insurance brokers do not sell insurance cover to their clients. Rather they purchase insurance cover on behalf of their clients.

Insurance brokers process around \$22 billion in insurance premiums each year in the Australian and international insurance markets, around half of the total Australian general insurance premium pool.

Insurance brokers hold and operate under Australian Financial Services licences, and are subject to regulation by ASIC at all times. Insurance broking firms are members of AFCA, and NIBA members subscribe to the Insurance Brokers Code of Practice.

Executive Summary

NIBA acknowledges:

- the importance of the objective behind the legislation to promote the provision of suitable financial products to consumers given the identified imbalance;
- the challenges ASIC faces in seeking to provide Guidance on what NIBA considers to be poorly drafted and confusing legislation (noting ASIC can only provide Guidance based on what it has been given);
- ASIC's focus on improving the conduct of insurers in relation to consideration of the value of the products for the target market, product design and distribution procedures;
- the Guidance is only an indication of the approach ASIC may take and is not final policy; and
- ASIC's statement that "We recognise that the approach taken by issuers and distributors to implement and comply with the requirements may also develop following practical experience which is likely to increase understanding of consumers' needs and objectives, and with the advancement of technology and data management capabilities. ...For example, the approach taken by issuers and distributors to comply with the design and distribution obligations on commencement of the regime may be different from the approach taken several years from now. We expect that systems and processes will develop, be tested and be refined over time. ...We expect to have a constructive relationship with industry during the implementation phase."

NIBA's key concerns can be summarised as follows:

- We have not identified an insurance example that is likely to assist the insurance industry in properly navigating this poorly drafted and confusing legislation;
- the Guidance is expressed in a way that appears to be inconsistent with the drafting of the actual legislation and may create confusion, especially for small businesses, if not clarified. Further discussion needs to occur in an insurance context on how this can be addressed;
- despite requests from NIBA and the insurance industry, ASIC has to date not been prepared to engage in the process of working through an insurance example in order to determine the likely impact of the law and/or ASIC draft guidance in an insurance context. NIBA strongly recommends that this be done to avoid unforeseen consequences;
- the Guidance includes matters, that whilst important, are not specifically required by the legislation. We believe the Guidance would be made significantly more useful by the inclusion of insurance specific examples; and
- the effect of the above is likely to:
 - reduce competition in the market to the detriment of consumers – this is because a confusing regime (noting that ASIC is dealing with what has

been provided to it and can only seek to reduce any adverse impact by helpful and clear Guidance) can make entry of new players difficult or unattractive;

- increase the cost of insurance for consumers arising from the likely confusion and higher compliance costs;
- reduce the accessibility of insurance to vulnerable consumers if insurers are forced to restrict offerings due to compliance uncertainty and cost; and
- adversely affect the industry for no obvious consumer benefit that is not already delivered in other law e.g ASIC Product Intervention power, Unfair Contract terms, Standard Cover proposals, Corporations Act efficient honest and fair obligation and Insurance Contracts Act duty of utmost good faith.

NIBA is supportive of any attempt to redress any imbalance between insurers and consumer BUT this should only be done after a proper costs benefit analysis has been conducted and in a way that effectively and simply deals with the issues. This is not the case with this legislation. NIBA provides examples below in support of its above view.

NIBA strongly submits that ASIC should consider engaging with NIBA and the Insurance Council of Australia to work through at least one example of a TMD e.g Motor Vehicle insurance in order to gain an understanding of what appear to be many practical challenges faced by industry having regard to ASIC's proposed Guidance. Following this, the Guidance could possibly be updated to reflect this experience and/or consideration given to relief where needed to address issues of concern.

If this is not done, NIBA is currently of the view that no insurance related Guidance may be a better result than what is currently provided.

We look forward to engaging with ASIC in a proactive and positive manner.

NIBA Detailed submission

NIBA provides its response below [NIBA Comments to the Guidance have been included in yellow] to:

- specific proposals and questions
- draft RG 000 Product design and distribution obligations
- alternative approaches that would achieve *ASIC's objectives*.

NIBA also comments on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Including both quantitative and qualitative information where available.

Timing

Section 2 of the Treasury Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 sets out commencement as follows:

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	5 April 2019
2. Schedule 1	The day after the end of the period of 2 years beginning on the day this Act receives the Royal Assent.	5 April 2021
3. Schedule 2	The day after this Act receives the Royal Assent.	6 April 2019

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Schedule 1 refers to Amendments relating to design and distribution of financial products.

Schedule 2 refers to Amendments relating to product intervention orders.

[NIBA Comment - Date of Royal Assent was 5 April 2019. 2 years from Royal assent is 5 April 2021. The day after this is 6 April 2021. Is ASIC of the view the commencement is 5 April or 6 April 2021?]

Fit for purpose

ASIC notes that "Issuers will have an increased responsibility to design products that are *fit for purpose and deliver good consumer outcomes*. More broadly, complying with the design and distribution obligations is consistent with some of the norms of conduct outlined by Commissioner Hayne in the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission). In particular, financial firms should *act fairly and provide services that are fit for purpose*.

[NIBA Comment Does ASIC have any guidance on what it believes fit for purpose is in an insurance context?]

ASIC Review of other Jurisdictions

ASIC notes: 16. “The introduction of the design and distribution obligations in Australia has been informed by international experience. We have engaged with peer regulators from comparable jurisdictions about their experience implementing and administering product governance regimes to inform our approach to the draft guidance.”

[NIBA Comment - What engagement has there been in the insurance context? Has ASIC identified and recorded any issues in overseas jurisdictions regarding the difficulty of industry understanding or complying with such legislation or adverse flow on effects to consumers e.g in terms of cost increases, reductions on product availability or available insurers etc e.g in the UK. NIBA’s engagement has indicated a great deal of confusion in the UK regard what will and will not be sufficient to comply.

If so, is ASIC taking any steps to consider how to avoid similar outcomes in Australia or monitor such possible outcomes?]

ASIC Overview of the design and distribution obligations

ASIC states in 28. “We expect that compliance with the design and distribution obligations should not be onerous for those firms that are already committed to good business practice. As observed by the FSI, for those businesses with good practices that are already taking a consumer-centric approach to designing and selling products, the design and distribution obligations will require only minimal changes.”

[NIBA Comment NIBA is unclear on how ASIC is able to make such a statement in the CP in the insurance context. Based on NIBA’s understanding:

Issuers will be required to:

- create numerous new TMDS for all retail clients;
- undertake significant reviews against new law;
- engage with Distributors having regard this and the new law;
- amend compliance and other processes to comply with the above.

Distributors will need to:

- undertake significant reviews against new law;
- engage with issuers having regard to this and the new law;
- amend compliance and other processes to comply with the above.

Whilst RG 000.4 quotes the FSI with no commentary. We are concerned this does not reflect the true result of the new obligations and it may be better to remove it to avoid any confusion.

In terms of the introductory parts of the Regulatory Guide we make the following comments relevant to that section.]

A Overview

Key Points

The design and distribution obligations are also intended to reduce:

- the number of consumers being sold financial products that do not meet their needs; and
- subsequent consumer detriment.

[NIBA Comment What does ASIC consider to be a “need” in the context of insurance? The TMD requirements refer to more than just a need]

To meet the design and distribution obligations:

- issuers must design financial products that are likely to be consistent with the likely objectives, financial situation and needs of the consumers for whom they are intended (the target market); and
- distributors must take ‘reasonable steps’ to distribute financial products to the target market.

[NIBA Comment - This statement does not appear to reflect the actual legal obligation on Distributors– there is no such obligation to take reasonable steps to distribute the products *to the target market*. We believe that this should be amended to reflect the law and the wording used to avoid possible confusion]

Purpose of the design and distribution obligations

RG 000.1 The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 introduced design and distribution obligations to Ch 7 of the Corporations Act, which commence on 5 April 2021.

[NIBA Comment - Isn't commencement date 6 April 2021?]

RG 000.1 A new objects clause will also be added to Ch 7, being the provision of suitable financial products to consumers of products: see s760A(aa) of the Corporations Act. To this end, the design and distribution obligations require issuers to design products that are likely to be consistent with the likely objectives, financial situation and needs of the consumers for whom they are intended. As a result of the obligations, issuers will no longer be able to offer an existing product if an appropriate target market cannot be identified for the product.

[NIBA Comment - This is not clear to NIBA. What is meant by an “appropriate target market”. The legal obligation is to identify a “target market” and then be able to ensure the appropriateness test is met relevant to that target market. We are not sure why ASIC is using terminology that is consistent with the law As we feel that this is likely to cause confusion]

Regulation to improve the product design and distribution process

RG 000.12 It is in this context that the FSI recognised the variable quality of design and distribution controls and recommended the introduction of the design and distribution obligations as a supply-side intervention that places responsibility on issuers and distributors. Issuers and distributors must now:

(a) design and distribute products that are likely to be consistent with the likely objectives, financial situation and needs of consumers; and **[NIBA Comment This should be clarified as it is “the target market” identified by the insurer not “consumers” generally.]**

(b) target products to those consumers who would benefit from them, to improve consumer outcomes. **[NIBA Comment We understand that the obligation is to meet the appropriateness test relevant to the target market as defined by the insurer. This statement does not appear to be consistent with the law as drafted].**

Products affected by the design and distribution obligations

[NIBA Comment Insurance issue – Does ASIC believe a “kind of product” in insurance is each of the listed types of retail insurance in the Corporations regulations?

As an example, Motor – Loss or damage and liability contract (e.g Comprehensive motor insurance) vs liability only contract (third party property damage only) – Is this considered 2 products? Same issue for others.

If there are 2 products can you have single TMD covering both? E.g Travel with different plans or Home Buildings and Home contents choice in one PDS? Motor PDS with comprehensive, Third party fire and theft and third party property damage only?

Guidance on ASIC’s position on this would be helpful]

RG 000.19 Products that are not subject to the obligations

[NIBA Comment There are new carve outs in the Regulations not listed. They should be referred to more specifically. There is only “Note 2: Financial products may also be excluded from the design and distribution regime under the Corporations Regulations 2001 (Corporations Regulations).” This does not only apply to securities as indented formatting seems to suggest]

Who the design and distribution obligations apply to

RG 000.20 Note: The Corporations Regulations may further prescribe who the design and distribution obligations apply to.

[NIBA Comment There are regulations in this regard. It would be useful to at least reference those in existence now]

RG 000.21 Distribution means ‘retail product distribution conduct’ in relation to a consumer, comprising:

(a) dealing in the financial product;

(b) giving a disclosure document in relation to offering a financial product;

(c) providing a PDS; and

(d) providing financial product advice (see s994A(1)).

[NIBA Comment We note that “Distribution” is not defined in the Act to mean “retail distribution conduct” as the RG seems to state. If ASIC is intending to short form “retail distribution conduct” in the RG to “distribution”, we believe that this should be made clearer as otherwise people may be confused. Distribution is a narrower concept than the defined term and it may be better to use the term in the Act rather than short form it in this instance.

In addition, there is no “and” in retail distribution conduct. It is *any* of these individually or collectively. Same issue re diagram in Figure 1.]

Obligations relevant to issuers (insurer)

37 To comply with the design and distribution obligations, an issuer must make an appropriate target market determination for each financial product it issues.

RG Table 1

- Make a target market determination: see s994B. An issuer must make an appropriate target market determination for its financial product. A target market determination must: ...
 - specify reporting periods for when the distributor should provide complaints to the issuer; and **[NIBA Comment** The actual words in the section are “number of complaints about the product”. This should be clarified]
 - specify what information distributor(s) must report to the issuer (and how frequently) to enable the issuer to identify whether the target market determination needs to be reviewed. **[NIBA Comment** The requirement in the section is only “kinds of information” This should be clarified].
- Keep records: see s994F(1) and 994F(3) An issuer must keep complete and accurate records of:
 - the decisions made in relation to its target market determinations, and associated reviews, including the reasons for those decisions; and
 - distribution information (to the extent that the issuer is also a distributor). **[NIBA Comment** This appears to suggest that the obligation in (3) also applies to an insurer when distributing its own products. Is this the ASIC view or is ASIC only trying to say that it applies if the insurer distributes another insurer’s products? If the former, this does not appear to be consistent with the law. In our view, the sub section clearly only applies to persons who are not insurers.]

Obligations relevant to distributors (issuer or Regulated persons)

RG Table 2

- Take reasonable steps in relation to distribution: see s994E(3) A distributor must take reasonable steps that will, or are reasonably likely to, result in a distribution being consistent with the most recent target market determination. **[NIBA Comment - There should be a note referring to the personal advice carve out].**

ASIC Proposal

B1 We propose 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

[NIBA Comment The reference to “consumer” here and in RG 000.32 should be to the target market identified by the insurer. To state “consumer” would not be consistent with the law and confusing].

- (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.

Your feedback

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?

[NIBA Comment Whilst such a process is clearly valuable, we feel that it significantly adds to the complexity of the RG and takes away from the legal obligations the RG is designed to actually address. It is a concept not specifically referred to in Part 7.8A. If it is to be included, it should be at the end of the RG. NIBA is concerned that it could have the same effect on industry (especially small businesses) as consumer exhaustion in product decision making that ASIC is concerned with.]

In relation to particular RG references in this section:

RG 000.46 At the product design stage, an issuer should also consider how its financial product will be distributed, to enable it to meet its obligations to:

- (a) specify conditions or restrictions on distribution to ensure that it is directed towards the intended target market (see RG 000.93– RG 000.97); and **[NIBA Comment The requirement in the insurance context is “issued” not directed]**
- (b) take reasonable steps to ensure that distribution is consistent with the target market determination (see RG 000.107–RG 000.121).

RG 000.47 At the product design stage, an issuer should consider the ‘choice architecture’ of its financial product to ensure that it is consistent with the target market,

including, for instance, the impact of complexity and frictions in choices, processes and information. The design of choice architecture is relevant to the issuer's reasonable steps obligation in s994E(1): see RG 000.117–RG 000.121. **[NIBA Comment The obligation in 994E(1) is that the issuer must take reasonable steps that will, or are reasonably likely to, result in a distribution *being consistent with the most recent target market determination.***

It is unclear to us how the statement above is accurate in this context. Is this an error ie is the word “determination” missing from target market above? If not, further clarification should be provided as the ASIC reasoning is not clear to us]

RG 000.48 At the product distribution stage, in order for issuers and distributors to meet their obligation to take reasonable steps that will, or are likely to, result in distribution being consistent with the target market determination, we expect the product governance framework to include processes and controls designed to reduce the risk of financial products being issued to consumers that are inconsistent with their objectives, financial situation and needs **[NIBA Comment This does not appear to be consistent with the law. We believe that it should refer to consumers in the target market and also only to the “likely” needs etc of the target market. This suggests a higher obligation and may cause confusion]**

Delivery of good consumer outcomes

53 We consider that this means issuers and distributors should not take advantage of *behavioural biases* or *factors that can impede consumer outcomes* (e.g. the effect of behavioural bias on consumer interaction with information). **[NIBA Comment NIBA supports the intent behind this. However, where does ASIC believe this obligation is included in the DDO law? It should be specified to avoid confusion]**. 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. **[NIBA Comment NIBA supports the intent behind this. However, where does ASIC believe this obligation is included in the DDO law? Does ASIC mean “likely needs” or “needs”? If a need exists but a product does not/cannot for sound and reasonable business reasons meet that need is ASIC of the view there is a breach by an insurer? What is ASIC’s view on “need” in an insurance context? NIBA again submits the need to engage with industry to help come up with a practical approach in this regard]**

54. Consumer vulnerabilities can include a consumer's personal circumstances, as well as the specific influence or impact of features in a product's 'choice architecture'. Note 2: 'Choice architecture' refers to features in an environment, noticed and unnoticed, that influence consumer decisions and actions. These features are present at every stage of product design and distribution. Examples include *product bundling, default settings, and website and sales process design*. **[NIBA Comment NIBA supports the intent behind this. However, where does ASIC believe this obligation is included in the DDO law? It should be specified to avoid confusion]**

Proposal

B2 We propose 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.

Your feedback

B2Q1 Is our guidance on the consumer-centric approach issuers and distributors should take to deliver good consumer outcomes useful?

B2Q2 What additional matters, if any, do you consider to be relevant?

[NIBA Comment] Whilst important, we feel the current location may take away from the issues the RG should focus on i.e. the obligations to be legally complied with under the DDO law as drafted. Certain aspects are unclear to us - See “needs” issue above. NIBA supports the intent behind this. However, where does ASIC believe this obligation is included in the DDO law? It may be better left to general guidance by ASIC regarding conduct generally at this point.

RG 000.54 also states “It is also important for issuers and distributors to consider consumer vulnerabilities, and how these vulnerabilities (which can include a consumer’s personal circumstances and the specific influence or impact of features in a product’s choice architecture) may increase the risk that products sold to consumers do not meet their needs and lead to poor consumer outcomes.”

This gives the impression of the need to consider personal circumstances and the obligation to meet a consumer’s personal needs vs the likely needs which is not in our view the intent of the DDO law. This may cause confusion and contribute to reader/compliance fatigue.]

Content and form of a target market determination

ASIC do not propose to give definitive guidance on the content and form of a target market determination and, in particular, the formulation of a target market.

61 A one-size-fits-all approach would not be appropriate, given the broad number of products the obligations apply to. We consider that industry is best placed to consider the circumstances of their own products.

[NIBA Comment] We agree definitive guidance is not appropriate nor a one size fits all approach.]

Proposal C1 We propose 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.

Your feedback C1Q1 Do you agree with our approach to guidance on the form and content of a target market determination? If not, why not?

[NIBA Comment] We have no issue with the general approach but believe ASIC should consider providing the insurance industry with specific feedback given the complexity of the issues. NIBA submits that ASIC should engage with NIBA and the ICA to work through a practical example which will be likely to assist all in making the Guidance as useful as possible in what is a difficult situation for all.]

Identifying and describing a target market

65 An appropriate target market for a financial product is one where the product is likely to be consistent with the likely objectives, financial situation and needs of a consumer in a given target market: see s994B(8)(b).

[NIBA Comment NIBA does not believe that the above statement accurately reflects the law and may create confusion. The obligation is to identify a target market and then be able to reasonably conclude that if the product is issued to a retail client, it would likely be consistent with the likely objectives, financial situation and needs of the identified target market.]

66 The purpose of the target market determination is to drive discipline in the design of financial products, to ensure issuers design products for which an appropriate target market can be defined, or conversely to consider whether the planned target market for products under development is appropriate: see the Revised Explanatory Memorandum, paragraph 1.48. We consider that best practice would see issuers identify a target market, **or the consumer need** that the product is to address, at the early stages of product design. **[NIBA Comment** This only refers to a consumer need – what about objectives and financial situation? We note that we struggle to determine in an insurance context how to identify such things so are not surprised the examples do not cover them either. Engagement between NIBA the ICA and ASIC may help in this regard.]

67 We recognise that starting with a target market or consumer need will not be practical for continuing products, because these products have already been designed. Some issuers may already have a concept of a ‘target market’, in a marketing or commercial sense, for the product. For these products, a different approach can be taken. However, if required, issuers should be willing to modify the design of the product, revise the distribution strategy in line with the identified target market, or cease offering the product if an appropriate target market cannot be identified.

[NIBA Comment We are unclear why ASIC makes such a distinction. There is nothing in the law regarding this we can identify. If as a matter of compliance an insurer must go to the level of granularity of the application eligibility process in order to ensure compliance regarding the impossible test of needs objectives and financial situation [see discussion below] this proposed approach may not be helpful for such insurers for renewals.

AS we see it, an insurer may need to have the customer confirm on renewal that no change to their circumstances have occurred since application or previous renewal i.e. confirm they still fit within the eligibility criteria. If there has been a change, a person may not be within the eligibility criteria and an insurer may need to offer alternative cover or reject renewal. We are happy to discuss this challenging issue further]

Proposal C2 We propose 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 **[NIBA Comment** See concern about words used in RG above re “need” only]

(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. **[NIBA Comment** See comments above. This is confusing to us. As we read the law, the obligation is to first identify the target market, not to do so by reference to the likely objectives, financial situation and needs of consumers for whom the product would likely be consistent. Once you have the target market you then need to ensure you can meet the appropriateness test relevant to the target market as defined. The distinction ASIC is trying to make between new and continuing products is also unclear to us. We cannot identify where this is covered in the law? Is this ASIC's attempt to make badly drafted legislation operate reasonably despite the law? If so, it may be more appropriate to amend the law so that it works. We submit that discussions between NIBA the ICA and ASIC may be able to address this.]

See draft RG 000 at RG 000.62–RG 000.65.

Your feedback

C2Q1 Is our guidance on the approach to identifying the target market for new products and continuing products useful?

[NIBA Comment ASIC's guidance is confusing to us for the reasons noted above]

C2Q2 What additional matters, if any, do you consider to be relevant? **[NIBA Comment** See comments above. NIBA notes that there is no guidance on what ASIC considers an objective, need or financial situation to be in the context of these obligations as they relate to a "class" of retail client. This is the main issue of concern in relation to the new obligations, especially in an insurance context. This lack of clarity in the legislation combined with a lack of industry specific guidance can create compliance confusion. We submit that discussions between NIBA the ICA and ASIC may be able to address this.

We note that in *Australian Securities and Investment Commission v Westpac Securities Administration Limited* [2019] FCAFC 187 the court effectively concluded that:

- an objective is an end towards which efforts are directed;
- a situation is a state of affairs or combination of circumstances; and
- a need is a case or instance in which some necessity or want exists.

This is easier in an investment context and more challenging in an insurance context.

At the highest level the legislation (as did the Royal Commission) (which we note ASIC has to deal with) failed to acknowledge the reality that what a consumer might reasonably want and what an insurer is reasonably able to provide can be different. How does anyone work out where they cross the line? Given the significant penalties that apply for a breach, this is not a satisfactory state of affairs and to date, it appears to remain the elephant in the room.

Further, to what level of detail must an insurer go to meet the obligation? For example, in the context of a standard home buildings policy, if it is all "persons who own a home building and reside in the home":

- the relevant distribution conditions would most likely be a knockout for persons not in this category which means all persons buying it are within the target market;

- the likely objectives, financial situation and needs of such a broad target market is more challenging. How does an insurer have any comfort it has got it right? ASIC's guidance only refers to needs in most examples. This is not reflective of the law or helpful.

Here are some examples of questions that need to be asked based on the legislation AS DRAFTED (noting ASIC is dealing with the legislation as drafted and has not created the issue):

- **the objective** – Is it only high-level? e.g. to transfer risk of damage to the home building to an insurer and legal liability arising as an owner occupier or something more granular e.g. transfer all risks of damage and liability or only certain types of risks (e.g. specified events or types of liability) or only certain risks to certain levels (e.g. levels of cover or excess levels) and so on. How can an insurer with any clarity form a view. ASIC's guidance clearly seeks greater granularity – see comments further below.
- **the needs** – Is it only high-level? e.g. the need to transfer risk of damage to the home building and protect themselves from liability to third parties i.e. the main covers provided or other needs as well e.g. the need to cover other things associated with damage such as removal of debris. There is no ASIC commentary on this we can identify.

Further, the “needs” of a retail client are not qualified in any way. Is it all needs no matter how unreasonable or commercially feasible for an insurer. E.g. a customer can argue that they “need” complete cover from an insurer for all risk of loss or damage or cover of specified types at a price they can afford. At least the unfair contracts regime allows for the protection of legitimate business interests. Such uncertainty can only add to the cost of insurance and affect the accessibility of insurance from markets beyond those in Australia i.e. if it is too hard and risky new participants are unlikely to enter, further reducing competition in the market to the disadvantage of consumers.

Even if a target market is defined at the highest level described above (and more so at a granular level), *no policy can ever realistically meet (or have compliance certainty that they would meet) the likely unqualified “needs” of such a target market.*

The reality is that a policy is intended to provide cover subject to limitations (i.e. what the insurer is commercially prepared to underwrite) and at a price reflective of this.

Policies have exclusions designed to reduce fraud and ensure the underwriting risk is at an acceptable level e.g. 72 hour exclusion periods. We doubt this would ever be considered to be a “need” of a retail client but it is a reasonable and necessary restriction on cover.

- **the financial situation** – this is even more complex. For a home buildings policy, where the target market is defined at the highest level, where do you start?

Is it the affordability of the policy per benefit or for all possible options that may be chosen in addition to the cover? Where flood is offered on an inclusive basis for someone in a flood area the price will often be what a consumer would consider

excessive but what an insurer considered reasonable based on the underwriting risk.

In terms of benefit levels, if an insurer is only prepared to offer cover up to certain limits and on the basis of minimum excesses, how do you determine in the context of such a broad target market that these meet the likely financial situation of the target market? It is more complex at the granular level.

We have not identified any guidance or commentary in this regard.]

RG 000.74 states” In identifying the common objectives, financial situation and needs of consumers in the target market, it is important to keep in mind that objectives, financial situation and needs should be considered in totality. We expect the issuer to also take into account the relationship between objectives, financial situation and needs, since they are not mutually exclusive.”

[NIBA Comment This makes little sense to us and provides any additional clarity, especially regarding the granularity and reasonableness concepts referred to above. Very few will understand what ASIC means by this with no practical example in an insurance context]

RG 000.75 states “For example, common objectives for consumers seeking to acquire a credit product are likely to include smoothing spending and/or financing the purchase of an asset. However, other relevant circumstances are likely to inform the question of whether a particular product is likely to be consistent with the likely objectives, financial situation and needs of consumers: see Example 1.”

[NIBA Comment We do not believe this is likely to be understood by industry. The examples provided do not really address how an entity would identify the likely target market “needs”, “objectives” and “financial situation” as is required. We submit discussions between NIBA the ICA and ASIC may be able to address this.

By way of example:

The Credit card example only identifies an “**objective**” - to reduce their credit card debt over a period of time.

The Reverse Mortgage example only identifies:

- “**financial objectives**” - such as enabling borrowers to:
 - maintain their current living arrangements with less financial stress;
 - obtain short-term finance;
 - have a general safety net for living expenses; and
 - afford a better quality of life
 - longer term needs (e.g. aged care).]

RG 000.76 notes common “objectives” for consumers seeking to acquire an investment product “are likely to include capital growth and/or income generation, these objectives

must be considered with other relevant circumstances. Consumers who have a low risk tolerance and who are seeking to preserve capital are unlikely to be suitable for a high-risk investment product that is intended to tie up a consumer's invested capital for five to ten years and that puts a consumer's invested capital at risk."

RG 000.77 states "A broad product objective alone is unlikely to sufficiently define the target market for a financial product. For example, it is unlikely to be sufficient to suggest that a target market for an income protection insurance product is anyone seeking to protect their income in case they become sick or injured. Products—even with broad objectives—vary in their terms, features and complexities, and these factors are likely to affect whether a product is likely to be consistent with the objectives, financial situation and needs of consumers."

[NIBA Comment The above suggests there is a restriction in the law on the insurer's ability to define the target market which does not appear to be accurate. The issue to be considered once the target market is defined is whether the appropriateness test can be met ie:

- specify in the TMD any conditions and restrictions on retail product distribution conduct in relation to the product (distribution conditions), other than a condition or restriction imposed by or under another provision of this Act conditions, that will allow the insurer to reasonably conclude that if the product were issued to a retail client in accordance with the distribution conditions—it would be likely that the retail client is in the target market
- be able to reasonably conclude that if the product is issued to a retail client, it would likely be consistent with the likely objectives, financial situation and needs of the target market. To be able to reach such a view the insurer must first identify the likely objectives, financial situation and needs of the target market and conclude that the product is likely to be consistent with these needs.

We agree that an insurer using such a broad definition of target market – "anyone seeking to protect their income in case they become sick or injured" would not be workable. As noted in the home example above, in terms of the objectives, needs and financial situation of such a broad target market, what level is sufficient to comply? The answer is that there is no real answer or guidance, especially in an insurance context.

For example in the home context, is it to transfer risk of damage to the home building to an insurer and legal liability arising as an owner occupier or something more granular e.g transfer all risks of damage and liability or only certain types of risks (e.g specified events or types of liability) or only certain risks to certain levels (e.g levels of cover or excess levels) and so on. How can an insurer with any clarity form a view?.

In short, wherever a choice exists in a product, an argument can be run that this creates a different type of target market relevant to the insurance product.

With no industry specific Guidance there is no reasonable compliance certainty. We submit that discussions between NIBA the ICA and ASIC may be able to address this].

Our examples for different product sectors

Proposal C3 While we do not propose to give any definitive formulation of how a target market should be described in a target market determination, we propose 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.

Your feedback

C3Q1 Do you have any comments on our approach to guidance on identifying and describing the target market?

[NIBA Comment See comments above]

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:

Example 1: Credit cards;

[NIBA Comment The example states: “For example, the issuer should consider whether the outcomes associated with the promotion are consistent with directing sales to the target market. When the promotion seeks to encourage people outside of the target market to acquire the product, the issuer may not have met its reasonable steps obligation.”

As we understand the appropriateness test (as it relates to insurance) it is to be able to reasonably conclude that if the product is issued or sold to a retail client, it would likely be consistent with the likely objectives, financial situation and needs of the target market. This is very different to the concept of “directing sales” which is broader. Can ASIC clarify why it is taking such a view?]

(c) Example 3: Cash options in superannuation;

[NIBA Comment This states “The likely objectives, financial situation and needs of the target market for the superannuation Choice product include members who will access this option with a view to ensuring that some or all of their capital is secure and not subject to potential negative investment returns.” The stated objective is “some or all of the capital is secure” We would expect the target market would have to be either:

- all capital being secure.
- some capital being secure.

The objective or need would be one or the other relevant to a target market, not both. If the later, to what degree? The ASIC example is a basic one ie loss or not. It is more complex when you look at degree of loss risk.]

(d) Example 4: Consumer credit insurance;

[NIBA Comment The example states “Consumer credit insurance (CCI) has been marketed to consumers to meet their needs if they are unable to meet their minimum loan repayments due to unemployment, sickness or injury, or to pay the outstanding loan balance upon death. CCI is optional and has historically been sold by lenders to consumers with a credit card, personal loan or home loan. In Report 622 Consumer credit insurance: Poor value products and harmful sales

practices (REP 622), we found that CCI had been sold to consumers who were ineligible to claim or unlikely to benefit from or need cover. Issuers should have regard to the problems identified in REP 622 when they consider their design and distribution obligations for CCI products. Note: See REP 622, pp. 13–16.”

This example only refers to **marketing** to consumers that it meets their needs.

We would appreciate more Guidance from ASIC on what it would expect in terms of a target market and the identification of the likely needs, objectives and financial situation of such a target market. We submit that discussions between NIBA the ICA and ASIC may be able to address this.]

(e) Example 5: Low-value products; and

[NIBA Comment This states “We agree with the observations of Commissioner Hayne, in the Royal Commission final report (vol. 1, pp. 293–4), that the design and distribution obligations will alter ‘the kinds of, and characteristics of, products that may be sold, including low-value products’. Funeral insurance is sold to consumers to cover the cost of funerals. It is a form of life insurance, which has ongoing premiums that are often stepped, increasing as the consumer ages. Commissioner Hayne observed, in the 2014 financial year, the amount paid out in claims was about one-third of the value of premiums collected over the same period. In the preceding year, the proportion was one-fifth. Commissioner Hayne also observed that many funeral insurance products ‘carry the potential for consumers to pay more in premiums over the life of the policy than they will receive as a benefit when they die’. The report noted that these statistics indicate these products are of little value to consumers. Under the design and distribution obligations, issuers must design products that are likely to be consistent with the likely objectives, financial situation and needs of consumers.”

As noted previously the obligation is to design products that are likely to be consistent with the likely objectives, financial situation and needs of consumers [in the target market as defined by the insurer]. We believe that ASIC should make this clearer to avoid confusion.]

C3Q3 What additional matters, if any, do you consider to be relevant?

[NIBA Comment NIBA believes that as a matter of urgency, ASIC should engage with NIBA and the ICA to work through one example of a TMD e.g Motor Vehicle insurance in order to properly understand the practical challenges faced by industry having regard to ASIC’s proposed Guidance. Following this, the Guidance could be updated to reflect this experience.]

Consumer understanding

73 The design and distribution obligations require issuers to consider objectively whether a product is likely to be consistent with the likely objectives, financial situation and needs of a class of consumers. We therefore do not consider that a **target market should be predominantly based on consumer understanding of a product.**

RG 000.80 states “The design and distribution obligations are a deliberate rebalancing of reliance on informed consumer decision making to improve consumer outcomes. The obligations require an issuer to consider objectively whether a financial product is likely to be consistent with the likely objectives, financial situation and needs of a class of

consumers. We therefore do not consider that a target market should be predominantly based on consumer understanding of a product (i.e. a target market should not be all consumers who meet a required level of understanding of how a product works). When a target market determination does refer to consumer understanding, an issuer will need to consider how consumer understanding of a particular product will be assessed as part of its reasonable steps obligation: see RG 000.107–RG 000.121. It will unlikely be sufficient for an issuer to base understanding on previous experience of the product (i.e. that they have purchased a similar product before).”

[NIBA Comment Such a view does not appear to be consistent with the law as drafted. It is a matter for the insurer to define the target market and satisfy itself that it can meet the appropriateness test. Nothing appears to legally stop an insurer building in such things. For example, a requirement regarding customer confirmation as to understanding or confirmation they fall within a certain category of person with a particular need etc. We have not identified in the law as drafted where this is prevented. Where this is the case, it needs to be made clear]

Proposal

C5 We propose 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.

Your feedback

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?

[NIBA Comment The Act allows an insurer to define the target market. It is unclear to us where the Act restricts the issuer’s ability to so define the target market. Can ASIC please clarify?]

Considering the ‘negative target market’

74 Unlike the EU product governance regime, the design and distribution obligations do not specify that a negative target market, where one exists, must be described in the target market determination: see s994B(5). The EU requirements are to identify the negative target market in addition to identifying the ‘positive’ target market for a product.

75 However, we consider that identification of a negative target market is likely to help issuers define the target market at a sufficiently granular level. This will prevent issuers from including any groups of consumers for whom the financial product would likely be inconsistent with their likely objectives, financial situation and needs. It would also be useful for distributors as they implement their obligations to take reasonable steps.

RG 000.81 states “To help ensure that it complies with the design and distribution obligations, an issuer—after it has identified a target market—will need to critically assess that the financial product it ultimately develops is likely to be consistent with the

likely objectives, financial situation and needs of its intended target market. Questions that issuers could usefully consider as part of this process include:

(a) What is the purpose of the product? Does it fulfil a well-founded need for consumers in the target market? Is it fit for purpose?

[NIBA Comment NIBA supports consideration of a negative target market. The above refers to a “well founded need”. The law refers to a “likely need”. Why does ASIC use the term “well founded”? Is this because there is no link to a **reasonable** need vs any need which an insurer can never comply with? What is ASIC’s view regarding a “well founded need” in an insurance context? To what level must an insurer go? What happens if an insurer cannot meet a well founded need for legitimate business reasons? Guidance on these issues would be appreciated]

Further Guidance on what ASIC considers to be “fit for purpose” in the insurance context would be helpful? We cannot identify where this term is used in the legislation.]

(b) Is the product likely to deliver what is promised? Has the product or this type of product resulted in good outcomes for the target market in the past? Did it deliver what was promised?

NIBA Comment In terms of promise, an insurance contract identifies what is covered and what is not. The non-delivery of what is “promised” will be an issue if there is misleading conduct on the part of the insurer/its agents beyond the terms of the agreement e.g in the sales process.]

(c) Does the product benefit the consumers in the target market? Who has benefited from this product or this type of product in the past? Did the product meet the needs of those we distributed it to? What did our key data points show were the ongoing benefits, risks and outcomes for consumers?

[NIBA Comment In insurance some people claim others don’t. How much benefit is enough? The legal requirement is to be able to reasonably conclude that it would likely be consistent with the likely objectives, financial situation and needs of the target market. There is no concept of any consideration of the degree of benefit being provided as ASIC is suggesting. The reality is that in relation to insurance, the insurance provided may, depending on the circumstances, meet:

- all needs;
- some needs to varying levels to the extent the insurer is able to (e.g up to limits or to extent loss is able to be covered vs all loss).
- no needs (if an exclusion applies).

The law as drafted does not appear to NIAB to acknowledge this reality, requiring that the product **meet** the likely objectives, financial situation and needs of the target market, no matter how unreasonable or uncommercial they may be etc. If ASIC believes the above view is not accurate further Guidance would be appreciated so we can better understand the ASIC view.]

(d) How is the product likely to perform in the hands of the consumers in the target market?

[NIBA Comment Same comments as the above. What we read ASIC as trying to say is that if there is no real value in a product for those buying it (noting that what is value etc is a subjective matter), it should not be offered to such persons (to the extent this can generically be determined and managed in the application or sales process) BUT this is not how the target market determination law is drafted or operates. ASIC's Guidance appears to be at odds with the law because it attempts to impose a degree of reasonableness on industry. This guidance is about good product design practices (which is important) rather than guidance on what the target market determination law requires. More focus on the practical application of the law would be more useful for industry. We submit that discussions between NIBA the ICA and ASIC may be able to address this.]

(e) Does the product include features that could be harmful or unnecessary for the target market?

[NIBA Comment In relation to insurance, harmful in what context? Harmful is easy if a product can be shown to provide no or little benefit. However, it gets more complex.

For example, in relation to limits and excess amounts, these may or may not be harmful depending on the customer's situation.

How can an insurer form a view that a limit or excess is reasonably likely to meet the target market's likely needs, objectives and financial situation? We have found no guidance on how this could be done or what ASIC would expect.

Ultimately the insurer must rely on the insured to form such a view and warn them that cover is not appropriate if the limit offered is not sufficient or the excess is not affordable or acceptable to the customer. If not, how is the insurer expected to describe the target market having regard to such matters? ASIC Guidance on how this could be done would be helpful.

In terms of "unnecessary for the target market", some additional benefits may or may not be necessary for the target market depending on their personal circumstances but may be of value to many. Is ASIC requiring insurers to remove benefits that may not be necessary to some? This will be to the detriment of consumers. Some cover may benefit those in more need than others. The more granular you get the worse off many disadvantaged consumers may be as they will be excluded from the target markets and may not be able to access cover they previously could have. If the expectation is to create separate target markets for such scenarios the cost of doing so would be prohibitive and for no real benefit.]

(f) Does the product need to be redesigned or changed to be suitable for the target market? Or does the target market need to be narrowed?

[NIBA Comment ASIC refers to the product being "suitable" for the target market. This generally means "acceptable or right for someone or something". Again, this is concept appears to apply irrespective of the *reasonableness* of the need, objective or financial situation of the identified target market and does not identify any level of granularity. The reality appears to NIBA to be that insurers cannot meet all of the likely needs, objectives or financial situation of the insureds it sells its products to. If we have missed the point we would appreciate further Guidance from ASIC on why so we can better explain it to members]

It is reasonable for an insurer to knock people out in the application process if they are in an identified class of person that cannot get any or only low value from the product in situations where this is reasonably able to be determined generically for the class.

This may be in terms of type of cover, limits, excesses, exclusions and condition, but not in all cases. In some cases, it is only the insured that can determine this in the application process and can confirm to the insurer whether such matters are consistent with its needs, objectives or financial situation. An insurer is not providing personal advice.

We request that ASIC work with NIBA and the ICA to pick one product e.g comprehensive motor vehicle insurance and identify the target market for the product having regard to all such matters ie:

- main cover(s);
- additional cover(s);
- optional cover(s);
- sum(s) insured/limits;
- excesses.

We struggle to see how it would be possible to draft a target market in a way that allows the insurer to reasonably conclude that if the financial product is issued to a retail client, it would likely be consistent with the likely objectives, financial situation and needs of the target market UNLESS it is drafted so as to take account of all classes of persons that fit within the different decision making categories arising from the above. If ASIC has a contrary view we would be pleased to have guidance on why and a practical worked through example.]

RG 000.84 states “Similarly, it will be important for insurers to consider how their products are likely to perform in practice and the likely outcomes for consumers in the target market, having regard to their circumstances in totality. For example, an insurance product that offers lower upfront costs in the form of more affordable premiums will be unsuitable for the target market of consumers the product is intended for, if the excess level is set so high that consumers in the target market are unlikely to be able to pay the excess necessary to make a claim on the product.”

[NIBA Comment How would ASIC propose an insurer identify the level of excess and its affordability to the target market? How would you then define the target market it relates to? Excesses are often adjustable. On the ASIC logic there would be a new target market based on excess levels or types which would appear to be unworkable. The ability of a consumer to pay is dependent on their financial situation which only they know. We note that in some cases a high excess may in some circumstances leave some consumers worse off than those who took a lower excess but in others leave them better off.

Does ASIC intend for insurers to have separate TMDs for each type of person for the same product as this suggests? E.g Those who are happy with the high excess and risks identified vs those who are not and choose the lower excess. This will create a significant amount of extra TMDs where you apply the same concept to other choices e.g agreed value vs market value or limit amounts or optional benefits. Where does ASIC draw the line? Without working through an example it is dangerous to provide such guidance as the ramifications of such a view on consumers (cost, competition and lack of access to

coverage) and industry (compliance cost for no practical or consumer benefit) may not be properly identified]

RG 000.85 Further, insurers will need to ensure that their products are likely to be consistent with the likely needs of the intended target market. Consumers who would not benefit from the product should not form part of the target market: see Example 4.

RG 000.87 States “The design and distribution obligations require the target market to be defined such that if the financial product were offered to a consumer in that target market, the product is likely to be consistent with the consumer’s likely objectives, financial situation and needs: see s994B(8)(b). Accordingly, 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, even if the issuer attempted to narrow distribution to a narrower set of consumers by use of distribution controls.”

RG 000.88 states “In all cases, 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.”

[NIBA Comment This supports the concerns raised above in relation to the way the law works in the insurance context. Where would the line be drawn for insurance in defining the target market? What is a sufficiently granular level in an insurance context?

How would ASIC propose an insurer knock out persons who may not be able to claim based:

- on future circumstances?
- a terrorism exclusion?
- drugs and alcohol; exclusions?
- ability to afford excesses?
- adequacy of limit levels?

The reality is that there are different types of knock outs that can be appropriate which ASIC’s statement ignores:

- not ever eligible to claim and this is identifiable by the insurer e.g vehicle type, non resident etc
- may be appropriate depending on consumer’s personal circumstances – excess affordability and limits of cover – What is ASIC’s expectation in this regard?

An insurer would normally form a view in terms of value of product a limit it is prepared to cover and excess ranges it will agree to. If a person were to claim they would get value which could differ depending on the circumstances. How could the TMD ever address this properly? This is a matter for the product value review process.

The reality is knock outs and warnings should be in application process and TMD serves little extra value for a consumer or Distributor that is required to follow that process.

We submit that discussions between NIBA the ICA and ASIC may be able to address this].

Proposal

C6 We propose 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.

Your feedback

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?

RG 000.90 states "...For example, for an insurance product, the negative target market would include persons who are excluded or ineligible to claim under the policy. Similarly, a negative target market for a high-risk investment product might include consumers with a low risk tolerance who do not have the ability to bear loss."

[NIBA Comment We do not believe that it is practical to describe all persons who are excluded from cover or ineligible to claim in a target market determination. This would be complex. At most, a description of example non eligible criteria would be appropriate. A target market may be a class that is happy with certain exclusions and conditions etc.

What is important is to ensure that persons who aren't eligible for a cover are knocked out in the application process (where an insurer can reasonably do so) and that if a feature of that cover is not acceptable for them (e.g limits, excess, waiting periods, exclusions or conditions) they are knocked out if this is not the case.]

C6Q2 Is our guidance on the role of describing a negative target market adequate and useful? If not, please explain why, giving examples.

[NIBA Comment see comments above]

Product-specific issues

Proposal

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

(b) when products are offered and acquired as a 'package' or 'bundle'; and

RG 000.103 states "When a single product has multiple elements that are offered as a package or bundle (e.g. an investment facility that provides exposure to both shares and debentures), the issuer must make a target market determination that considers the entire product. When multiple products are 'packaged' or 'bundled' by an issuer, a target market determination must be made for each separate product. We do not consider this prevents an issuer continuing to offer the product as a package or bundle.

Note: Due to the application of s764A(1A), single contracts of insurance that provide two or more kinds of cover are deemed to be separate products. Similarly, due to the combined application of s764(1A) and (1B), contracts of insurance that provide a kind of cover in relation to two or more kinds of asset are deemed to be separate products. Accordingly, a separate target market determination should be made for each product in these circumstances.”

[NIBA Comment See earlier comments re insurance products e.g Home and contents and ASIC’s position on this. ASIC should also provide a view on whether it believes a TMD can be used to cover more than one financial product e.g Home Buildings and Home Contents insurance are both separate financial products.]

(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).

RG 000.104 states “When a financial product is 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), the issuer must consider these choices and options in determining the target market for the product. When there are different target markets for differing forms of the product (as a result of particular options or choices), these should be described in the target market determination.”

[NIBA Comment This seems to suggest that ASIC believes one target market determination can be created for a product but there may be different target markets described for the product in the target market determination. Is this the intent. An example would make things clearer].

RG 000.105 states “We do not expect that every choice or option will change the class of consumers for whom a product is likely to be consistent with their objectives, financial situation and needs. Some choices and options may not change the target market, but instead be available for consumers within a target market to tailor the product to their individual circumstances (e.g. making incremental changes to the excess level for an insurance product or choosing a personalised level of cover for certain contents items as part of acquiring home and contents insurance).”

[NIBA Comment It is not clear to us how this can be done. We assume ASIC believes an insurer can form the view that a certain range of excess level is likely to meet the needs, objectives and financial situation of the target market and any changes within that range won’t affect that target market.

Does this mean there must be a new target market determination for a product with a range of excess choices that are not so incremental. On the same logic different target markets would exist for types of excess offered e.g driver/age etc and so on regarding different choices. ASIC’s example ignores this complexity. See earlier comments re the issues.]

Your feedback

C7Q1 In relation to our guidance on how a target market determination should be approached for superannuation products, as set out in Example 7:

(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? **[NIBA Comment See comments above].**

... (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? **[NIBA Comment See comments above].**

C7Q3 Do you agree with our guidance on how a target market determination should be approached for a bundled product? If not, why not? **[NIBA Comment See comments above].**

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? **[NIBA Comment See comments above].**

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. **[NIBA Comment See comments above].**

Taking reasonable steps in relation to distribution: Issuers

89 An issuer must take reasonable steps that will, or are reasonably likely to, result in distribution being *consistent with the target market determination* for the financial product (reasonable steps obligation): see s994E(1).

90 When determining what steps are reasonable to take, an issuer must take into account all relevant factors, including:

(a) risk—the likelihood of the distribution being inconsistent with the target market determination;

(b) harm—the nature and degree of harm that might result from the financial product being issued otherwise than in accordance with the target market determination; and

(c) mitigation steps—what steps can be taken to eliminate or minimise the likelihood of the distribution being inconsistent with the target market determination and the harm that might result (see s994E(5)).

91 To meet the reasonable steps obligation, we expect issuers to implement controls that are likely to direct distribution of the financial product to the target market. As part of its controls, we expect an issuer to have appropriate systems and processes to effectively manage the risks identified in its distribution arrangements.

[NIBA Comment The above statement and that in RG 000.111 do not appear to be consistent with the TMD appropriateness obligation. As we read the law, it is not about directing distribution. The appropriateness obligation in this regard is to reasonably conclude that if the product were issued to a retail client in accordance with the distribution conditions—it would be likely that the retail client is in the target market. Something can be distributed but not issued. Why is ASIC taking a different approach?]

93 However, in order to assist issuers, we have sought to set out in draft RG 000 the factors we will consider in our administration of the reasonable steps obligation for issuers. In identifying these factors, we have taken into account our regulatory

experience and the focus of the law on managing the risk of harm in distribution. We consider that these factors are likely to be relevant across many sectors of the regulated population.

RG 000.113 states “The issuer’s distribution conditions are one component of the controls that it will need to implement to take reasonable steps in the distribution of its financial product. What are reasonable steps in the circumstances will also be informed by the issuer’s broader approach to distribution—its distribution strategy.”

[NIBA Comment The words “take reasonable steps in the distribution of its financial product” are not consistent with the law. The obligation is to take reasonable steps that will, or are reasonably likely to, result in **[retail distribution conduct] being consistent with the target market determination**. This is a very important distinction and should be corrected to avoid confusion.]

RG 000.115 For example, in setting the distribution strategy, we expect the issuer would consider whether the distribution method(s), through which the issuer intends the financial product to be acquired by the consumer, is consistent with the target market.

[NIBA comment should have word “determination at end]

RG 000.116 states “As part of the distribution strategy, we also expect the issuer to select distributors whose typical consumers, and services offered, are consistent with the target market for the financial product, and consider the potential vulnerabilities of existing and prospective distribution methods.”

[NIBA Comment This appears to go beyond the law. The target market determination identifies a target market and the distribution conditions listed in it must be such that the insurer can reasonably conclude that **if the product were issued to a retail client in accordance with the distribution conditions**—it would be likely that the retail client is in the target market.

To provide advice or a PDS or dealing conduct in a manner consistent with the target market determination, the insurer need only ensure that the distribution conditions are complied with so that where the product is issued to a retail client in accordance with the distribution conditions it would be likely that the retail client is in the target market. Can ASIC identify in the Guidance where the Explanatory Memorandum or the law requires this?

RG 000.118 We will take into account whether the choice architecture of the issuer’s financial product is consistent with its target market and distribution strategy. This includes: (a) the design of the choice architecture at every stage of distribution; and (b) complexity (including unnecessary complexity) in, for example, choices, processes and information.

[NIBA Comment We repeat our comments above. NIBA notes that “Choice architecture” is not part of the DDO law and use of such concepts can cause confusion.]

Proposal

C8 We propose 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;

We will take into account whether the distribution conditions the issuer sets in the target market determination are sufficient to direct distribution towards the target market for its financial product.

We expect that for a financial product with a narrow target market, the distribution conditions would be more specific and detailed to reflect the intended distribution strategy. For a product with a comparatively wide target market, fewer distribution conditions may be needed to ensure that the products are sold in accordance with the target market determination.

In addition, we consider that more restrictive distribution conditions may result in fewer additional steps being required for issuers to meet the reasonable steps obligations.

For example, if an issuer determines that the product should be distributed under a personal advice model only, owing to this control, the content of its reasonable steps obligation is likely to be reduced compared to if the issuer elects to distribute more broadly through general advice or no advice channels.

[NIBA Comment We believe that this is inconsistent with the law for the reasons noted above. It is not about *directing distribution towards the target market*. The target market determination identifies a target market and the distribution conditions listed in it must be such that the insurer can reasonably conclude that if the product were issued to a retail client in accordance with the distribution conditions—it would be likely that the retail client is in the target market. The distributor then needs to act consistently with the TMD which is what the “take reasonable steps” obligation applies to.]

(b) the issuer’s marketing and promotional materials

[NIBA Comment Same issue as above re directing distribution.]

(c) the selection of distributors;

We will consider the steps that an issuer has taken in conducting due diligence in the selection of distribution channels and distributors. We expect that reasonable steps may include making an assessment of the capacity of the distributor to comply with the distribution conditions imposed. We consider that relevant factors would include:

an assessment of the distributor’s resources;

requisite knowledge; and

competence to distribute the financial product.

An issuer should consider the likelihood of the distributor’s conduct being inconsistent with the target market determination for the financial product. If the issuer has prior knowledge of conduct or resourcing concerns about a distributor, we would expect the issuer to undertake an assessment of the risk and the available steps to mitigate that risk in forming a view on what is reasonable in the circumstances.

[NIBA Comment Same issue as above re directing distribution.]

(d) the supervision and monitoring of distributors;

(e) the issuer’s ability to eliminate or appropriately manage conflicts of interest; and

Conflicts of interest We will take into account whether a conflict, potential conflict or apparent conflict of interest exists (including in remuneration and incentive structures proposed for distribution), and the issuer's ability to eliminate or appropriately manage those conflicts of interest.

In developing remuneration and incentives for the distribution of a financial product, we expect an issuer will consider the role that incentives have in influencing behaviours that could result in distribution being inconsistent with the target market determination, and the harm that could arise as a result.

If the issuer decides it is likely that incentives will influence behaviours that result in distribution being inconsistent with the target market determination, we expect that this will be a consideration in altering distribution channels or not proceeding with that distributor.

[NIBA Comment Same issue as above re consistency with the actual legal obligation].

(f) whether issuers have provided distributors with sufficient information to help them ensure that distribution is consistent with the target market determination.

Your feedback

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?

[NIBA Comment There is no insurance example. We submit discussions between NIBA the ICA and ASIC may be able to address this]

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?

[NIBA Comment We don't believe ASIC's guidance is consistent with the law. See comments above]

C8Q3 What additional factors, if any, do you consider should be included in Table 3 of draft RG 000?

[NIBA Comment See above]

Reviewing the target market determination

Proposal

C9 We do not propose to set out in guidance standard review triggers and maximum review periods for issuers to adopt. Instead, our 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.

Your feedback

C9Q1 Do you have any comments on our guidance on setting appropriate review triggers and maximum review periods?

[NIBA Comment It should be left to the issuer to determine.]

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

Example 12: Insurance

Issuers of insurance products could consider the following data when identifying review triggers that may indicate that the target market is no longer appropriate:

- product claim ratios;
- the number, nature and magnitude of paid, denied and withdrawn claims;
- the number of policies sold, including penetration rates;
- policy lapse or cancellation rates;
- average claim times; and
- the nature and number of complaints and complaint trends. To fully understand the implications of the data reviewed, distributors may need to segment the data by distribution channel and underwritten risk type.

[NIBA Comment These all seem sensible. The main issue is to what extent an insurer will require such information from distributors as part of the reporting obligations and the practical issues this may create. We discuss this below]

Specifying required information from distributors and reporting periods

98 We are not proposing to set out in our guidance:

- (a) standard information that an issuer should collect from distributors; or
- (b) standard reporting periods for a distributor to report on the number of complaints.

99 The FSI envisaged that industry would supplement the principles-based design and distribution obligations with appropriate standards for different classes of financial products. Given the range and breadth of products to which the regime applies, we consider that standardisation of information collection is better driven by industry, segmented by product class where appropriate.

Proposal

C10 We propose 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.

Your feedback

C10Q1 Do you have any comments on our guidance on the issuer's obligation to specify information it requires from its distributors?

[NIBA Comment NIBA assumes ASIC does not expect an insurer to have to identify any regulated person individually as this would be impractical. This should be clarified. E.g A description that the requirements apply to "Any AFSL holder or Authorised Representative acting on behalf of insurer # would be acceptable".]

RG 000.139 Information from a distributor that may be necessary to enable an issuer to identify whether a target market determination should be reviewed could include:

- (a) complaints data; **[NIBA Comment** If s994B(5)(g) only requires the *number of complaints*]
- (b) consumer feedback (including on the performance of the product);
- (c) requests for information from consumers; **[NIBA Comment** This is unclear and broad]
- (d) percentage of sales to consumers who are not in the target market;
- (e) samples of recorded sales calls;
- (f) conversion rates;
- (g) volume of sales; and
- (h) web analytics (e.g. click data and website paths)

[NIBA Comment The obligation is to identify the *kinds of information needed to enable the person who made the TMD to identify promptly whether a review trigger for the determination, or another event or circumstance that would reasonably suggest that the TMD is no longer appropriate, has occurred and, for each kind of information, specify:*

1. the regulated person or regulated persons that are required to report the information to the person who made the determination; and
2. a reporting period for reporting the information which must be reasonable.

Nothing in the Act restricts how the *kinds of information* required should be drafted in the TMD.

ASIC's examples, whilst useful, would be a large impost on the distributor if an insurer listed information of the type specified by ASIC, especially the very broad and unclear statement "requests for information from consumers".

An industry alternative need to be discussed that is workable for brokers and more generic. We submit discussions between NIBA the ICA and ASIC may be able to address this].

C10Q2 What existing information collected by distributors would be relevant to an issuer's consideration of the ongoing appropriateness of its target market determination?

[NIBA Comment This will depend on the circumstances.]

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.

C10Q4 What potential effects on competition may occur as a result of the issuer's right to set the information the distributor must provide?

[NIBA Comment An insurer could seek to obtain information from a Distributor such as an insurance broker acting for its client, contrary to the terms of an agreement which protects the business interests of the distributor or the confidentiality of its clients.]

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?

[NIBA Comment No issues]

Conducting a review of a target market determination

Proposal

C11 We propose 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.

Your feedback

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?

[NIBA Comment The ASIC concept of "all available information" appears to be too broad. It should be linked to the obligations relating to compliance of a TMD ie to allow

the insurer to conclude that it meets the appropriateness test and otherwise meets the TMD obligations.]

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?

C11Q3 Do you have any other comments on our guidance on conducting a review of a target market determination?

RG 000.145 states “We expect that reviews may also prompt an issuer to reconsider the product’s design, if it emerges that there are very few consumers for whom: (a) the product would likely be consistent with their likely objectives, financial situation and needs; or (b) the product could be sold **without harm**.”

[NIBA Comment We believe that this should be deleted. It is not consistent with the law and by its nature an insurance product contains exclusions that may be argued to create “harm”. It is impossible that there be no harm. This will cause confusion].

Notifying ASIC of ‘significant dealings’

103 An issuer must notify ASIC of a significant dealing (except excluded dealings) in a financial product that is not consistent with the product’s target market determination.

Proposal

C12 We propose 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.

Your feedback

C12Q1 Are there any additional factors that issuers should consider? If yes, please provide details.

RG 000.148 states “We expect that the following factors will be relevant to considering whether a significant dealing has occurred (these are not intended to be an exhaustive list of potentially relevant factors):

- (a) the proportion of consumers who are not in the target market acquiring the financial product;
- (b) the actual or potential harm to consumers, including the amount of any monetary loss, resulting from consumers who are not in the target market acquiring the product; and

(c) the nature and extent of the inconsistency of distribution with the target market determination (noting that distribution to a consumer can be either more or less consistent with a target market along a continuous spectrum).

Note: In outlining the above factors to consider when determining whether a significant dealing has occurred, we have considered the factors outlined in the law in s994E(5) and the matters set out in s1023E(1).”

[NIBA Comment What is a significant dealing or not is determined by reference to whether in the first place the dealing is or is not consistent with the product’s target market determination as drafted by the insurer.

If it is not so consistent (see comments earlier on what we believe is and is not consistent) the issue becomes whether it is a significant dealing or not. Any of the factors listed must be clearly linked to the inconsistent dealing conduct and its impact.]

Content of the notification

RG 000.149 The notification of a significant dealing can include the information in Table 4. If an issuer does not have information about specific matters in Table 4 at the date of the notification, it should include the information it does have and supplement it by providing further information as it becomes available.

[NIBA Comment ASIC has not asked for feedback on the proposed content of the notification. We note there is no requirement in this regard in the law. This should be made clear in the Guidance to avoid confusion.]

PROPOSED GUIDANCE ON OBLIGATIONS FOR DISTRIBUTORS

Taking ‘reasonable steps’: Distributors

107 Separately to the issuer’s reasonable steps obligation discussed in Section C of this paper, a distributor must take reasonable steps that will, or are reasonably likely to, result in distribution consistent with the target market determination for the financial product (reasonable steps obligation): see s994E(3). Failure to comply with this obligation is an offence and may also attract civil penalties.

108 The obligation on a distributor to take reasonable steps requires an assessment of what steps are reasonable in the circumstances. Consistent with the risk management approach adopted by the law, this assessment will take into account the scale, sector and distribution method employed in the distributor’s business model: see Revised Explanatory Memorandum, paragraph 1.97.

109 Our proposed guidance on the reasonable steps obligation for distributors is high-level and principles-based, which is consistent with our general approach to guidance on the design and distribution obligations. It does not provide prescriptive or industry-specific guidance. We consider that distributors are best placed, given their knowledge and experience of their business model and industry, to consider the appropriate approach.

110 However, in order to assist distributors, we have sought to set out in draft RG 000 the factors we will consider in our administration of the reasonable steps obligation for distributors. In considering which factors will be relevant, we have taken into account our regulatory experience and the focus of the law on managing the risk of harm in

distribution. We consider that these factors are likely to be relevant across many sectors of the regulated population.

Proposal

D1 We propose 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.

Your feedback

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? **[NIBA Comment – See comments below]**

D1Q2 What additional factors, if any, do you consider should be included in Table 5 of draft RG 000? **[NIBA Comment – See comments below on those relevant]**

Table 5 Examples

Distribution method Examples of distribution methods include online, face-to-face, and inbound or outbound telephone sales. Some channels may not be appropriate for all financial products.

We will take into account whether the means through which a distributor chooses to interact with the consumer (i.e. its distribution method) is reasonably likely to be consistent with the target market for the financial product.

For example, if significant consumer harm is likely to result from a financial product being mis-sold (i.e. sold to consumers who are not in the product's target market), and the risk of mis-selling is material for a given distribution method, this method should not be used. This means that a distributor should not engage in sales of complex insurance products

through a distribution method that gives rise to a risk that the product will be sold indiscriminately, including to consumers who are ineligible to claim.

Marketing and promotional materials

We will take into account the content and medium of delivery to end consumers of promotional or advertising materials circulated by distributors. The materials and delivery should be informed by, and consistent with, the target market determination for the financial product. For example, we expect that a complex or high-risk investment product with a narrow target market is generally not appropriate to be marketed widely through mass market advertising or prominent online methods, such as banner advertising, unless it is sufficiently clear from the content of the advertising that the product is of limited suitability. Note: Generally, promotional material for a product must describe the target market or specify where the target market determination is available: see s1018A.

[NIBA Comment Whether this applies or not will depend on how the TMD is drafted and such a qualifier should be included in the commentary]

Effectiveness of product governance framework

We will consider whether a distributor's product governance framework is effective to ensure that distributors have a degree of control and oversight over their distribution process. An effective product governance framework should allow distributors to:

monitor whether conduct is compliant with the law and consistent with the target market determination; and

highlight areas for improvement in conduct of sales staff, or the operation of systems or processes. We expect that there will be a process for identifying changes that may impact on the effectiveness of the product governance framework. Distributors should regularly review the framework to ensure that it remains effective. For guidance on reviewing the product governance framework, see RG 000.41– RG 000.43.

[NIBA Comment The extent of this will depend on how the TMD is drafted and such a qualifier should be included in the commentary]

Inappropriate incentives

We will take into account the steps the distributor has taken to eliminate or appropriately manage the risk that incentives for staff or contractors may influence behaviours that could result in consumer harm or distribution being inconsistent with the target market determination.

[NIBA Comment This was not something referred to in the Revised Explanatory Memorandum and should not be included in the Guidance. It is likely to cause confusion.]

Reliance on existing information about the consumer

In some cases, the distributor may already have information about a prospective consumer (e.g. if they are an existing consumer in the case of a renewal) prior to distribution. We will take into account whether the distributor has relied on the following matters appropriately:

- broader indicators about the likely circumstances of the consumer or a particular grouping of consumers;
- matters that can reasonably be implied or assumed (e.g. information inferred from the postcode of the consumer's residential address); or
- information that the distributor may already hold about the consumer. When relying on existing information, a distributor should consider what additional steps may be required to meet the reasonable steps obligation. We expect that a distributor would consider the following factors in deciding whether it is appropriate to rely on existing information, and the extent to which it should rely on it:
 - the likelihood of circumstances changing so that consumers are no longer in the target market for the financial product;
 - the harm that may result from consumers who are no longer in the target market acquiring the product; and
 - the time that has elapsed since the distributor formed a reasonable view of whether a consumer is reasonably likely to be in the target market, or when the distributor last gathered relevant information. We expect a distributor to have a reasonable basis for making conclusions about the above factors. For example, conclusions might be based on forecasts or predictive models, informed by ongoing data collection about the financial product. In addition to relying on existing information, a distributor should also consider if it is appropriate to:
 - seek further information from the consumer; and

implement controls as a means to filter out consumers who are no longer in the target market—for example, a distributor could prompt consumers to consider if they remain in the target market for the financial product. However, relying solely on warnings and disclosures to consumers is unlikely to be sufficient.

[NIBA comment – We are concerned that such Guidance is likely to confuse Distributors and make them think they have a higher obligation than that which exists or was intended to exist at law. The Revised Explanatory Memorandum does not provide any such scenario:

1.97 The new law uses a risk management approach to determine what satisfies the requirement of 'reasonable steps' for the purposes of the obligation. 'Reasonable steps' means steps that are, in the circumstances, reasonably able to be taken so that retail product distribution conduct in relation to the product is consistent with the product's target market determination. In making this assessment, issuers and distributors (as the case may be) are to take into account all relevant matters, including: • the likelihood of their conduct being inconsistent with the target market determination (that is, the likelihood of the risk); • the nature and degree of harm that might result from the product being issued otherwise than in accordance with the determination (that is, the consequence of the risk); • the availability and suitability of ways to eliminate or minimise the likelihood and the harm (that is, the extent to which the risk may practicably be mitigated); and • what the responsible person knows, or ought reasonably to know, about the matters referred to above (that is, the responsible person's understanding of the risk and ways to mitigate it). [Schedule 1, item 5, subsection 994E(5) of the Corporations Act]

1.98 A risk management approach ensures the obligation is scalable according to the risk associated with an inappropriate distribution of a product and the practicability of mitigating the risk. For example, where a distributor's previous conduct indicates that they may be at higher risk of engaging in conduct that is not consistent with the target market determination, issuers will need to take reasonable steps to address the risk. This could include: having systems that enable distributors to be alerted to updates of target market determinations; assisting distributors to address concerns; or, in extreme cases, ceasing to distribute the product through the distributor where doing so is possible. Other relevant factors include the complexity and risk profile of the product, and the nature of any relationship between an issuer and a distributor of a product. [34 The obligations do not require any formal relationship (for example, contract or other arrangement) to exist between an issuer and a distributor. However, the existence or nonexistence of any such relationship may be relevant in determining whether or not an issuer has met its obligation to take 'reasonable steps'. In addition, it may be a 'reasonable step'. However, what constitutes 'reasonable steps' will ultimately depend upon the circumstances of each case.]

Assessment of whether a consumer is in the target market

We will take into account how a distributor forms a reasonable view that a consumer is reasonably likely to be in the target market for a financial product. For further guidance, see RG 000.164–RG 000.169.

[NIBA Comment We believe these requirements go well beyond the law in many cases and whether they are relevant can depend on the TMD. The reliance on existing information requirement seeks to impose a quasi personal advice obligation on the distributor. If this is not the intent, the explanation is confusing and unclear and needs to be clarified to avoid confusion.

In relation to the "Assessment of whether a consumer is in the target market" this is not what the requirement imposes and should be removed. They only have to ensure that the retail distribution conduct is consistent with the TMD as drafted.]

RG 000.155 An issuer that distributes its products directly to consumers must comply with both the reasonable steps obligation under s994E(3) (described in this section of the guide) and the reasonable steps obligation under s994E(1) (described in Section C of this guide at RG 000.107–RG 000.121).

[NIBA Comment Note the dual obligation in this requirement and the fact that in s994F(a) and (2) this is not the case.]

Renewal of general insurance policies

111 Many general insurance policies renew on an annual or periodic basis. This will constitute a new 'issue' of the product under the design and distribution obligations, meaning that the reasonable steps obligation will apply at the point of renewal. This means that some consideration of whether the consumer remains in the target market at each renewal may be required. **[NIBA Comment** It is the appropriateness test not reasonable steps that creates the issue]

112 The focus of the design and distribution obligations on new issues means that, when a financial product renews, issuers and distributors will need to consider what controls they will apply to determining whether the consumer remains within the target market.

We do not propose to provide tailored guidance on how the reasonable steps obligation should be met for products that are issued or renewed periodically.

113 However, we have sought to provide useful guidance for industry by setting out an example to illustrate how the reasonable steps obligation can be approached in this context. Distributors should consider the underlying approach set out in Example 14 of draft RG 000 for relevance to their own circumstances.

114 We consider that industry is best placed, given its knowledge and experience of its financial products and how consumers are reached, to consider the appropriate approach to the reasonable steps obligation at renewal.

Proposal

D2 We propose 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.

Example 14: Renewal of general insurance policies

Many general insurance policies renew on an annual basis and consumers enter into a new contract at each renewal. These include policies covering risks of loss or damage to motor vehicles and home buildings and contents.

Each renewal will constitute a financial product issue where reasonable steps are required. What are reasonable steps at each renewal will need to be determined by the insurer based on the information it holds and its experience in practice. It may not be necessary to take the same steps at each renewal.

We expect insurers will have information on the most common events that would result in the likely objectives, financial situation and needs of groups of consumers changing such that the group would no longer be in the target market for a policy, and the likelihood of those events occurring over time since initial policy purchase.

For example, depending on the particular policy, the passage of time may result in a change to the needs of consumers to obtain comprehensive car cover (given the age of

the car), such that they are no longer reasonably likely to be in the target market for the policy. At the time of renewal, an insurer (in its role as distributor) must take reasonable steps to ensure that the renewal process results in outcomes that are consistent with the target market determination.

We expect, at the time of renewal of an insurance policy, an insurer would consider:

- the likelihood that consumers are no longer in the target market for the policy (which may be considered by reference to a class to which the consumer belongs);
- its existing data, such as information held about the class of consumers, the asset being insured and relevant claims data;
- any updates the consumer has provided; and
- whether more data should be gathered from consumers to inform its analysis.

We expect the insurer to analyse information it holds. For example, if that analysis shows that:

- the risk of consumers in a particular class no longer being in the target market increases significantly after a set period, say after the fourth or fifth renewal following initial policy purchase, we expect the controls the insurer would apply, and further steps the insurer would take at that point, to be scaled up as appropriate; or
- the risk that consumers in a particular class are no longer in the target market increases significantly from a specific date or age, the controls and further steps would be similarly scaled up for consumers who have reached that threshold.

Examples of further steps that may be appropriate in the above scenarios could include obtaining further information from the relevant consumers or informing the relevant consumers that the information held indicates the consumer may no longer be in the target market for the product and offering alternative products whose target markets the consumer would likely be in.

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

Your feedback

D2Q1 Do you have any comments on our proposed guidance for distributors in Example 14 of draft RG 000?

[NIBA Comment The above proposed guidance imposes significant obligations on insurers and distributors on renewal. Currently, it is left for a consumer to advise if any changes to circumstances have occurred or not. If they have, they must engage with the insurer. The above seems to indicate a more positive obligation on an insurer to knock out persons who are no longer in the target market as defined if their circumstances relevant to whether they are within the target market or not have changed at renewal. E.g value of a car goes below a certain level on renewal that means they are no longer in the target market for comprehensive motor insurance. The systems changes associated with this are likely to be significant and we expect the cost of this could be passed to customers.]

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?

[NIBA Comment – NIBA believes that some form of relief should be provided to avoid the above result. Discussion between ASIC, the ICA and NIBA should take place]

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

Asking additional, specific questions of consumers

118 To meet its reasonable steps obligation, a distributor must take reasonable steps that will, or are reasonably likely to, result in distribution being consistent with the target market determination for the financial product.

119 We expect 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 product. However, in some circumstances, and given particular distribution methods, a distributor may consider it necessary for compliance with the reasonable steps obligation to ask specific questions to assess whether an individual consumer is reasonably likely to be within the target market. **[NIBA Comment This appears to be contrary to the legislative intent not to apply the obligations on an individual customer basis]**

120 In outlining our guidance on some of the ways in which a distributor may approach this assessment, we have taken into account the broad objectives of the design and distribution obligations.

115 The law provides that distributors are not taken to have failed to take reasonable steps merely because a consumer who is not in the target market for the financial product acquires the product: see s994E(4). We interpret this to mean that the reasonable steps obligation is focused on a distributor having effective systems and processes in place to enable it to form a reasonable view on whether a consumer is reasonably likely to be in the target market for a product. **[NIBA Comment This is not consistent with the law. The obligation relates to distribution being consistent with the target market determination for the financial product NOT on an individual consumer basis as this suggests]**

116 In most cases, we expect a distributor should be able to obtain sufficient information about a consumer from 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. **[NIBA Comment This appears to be contrary to the legislative intent not to apply the obligations on an individual customer basis]**

117 Although a distributor may express an opinion that the consumer is in the target market for a financial product, it should not frame its processes in a way that influences the consumer, including by suggesting, through express recommendations or explicit statements of opinion, that the product is suitable for the consumer.

Proposal

D3 We propose 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;

NIBA Comment This does not appear to be consistent with the law. The obligation relates to distribution being consistent with the target market determination for the financial product NOT on an individual consumer basis as this appears to suggest.]

(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)).

NIBA Comment This appears to be contrary to the legislative intent not to apply the obligations on an individual customer basis]

Your feedback

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?

NIBA Comment This appears to be inconsistent with the law. The obligation relates to distribution being consistent with the target market determination for the financial product NOT on an individual consumer basis as this suggests.]

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?

NIBA Comment This appears to be inconsistent with the law. The obligation relates to distribution being consistent with the target market determination for the financial product NOT on an individual consumer basis as this suggests.]

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?

[NIBA Comment No]

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?

[NIBA Comment ASIC's interpretation needs to be reconsidered. As we read the law, they only have to take reasonable steps to ensure that the retail distribution conduct is consistent with the TMD as drafted. If they act consistently with the TMD, whether the retail client is or is not in the target market or not is irrelevant. There is no positive obligation to check if a person is in the target market or not as ASIC appears to state. See below which is inconsistent with the ASIC approach as we read it:

*RG 000.3 The design and distribution obligations are intended to assist consumers to obtain appropriate financial products by requiring issuers and distributors to have a consumer-centric approach to designing and distributing products. **The obligations do not equate to an individual product suitability test that requires assessment based on an individual's personal circumstances at point-of-sale.** The obligations provide a legislative framework for issuers and distributors to develop and maintain effective product governance processes across the lifecycle of financial products. This will result in improved outcomes for consumers of these products.]*

Consumers outside the target market

122 A distributor must comply with the reasonable steps obligation in the event that it becomes aware that it is interacting with a consumer who is outside the target market for a financial product. Our guidance seeks to provide some clarity in relation to the way in which distributors should approach these situations.

121 We consider that the systems and processes implemented by issuers and distributors mean it should be less likely that consumers will find themselves actively seeking to acquire financial products that are not consistent with their likely objectives, financial situation and needs. However, in the event that a distributor becomes aware that a consumer outside the target market for a product is seeking to acquire that product, the distributor must have regard to its reasonable steps obligation.

Proposal

D4 We propose 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.

Your feedback

D4Q1 Do you have any comments on our proposed guidance on the content of the reasonable steps obligation in these circumstances?

[NIBA Comment ASIC's interpretation needs to be revisited. As we understand the law they only have to take reasonable steps to ensure that the retail distribution conduct is consistent with the TMD as drafted. If they act consistently with the TMD, whether the

retail client is or is not in the target market or not is irrelevant. There is no positive obligation to check if a person is in the target market or not as ASIC appears to state..

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?

Example 15: Tyre and rim insurance

Tyre and rim insurance products are generally sold at the time of purchase of a motor vehicle. In making a target market determination for the product, we expect the issuer to consider consumers for whom the product is clearly unsuitable. Consumers who are ineligible to claim—because they do not meet the key eligibility criteria or were unlikely to benefit from the insurance product—should not be included in the target market. For example, in Report 492 A market that is failing consumers: The sale of add-on insurance through car dealers (REP 492), we identified consumers being sold tyre and rim insurance when the type or use (e.g. personal use or business use) of the vehicle meant the consumer was not covered in the event of a claim. Examples of the eligibility criteria insurers and distributors would need to consider include: • the type or class of vehicle (e.g. if the policy does not cover vehicles over a certain age); and • the use or purpose of the vehicle (e.g. if the vehicle is to be used as a taxi or for other similar business purposes).

The eligibility criteria in respect of the type or class of the car are objective matters that are readily ascertainable at the time of sale of these products. The distributor can therefore develop simple and effective procedures to ensure that these criteria are met. The eligibility criteria in respect of the use or purpose of the vehicle should also be dealt with in the distributor's processes to minimise the risk of sales to consumers who are ineligible to claim. Note: See REP 492.

[NIBA Comment This example does not addresses in any detail what an insurer will practically have to do. It expectations on distributors appear to be inconsistent with the law as noted above. We submit that discussions between NIBA the ICA and ASIC may be able to address this.]

Example 16: Direct life insurance

Direct life insurance is sold to consumers by insurers or their sales partners, by inbound phone calls from consumers, online or face-to-face. These products are sold with general advice (meaning a consumer's individual circumstances are not considered), or with no advice (meaning only factual information is given). In Report 587 The sale of direct life insurance (REP 587), we found that sales practices and product design of direct life insurance was leading to poor consumer outcomes. Practices such as pressure selling, inadequate explanations of future cost and product exclusions resulted in high rates of cancellations during the cooling-off period, short-term lapse rates, and poor claims outcomes.

In such instances, we expect that the following matters would be relevant to a distributor's consideration of its reasonable steps obligation:

- the level of oversight to apply, including the provision of training and scripts to set clear professional standards for sales conduct (e.g. setting standards for how distributors behave with vulnerable consumers);

- the appropriate controls to apply, including implementation of quality assurance frameworks that monitor sales conduct, and resolve poor consumer outcomes;
- the distribution conditions;
- the choice architecture employed; and
- sufficient monitoring of consumer outcomes to ensure that the distribution processes are performing in line with expectations. Note: See REP 587, pp. 37–62.

[NIBA Comment This example does not address what an insurer will practically have to do. Its expectations on distributors appear to be inconsistent with the law as noted above. We submit that discussions between NIBA the ICA and ASIC may be able to address this.]

Interaction with personal advice obligations

125 The law provides that the reasonable steps obligation does not apply to a financial adviser when the adviser is providing personal advice, or implementing the advice. We consider that some guidance for financial advisers and distributors is useful for industry to understand our view on the relevance of the target market determination to the provision of personal advice.

123 A financial adviser is a distributor under the design and distribution regime. If a financial adviser provides compliant personal advice to a consumer in relation to a financial product, the advice will be tailored to the consumer's individual circumstances.

124 When providing personal advice, and implementing the advice, the adviser is not required to take reasonable steps that will, or are reasonably likely to, result in distribution of a financial product being consistent with the target market determination: see the definition of 'excluded conduct' in s994A and 994E(3). Financial advisers providing personal advice are under legal obligations to take into account the consumer's personal circumstances and provide advice in the consumer's best interests.

Scope of the personal advice exemption

RG 000.176 The law provides that the act of asking for information solely to determine whether a person is in the target market for a financial product, and of informing the person of the result of that determination, do not, of themselves, constitute personal advice: see s766B(3A).

RG 000.177 The exemption from the personal advice obligations is only provided for the actions of asking for information to ascertain whether a consumer is in the target market and informing them of the result. For example, we consider the exemption in s766B(3A) will not apply if, before asking the consumer for information (or informing a consumer of their status in the target market), the distributor sets up the interaction in a way that gives the consumer the impression their personal circumstances are being considered, and any recommendation to buy the financial product has taken into account the consumer's individual circumstances. This conduct goes beyond asking for information solely to determine whether the person is in the target market, and of informing the person of the result of that assessment.

RG 000.178 Further, if a distributor informs a consumer that they are in the target market for a financial product, the distributor must not suggest or imply that it has considered the consumer's personal objectives, financial situation and needs and the product is suitable

for the consumer's individual circumstances. To do so may be misleading or deceptive: see s12DA(1) of the ASIC Act.

Note: Regulatory Guide 244 Giving information, general advice and scaled advice (RG 244) explains the differences between giving factual information, general advice and personal advice.

RG 000.179 Conduct beyond the exception provided in s766B(3A) could constitute the provision of personal advice in breach of the law if the associated personal advice obligations are not met.

Note: Persons giving personal advice must act in the best interests of the consumer in relation to the advice (see s961B), as well as meeting a number of other obligations associated with the provision of personal advice.

[NIBA Comment We agree with the above approach.]

Proposal

D5 We propose 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.

RG 000.181 However, we consider 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.

Note: For example, we consider that a target market determination may be a factor considered under s961B(2)(e).

RG 000.182 It may be appropriate for a financial adviser to advise a consumer outside of the target market to acquire a financial product, when acquisition would be in the best interests of the consumer. For example, when the product would ordinarily be too high risk for the class of consumers if it were a concentrated holding, it may be appropriate in the broader context of a consumer's portfolio, taking into account the consumer's relevant circumstances.

Adviser-only channels

RG 000.183 We consider that the legislative intent in substituting personal advice (when given) for the distributor's reasonable steps obligation is to address the potential duplication of regulation on personal advice providers. The regulation of personal advice provides existing consumer protections that are consistent with the objectives of the design and distribution regime

[NIBA Comment - We agree.]

Your feedback

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.

[NIBA Comment Is ASIC using the term financial adviser in the context of the defined term in the Act or more broadly? To avoid confusion a different term should be used e.g personal advice provider.

This should not be expressed as an obligation on the adviser as it may or may not be relevant depending on the circumstances.

The definition of “Excluded dealing” is not well drafted. The definition of “excluded dealing” is this “associated conduct” and is narrowly worded. It only catches arranging by person “for the purpose of implementing personal advice that the person has given to the retail client”.

If a person has been given information about 2 products and received personal advice recommending product 1, but they wish to purchase product 2 (which may be more expensive or have some other benefit the client prefers for some other reason) despite the personal advice, the arranging conduct implementing the client’s instructions could be argued not to be exempt.

Treasury has advised that its view is that the words should be given broad meaning (having regard to Explanatory memorandum and intent) and that dealing conduct is excluded as long as the client has received personal advice.

We note that the concept of dealing is covered by the above but brokers (when engaging in excluded conduct) may also give a PDS which is a separate form of Retail product distribution conduct and not carved out in the definition of excluded conduct.

This does not appear to be the intent and we expect Treasury and ASIC would take a similar broad view. ASIC should include this in the Guidance.]

Provision of information to issuers

129 A distributor must report information on its distribution to the issuer. A distributor must report to issuers in writing on:

- (a) whether it received complaints about the financial product during a specified reporting period and, if so, the number of complaints received;
- (b) all information it acquired during a specified reporting period that is of the kind specified by the issuer in the target market determination under s994B(5)(h)(i); and
- (c) a significant dealing in the financial product that is not consistent with the target market determination (see s994F(4)–(6)).

Proposal

D7 We do not propose to provide specific guidance on the practical aspects of the relationship between the issuer and the distributor regarding information exchange.

Your feedback

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?

[NIBA Comment No]

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?

Keeping records

Collecting and reporting information

[NIBA Comment Nothing of concern beyond the scope of the insurer's request.]

Keeping records

RG 000.200 'Distribution information' includes the following: (a) the number of complaints the distributor receives in relation to the financial product; (b) the steps the distributor has taken to ensure that its distribution is consistent with the target market determination (see RG 000.154– RG 000.163);

[NIBA Comment Should note the excluded conduct carve out for this obligation]

Proposed guidance on our administration of the design and distribution obligations

131 ASIC has a discretionary power to provide exemptions from, and modifications to, the design and distribution obligations in Pt 7.8A of the Corporations Act. We have similar powers in relation to other parts of the Corporations Act. These powers are also known as ASIC's relief powers.

132 The factors that we will take into account when considering whether to provide an exemption from, or modification to, the design and distribution obligations are consistent with our broader policy on applications for relief: see Regulatory Guide 51 Applications for relief (RG 51).

133 When assessing relief applications, we will:

(a) promote the policy objectives underlying the Corporations Act; and

(b) exercise ASIC's powers in accordance with the aims in s1(2) of the ASIC Act (see RG 51 at RG 51.60).

Proposal

E1 We propose 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.

Your feedback

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?

[NIBA Comment] Provide they are consistent with ASIC's obligations at law NIBA makes no further comment]

E1Q2 Are there any additional factors that you consider we should take into account?

[NIBA Comment] As above]

Interaction with disclosure relief

134 In certain circumstances, we may grant relief from the requirement to provide disclosure in relation to financial products.

Proposal

E2 We propose 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.

Your feedback

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?

[NIBA Comment] Provided they are consistent with ASIC's obligations at law NIBA makes no further comment]

REGULATORY AND FINANCIAL IMPACT

136 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will:

(a) help issuers and distributors understand what is required to comply with their design and distribution obligations; and

(b) help issuers and distributors implement appropriate measures (including by adapting existing practices) to ensure they:

(i) design and distribute products that are likely to be consistent with the likely objectives, financial situation and needs of consumers; and

(ii) target products to those consumers who would benefit from them, to improve consumer outcomes.

137 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

(a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;

(b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and

(c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

138 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

[NIBA Comment NIBA is concerned regarding the above view.]

NIBA is of the view that the effect of the above legislation, combined with the Guidance is likely to:

- **reduce competition in the market to the detriment of consumers – a confusing regime makes entry of new players difficult or unattractive;**
- **increase cost of insurance for consumers arising from the confusion and higher compliance costs;**
- **reduce the accessibility of insurance to vulnerable consumers as insurers are forced to restrict offerings due to compliance uncertainty and cost;**
- **adversely affect the industry for no obvious consumer benefit that is not already delivered in other law e.g ASIC Product Intervention power, Unfair Contract terms, Standard Cover proposals, Corporations Act efficient honest and fair obligation and Insurance Contracts Act duty of utmost good faith.**

NIBA is supportive of any attempt to redress any imbalance between insurers and consumer BUT this should only be done after a proper costs benefit analysis has been

conducted and in a way that effectively and simply deals with the issues. This is not the case with this legislation]

Please do not hesitate to contact NIBA if you wish to discuss any matter in this note or in the attached submissions.

Dallas Booth
Chief Executive Officer