



ASIC
Australian Securities &
Investments Commission

REPORT 674

Response to submissions on CP 325 Product design and distribution obligations

December 2020

About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 325](#) *Product design and distribution obligations* (CP 325) and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

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

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see [Regulatory Guide 274](#) *Product design and distribution obligations* (RG 274).

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A Overview

1 The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (Product Regulation Bill) was passed in April 2019. The Product Regulation Bill implemented recommendations made by the final report of the Financial System Inquiry (FSI).

Note: See FSI, [Financial System Inquiry: Final report](#) (FSI final report), November 2014.

2 On 16 December 2019, the Corporations Amendment (Design and Distribution Obligations) Regulations 2019 were registered, extending the design and distribution obligations to additional persons and products and excluding certain persons and products from the regime's operation.

3 On 19 December 2019, ASIC released [Consultation Paper 325 Product design and distribution obligations](#) (CP 325) and the attached draft Regulatory Guide 000 *Product design and distribution obligations* (draft RG 000). Both were drafted before the Corporations Amendment (Design and Distribution Obligations) Regulations 2019 were registered. The final guidance in [Regulatory Guide 274 Product design and distribution obligations](#) (RG 274) is consistent with the changes made in the regulations.

4 In [CP 325](#), we consulted on our proposed guidance on ASIC's approach to the design and distribution obligations in Pt 7.8A of the *Corporations Act 2001* (Corporations Act).

5 This report highlights the key issues that arose out of the submissions received on [CP 325](#) and our responses to those issues.

6 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from [CP 325](#), but is a response to the key issues raised and a summary of significant changes made to draft RG 000.

Consultation

Written submissions on CP 325 and draft RG 000

7 The consultation on [CP 325](#) and draft RG 000 was initially open for a period of 12 weeks, from 19 December 2019 to 11 March 2020.

8 Several respondents requested an extension to the submission due date because of resource constraints arising from the impact of the COVID-19

pandemic and other reform consultation processes that were running in parallel.

- 9 We received five confidential and 43 non-confidential formal written responses to [CP 325](#).
- 10 Respondents represented a broad range of stakeholders, including financial firms, industry groups and associations, and consumer groups. We are grateful to respondents for taking the time to send us their comments.
- 11 For a list of the non-confidential respondents to [CP 325](#), see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 325.

Roundtable discussions on draft RG 000

- 12 In addition to written submissions, our approach to guidance has been informed by feedback provided by stakeholders during roundtable consultations conducted over two rounds. We invited stakeholders to provide thoughts on and questions about the design and distribution obligations to help inform our approach.

Round 1: Pre-publication of CP 325

- 13 The first set of roundtable discussions occurred before [CP 325](#) and the attached draft RG 000 were published—in August and September 2019. Roundtable discussions were held over two days in August in Sydney, with a further teleconference in September. They were attended by representatives from financial firms, industry groups and associations, and consumer groups.
- 14 The intention of holding these discussions was to inform our drafting of the consultation paper and draft regulatory guide, and to identify issues of concern early in the development of our guidance.

Round 2: Post-publication of CP 325

- 15 We held further roundtable discussions after the publication of [CP 325](#) and draft RG 000 in March 2020, before the closing date of submissions. These discussions were held over three days in Melbourne, Sydney and Brisbane, and were attended by representatives from financial firms, industry groups and associations, and consumer groups.
- 16 We sought feedback on draft RG 000 to help us identify issues causing concern or confusion that would benefit from further clarification or changes.

Feedback received

- 17 Most respondents recognised the importance of a robust and effective product governance framework and were generally supportive of the intent behind the design and distribution obligations.
- 18 The main issues raised by respondents related to:
- (a) the arrangements required to be implemented in order to comply with the design and distribution obligations;
 - (b) the approach that issuers should take when preparing the target market determination (TMD), including the level of granularity of the target market description and the form of the TMD when products are bundled or can be customised at point-of-sale;
 - (c) the steps that issuers and distributors will need to consider taking to meet their reasonable steps obligation; and
 - (d) the application of the design and distribution obligations to certain products, issuers and distributors.

Our response

- 19 The design and distribution obligations represent a step change in financial services regulation. They should drive better business and consumer outcomes by requiring:
- (a) issuers to design financial products that are likely to be consistent with the likely objectives, financial situation and needs of consumers for whom they are intended;
 - (b) issuers and distributors to take ‘reasonable steps’ that are reasonably likely to result in financial products reaching consumers in the target market defined by the issuer; and
 - (c) issuers to monitor consumer outcomes and review products to ensure that consumers are receiving products that are likely to be consistent with their likely objectives, financial situation and needs.
- 20 The legislation provided a two-year transition period. Issuers and distributors that already have robust and effective product governance arrangements will readily adapt to the new obligations, and over time all issuers and distributors will become better at meeting their obligations.
- 21 We have deferred the commencement of the design and distribution obligations for an additional six months, until 5 October 2021. In doing so, we emphasise that we will not take a broad ‘facilitative’ or no-action position on compliance after commencement.

- 22 However, we anticipate that issuers' and distributors' approaches to complying with the design and distribution obligations will develop over time. As these approaches improve, our guidance may also evolve.
- 23 We have provided examples throughout [RG 274](#) to illustrate the approach issuers and distributors should take in complying with the design and distribution obligations. These examples have been drawn from our work and areas that we have reviewed. The examples are illustrative and are intended to be clear and broadly applicable. Our purpose in including examples is not to cover the field, but to provide a selection of evidence-based examples of how the law should be applied.

B Feedback on the arrangements necessary to implement and comply with the design and distribution obligations

Key points

In Section B of [CP 325](#), we put forward the view that the design and distribution obligations provide a legislative framework for issuers and distributors to develop and maintain effective product governance processes across the life cycle of financial products. We proposed to give guidance to issuers and distributors on how to introduce a product governance framework and deliver good consumer outcomes.

The responses received were largely supportive of our approach but included some requests for clarification or further information.

Feedback specifically related to:

- whether introducing a product governance framework is mandatory; and
- the approaches to delivering good consumer outcomes, including through consideration of behavioural bias, choice architecture and consumer vulnerability.

Introducing product governance arrangements

- 24 In [CP 325](#), we proposed to give guidance that a robust and effective product governance framework that fulfils the objectives of the design and distribution regime should:
- (a) focus on the identified target market across the life cycle of the product;
 - (b) be designed to reduce the risk of products being sold to consumers that are not consistent with their likely objectives, financial situation and needs; and
 - (c) be documented, fully implemented, monitored and reported on, and regularly reviewed to ensure that it is up to date.
- 25 We sought feedback on whether our guidance on introducing a product governance framework is useful, and whether there are any additional matters that are important in ensuring that a product governance framework will be effective and support compliance with the design and distribution obligations.

Stakeholder feedback

- 26 The responses to this proposal were generally supportive, but some respondents raised qualifications or made additional comments.
- 27 Respondents generally supported the concept of a robust and effective product governance framework. Some respondents were of the view that this approach should be presented in the guidance as best practice, rather than necessary for compliance with the design and distribution obligations. Some felt that this approach would only be necessary for complex products.
- 28 Other respondents recommended that references to scalability should be removed to ensure a higher level of compliance. One respondent also recommended that there should be a requirement for issuers and distributors to publish their product governance frameworks.

ASIC's response

To comply with the design and distribution obligations, issuers and distributors will need to take deliberate actions. As a systems-driven regime, appropriate product governance arrangements are a necessary component of compliance with the design and distribution obligations. We have changed the wording in [RG 274](#) to refer to 'product governance arrangements' instead of a 'product governance framework'. This is consistent with the general licensee obligations in s912A of the Corporations Act, which refer to adequate arrangements and systems. In RG 274, we have noted a recent judgment that highlighted the need for effective product governance arrangements to comply with s912A and support the effective provision of products: see *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790.

As [RG 274](#) explains at RG 274.32, implementing and maintaining robust and effective product governance arrangements is a necessary step in ensuring that issuers and distributors meet their obligations. Effective arrangements will reduce the risk of products being sold to consumers that are not consistent with their likely objectives, financial situation and needs.

Our guidance on product governance arrangements in [RG 274](#) applies broadly. We intended to convey that in complying with the obligations, issuers and distributors need to take a risk management approach, consistent with the legislative framework. The risk management approach adopted may change depending on the size of the business, for example, but the obligations themselves apply regardless. To avoid any confusion on this point, we have removed references to scalability.

All issuers and distributors should have product governance arrangements that will enable them to comply with the design and distribution obligations.

Delivering good consumer outcomes

- 29 In [CP 325](#), we proposed to give guidance that issuers and distributors should not take advantage of behavioural biases or factors that can impede consumer outcomes.
- 30 We also noted that 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.
- 31 We sought feedback on the usefulness of our proposed guidance in draft RG 000 on the consumer-centric approach issuers and distributors should take to deliver good consumer outcomes, and whether there are any additional matters that are relevant.

Stakeholder feedback

- 32 Most respondents who addressed this aspect of draft RG 000 agreed that taking a consumer-centric approach is useful or necessary. However, some respondents sought further information on what taking a consumer-centric approach means in practice.
- 33 Some respondents queried the link between the legislation and this section of draft RG 000. One respondent suggested that references to ‘choice architecture’ should be removed.
- 34 Some respondents suggested that the concept of consumer vulnerability should be defined in the guidance, but varied in their suggested approaches for achieving this aim. For example:
- (a) some respondents recommended that the definition be aligned with various industry codes of conduct; and
 - (b) one respondent recommended that any definition of vulnerability include people experiencing structural disadvantage, and people in regional, rural and remote areas.

ASIC's response

There is a strong and clear link between the legislation and our guidance on delivering good consumer outcomes by taking a customer or consumer-centric approach.

‘Customer-centric’ is a term used at paragraphs 1.5 and 1.7 in the [Revised Explanatory Memorandum for the Treasury Laws Amendment \(Design and Distribution Obligations and Product Intervention Powers\) Bill 2019](#) (Revised Explanatory Memorandum) and in the then-Minister's [second reading speech](#) (p. 9698), to

describe the intended application of the design and distribution obligations:

But, most importantly, these obligations will encourage issuers and distributors to have a customer-centric approach to designing, marketing and distributing financial products.

In our guidance we have explained that consumer-centric means placing consumer outcomes front and centre at the product design, product distribution and monitoring and review stages of the product life cycle: see RG 274.5–RG 274.14. In particular, we have explained that the obligations require issuers and distributors to monitor and respond to consumer outcomes produced by the design and distribution of financial products. Consistent with our broader approach, we are not intending to provide prescriptive guidance in relation to this.

Issuers and distributors should have developed over time a reasonable understanding of what design or distribution approaches result in poor outcomes for consumers. Under the design and distribution obligations, issuers and distributors should be monitoring and reviewing their products in light of consumer outcomes and adjusting arrangements when necessary.

There is no one-size-fits-all approach that can be set out in guidance. This would unnecessarily restrict issuers and distributors in circumstances where the product governance arrangements they will need to put in place will depend on their products and the outcomes associated with their sales practices.

Accordingly, we have amended our guidance in [RG 274](#) to suggest that issuers and distributors consider outcomes as part of a consumer-centric approach to designing products. The specific settings to achieve good consumer outcomes will vary depending on the context, but issuers and distributors can monitor outcomes to ensure that they have put the right settings in place.

To address any confusion about the definition of ‘vulnerability’, we have provided further information in Note 1 at RG 274.47, setting out a non-exhaustive list of factors that can contribute to vulnerability.

C Feedback on obligations for issuers

Key points

In Section C of [CP 325](#), we proposed guidance in draft RG 000 on the design and distribution obligations for issuers. Central to these obligations is the concept of a target market determination (TMD). Our proposed guidance covered making a TMD, taking reasonable steps to ensure that distribution is likely to be consistent with the TMD, and reviewing the TMD.

This section outlines the feedback received on our proposed guidance on obligations for issuers. Specifically, the feedback from respondents related to:

- making a TMD, including identifying and describing a target market for a financial product;
- how the reasonable steps obligation applies to issuers;
- reviewing the TMD, including the collection of information from distributors to help an issuer meet its review obligations; and
- how to meet the obligation to notify ASIC of any 'significant dealings' in a financial product that are not consistent with the product's TMD.

Making a TMD

35

Making a TMD is a key obligation for issuers under the design and distribution obligations. In [CP 325](#), we proposed to give guidance on making a TMD. Proposed guidance in draft RG 000 related to:

- (a) the content and form of a TMD;
- (b) identifying and describing a target market for new and continuing products;
- (c) our examples for different product sectors;
- (d) the role of diversification as it relates to the issuer's identification of the target market;
- (e) the impact of consumer understanding of a product on the target market; and
- (f) product-specific issues, including for superannuation, investor directed portfolio services (IDPSs), customisable products and products sold in bundles.

The content and form of a TMD

36 In [CP 325](#), we proposed to give guidance that what amounts to an appropriate TMD 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.

Stakeholder feedback

37 Most respondents agreed with our principles-based approach to making a TMD, although most made additional comments or requests for clarification. Some respondents did not support the approach we took in draft RG 000.

38 Some respondents requested further detail on the content and form of TMDs. Some respondents recommended that template TMDs, indicative examples or standards be developed by industry, by ASIC, or by both in collaboration. In particular, some respondents requested further guidance or examples to illustrate how narrowly to define the target market for 'simple' products. Some respondents raised a concern that, in the absence of prescriptive guidance, issuers would be likely to define the target market in such a broad manner that it would no longer be useful.

39 In roundtable consultations, some stakeholders asked whether ASIC could facilitate or support some form of standardisation, particularly for key terms used in TMDs and record keeping.

40 Respondents were generally supportive of our proposed guidance on the role of the 'negative target market'. All respondents who directly addressed this either agreed, or agreed with minor caveats, with our position that, when determining the target market for a product, it may be useful for an issuer to consider those for whom the product is clearly unsuitable.

ASIC's response

Content requirements

The law sets out what content is required in a TMD and we have made this clearer in [RG 274](#) at RG 274.63.

Appropriateness requirements

To assist with the development of TMDs, we have provided more detailed guidance in [RG 274](#) on our interpretation of the appropriateness requirements and how these impact on the content required in a TMD.

The appropriateness requirements, contained in s994B(8) of the Corporations Act, state that a TMD for a financial product must be such that it would be reasonable to conclude that, if the product were to be issued, or sold in a regulated sale:

- to a retail client in accordance with the distribution conditions—it would be likely that the retail client is in the target market: s994B(8)(a); and
- to a retail client in the target market—it would likely be consistent with the likely objectives, financial situation and needs of the retail client: s994B(8)(b).

We have explained in RG 274.100 that to satisfy the appropriateness requirement in s994B(8)(a), the TMD must explain why the distribution conditions will make it likely that the consumers who acquire the product are in the target market.

We have explained in guidance at RG 274.68 that to satisfy the appropriateness requirement in s994B(8)(b), the TMD must include sufficient information to explain why the product, including its key attributes, is likely to be consistent with the likely objectives, financial situation and needs of consumers in the target market. As part of this, an issuer will generally need to set out in the TMD:

- a description of the likely objectives, financial situation and needs of consumers in the target market;
- a description of the product, including its key attributes; and
- an explanation of why the product (including its key attributes) is likely to be consistent with the likely objectives, financial situation and needs of consumers in the target market.

We explain at RG 274.76 that key attributes are product terms, features and attributes that affect whether the product is likely to be consistent with the likely objectives, financial situation and needs of consumers in the target market. Without considering and identifying the product's key attributes, it will not be possible to demonstrate that the product is likely consistent with the likely objectives, financial situation and needs of consumers in the target market.

At RG 274.80, we explain that the class of consumers that comprises the target market for a product needs to be defined with objective, tangible parameters so that it is clear which consumers form part of the target market. Without this, an issuer is unlikely to be able to meet the appropriateness requirements because it will be difficult to demonstrate through the TMD that the product will likely be consistent with the likely objectives, financial situation and needs of classes of consumers that fall within the target market.

Additionally, in meeting the appropriateness requirements, we consider it is also useful for issuers to consider the class of consumers for whom the product will not be appropriate when determining the target market for the product. In [RG 274](#), we no longer refer to this concept as the 'negative target market'. However, the concept itself remains key, and issuers and distributors should consider it. At RG 274.85, we note that in some cases it may be simpler or even necessary to define the

target market as including some classes of consumers and excluding others.

Standardisation

We consider that some degree of standardisation will be useful in achieving the objectives of the design and distribution obligations. Industry is best placed to work towards this. However, this does not mean issuers can disengage from their TMDs. Issuers should take ownership of both their products and their TMDs. Issuers and distributors must remain focused on implementing effective product governance arrangements for their products and on monitoring and improving consumer outcomes.

Identifying and describing a target market for new and continuing products

41 In [CP 325](#), we proposed to give guidance that:

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

Stakeholder feedback

42 Most respondents were generally supportive of our guidance on identifying and describing the target market for new and continuing products, although several raised various qualifications.

43 Some respondents recommended that the guidance make it explicit that the concept of a target market as part of the design and distribution obligations is likely to be different from issuers' and distributors' existing conceptions of 'target markets' used by their marketing departments. That is, people who are most likely to respond to marketing about the product might not be the same people who would fall within the target market under the design and distribution obligations.

44 Some respondents raised a concern about the expectations in draft RG 000 about data collection. These respondents noted that meeting these expectations will require changes for issuers and distributors. One respondent noted that in the case of issuers of managed funds and superannuation products, the issuer has minimal direct contact with the end

customers and that the only information these issuers currently collect is limited to that required to satisfy limited requirements such as anti-money laundering.

- 45 Some respondents did not support our proposed guidance. One respondent disagreed with the concept that a product should be designed following development of its target market. This respondent noted that while there may be cases where this will occur, it should not be the expectation. This respondent also disagreed with the expectation outlined in draft RG 000 that product design should be driven by features that benefit the consumer, arguing that the appropriateness requirement in s994B(8) of the Corporations Act is not framed around consumer benefit.
- 46 Of the other respondents who did not support the proposed guidance, one found it confusing and another felt draft RG 000 was too detailed and prescriptive. Conversely, one respondent recommended the guidance be strengthened by including more examples of consumer data held by issuers that could be used to determine the target market. The examples suggested by this respondent included any regulatory actions taken or complaints made in relation to the product, and the proportion of consumers who default, pay the minimum amount, live in rural, regional or remote areas, and receive social security payments.

ASIC's response

The design and distribution obligations are directed towards issuers designing products in a way that supports the delivery of good consumer outcomes: see paragraphs 1.7 and 1.48 of the [Revised Explanatory Memorandum](#).

We remain of the view that, consistent with the objectives of the design and distribution obligations, consumer needs should drive the design of products. However, we acknowledge that product design and development is an iterative process. We do not consider that our approach to guidance in RG 274.42–RG 274.43 prevents an issuer from designing a product following or in conjunction with identifying a target market, as long as the issuer ultimately ensures that the product (including its key attributes) is likely to be consistent with the likely objectives, financial situation and needs of the consumers in the target market.

We have explained at RG 274.44 that issuers may already have a concept of a 'target market' for the product (e.g. in a marketing or commercial sense). In these cases, issuers must still critically assess the product (including its key attributes) and identify a target market by reference to consumers for whom the product is likely to be consistent with their likely objectives, financial situation and needs.

When designing products, we have explained that issuers should consider information reasonably available to them on consumer outcomes for past or similar products. The design and distribution

obligations mean that a product development process that does not consider consumer outcomes will not be feasible. At RG 274.39, we provide guidance on how this approach should fit within an issuer's product governance arrangements.

On data collection, we acknowledge the view of some respondents that meeting the obligations will require changes for issuers and distributors. We do not disagree with this. The design and distribution obligations are a step change, and compliance will, in some cases, require changes to existing business practices and arrangements. As mentioned above, we anticipate that issuers' and distributors' approaches will evolve over time.

Our examples for different product sectors

47 We did not propose to give a definitive formulation of how a target market should be described in a TMD. Instead, we proposed to give guidance that explains the process and key considerations for identifying and describing a target market, using the following examples:

- (a) Example 1: Credit cards;
- (b) Example 2: Reverse mortgages;
- (c) Example 3: Cash options in superannuation;
- (d) Example 4: Consumer credit insurance;
- (e) Example 5: Low-value products; and
- (f) Example 6: Basic banking products.

Stakeholder feedback

48 Most respondents were of the view that the examples were useful, with some making comments or suggestions for changes.

49 Some suggested additional product examples should be added on topics including investment products, add-on insurance and small credit contracts.

50 Some respondents commented on the subject matter of the examples. While comments varied, overall these submissions put forward the view that the examples could be more useful if they were focused on more common products that the respondents felt would be likely to have a broad target market.

51 While most respondents were broadly supportive of our principles-based approach, some recommended standardisation, minimum criteria or further detailed guidance on our expectations for how granular a TMD needs to be. These comments were similar to the comments provided on the overall form and content of a TMD: see paragraphs 37–40.

Example 1: Credit cards

- 52 One respondent raised a concern that the credit card example described an individual product suitability test, rather than consideration of the objectives, financial situation and needs of the target market as a class.
- 53 Another respondent recommended that the example be amended to recognise that a TMD may consider existing business practices, such as periodically assessing a consumer's use of their credit card to determine whether it suits their needs.
- 54 Another respondent did not agree that offering a concessional fee is an example of a fundamental alteration to the underlying product. Conversely, a different respondent was supportive of the example and further recommended that a TMD should be required to consider whether, in the absence of the concession or promotion, the product would remain appropriate for the target market.

Example 3: Cash options in superannuation

- 55 Some respondents were of the view that the example on cash options in superannuation was too critical and did not give proper consideration to other reasons for investing in cash options, such as for use as a defensive asset in poor market conditions.
- 56 One respondent noted that the design and distribution obligations apply at the financial product level, but that the example appeared to suggest separate TMDs are required for each option.

Example 6: Basic banking products

- 57 Some respondents commented on the interaction between the design and distribution obligations and the Australian Banking Association's [Banking Code of Practice](#), with one respondent recommending that the example be amended to reflect recent changes to the code and another recommending that guidance make it clear that a TMD that aligns with the code requirements for particular customer segments is sufficient to address issues around low-income earners and informal overdrafts.

ASIC's response

Three examples received most of the attention from respondents: credit cards (Example 1 in [RG 274](#)), cash options in superannuation (Example 4 in [RG 274](#)), and basic banking products (Example 3 in [RG 274](#)). We have considered this feedback and have decided to retain the examples with some amendments to address the feedback.

We have added Example 14 *Product changes and reviewing the TMD* in [RG 274](#) to clarify that when adding a new promotional

feature to a product, the issuer should consider whether means the target market for the product will need to be adjusted.

We have made minor changes to the example on cash options in superannuation, to clarify the actions an issuer could take if the results of testing indicate that a product is not likely to meet the needs of the target market.

We have amended the example on basic banking products to reflect recent changes to the Banking Code of Practice.

Portfolio diversification

- 58 In [CP 325](#), we proposed to give guidance that when an issuer considers it appropriate to contemplate consumers in the target market acquiring a financial product as part of a diversified portfolio, the reasonable steps obligation will require the issuer to manage the risk of the product being sold to consumers who do not have a diversified portfolio.

Stakeholder feedback

- 59 Feedback from respondents on this proposal was mixed. A minority of respondents addressed this section of the guidance, with most raising additional points and requesting clarification, rather than wholly agreeing or disagreeing with our proposed approach.
- 60 Feedback was largely focused on three points:
- (a) There was confusion around the term ‘inherently flawed’. Respondents noted that the design and distribution obligations and other obligations prevent issuers from designing inherently flawed products, and consequently the guidance at draft RG 000.79 that some financial products will not be appropriate even if sold as part of a diversified portfolio was unnecessary.
 - (b) It will be difficult to ensure that consumers have a diversified portfolio without engaging in personal advice, which may have the effect of reducing access to particular products.
 - (c) The definition of ‘diversified portfolio’ needed to be clarified.

ASIC’s response

We agree with the point made in submissions that it is clear enough an inherently flawed product must not be offered after the design and distribution obligations commence, regardless of whether it is offered as part of a diversified portfolio or not. We have removed references to inherently flawed products on this basis.

[RG 274](#) clarifies that an issuer who chooses to target consumers who are likely to hold the product as part of a diversified portfolio will still need to consider if a product (including its key attributes)

is likely to be consistent with the likely objectives, financial situation and needs of consumers in that target market, and comply with its reasonable steps obligation.

We have also clarified that when an issuer is directing products to consumers who have diversified portfolios, we do not consider that issuers will be required to have knowledge of each individual consumer's financial situation. Rather, the reasonable steps obligation requires issuers and distributors to manage the risk of the product being widely sold to consumers who do not have a diversified portfolio.

Consumer understanding of a product

- 61 In [CP 325](#), we proposed that a target market for a product should not be predominantly based on consumer understanding of that product. The design and distribution obligations represent a move away from relying primarily on disclosure and the concept of the 'informed consumer' to reduce consumer harm. The obligations require issuers to consider objectively whether a product (including its key attributes) is likely to be consistent with the likely objectives, financial situation and needs of consumers in the target market for that product.

Stakeholder feedback

- 62 Most respondents did not directly comment on this proposal. Of those respondents who did comment, most were supportive, with a minority disagreeing with our proposal that a target market for a product should not be predominantly based on consumer understanding.

ASIC's response

The design and distribution obligations are a deliberate rebalancing of past over-reliance on the assumption that disclosure produces informed consumer decision making.

In order to achieve the policy goals of the design and distribution obligations, it is important that issuers do not define target markets by reference to whether the consumer understands the product. Whether consumers understand the product should not be given greater weight than the key issue, which is whether the product is objectively consistent with their likely objectives, financial situation and needs.

Product-specific issues

- 63 In [CP 325](#), we proposed to give specific guidance on the application of the design and distribution obligations to some products that generated early queries or that we identified would benefit from some examples and guidance.

Stakeholder feedback

Superannuation

64 Feedback on the example for how the TMD applies to superannuation (Example 7 in draft RG 000) was largely positive, with most respondents agreeing in principle with our proposed guidance. When issues were raised, these included:

- (a) requests for further clarity as to the form of a TMD when an issuer considers 'sub-markets' for particular choice options;
- (b) requests for clarification of the example language to confirm the application to options; and
- (c) how the TMD applies to insurance within superannuation.

65 One respondent requested that we use ASIC's modification powers to clarify the application to investment options offered in a superannuation product.

66 Some respondents requested that our guidance be expanded to address further superannuation-specific issues, including the application of the obligations to reversionary pension interests, intra-fund transfers and superannuation splitting payments under the *Family Law Act 1975*. One respondent requested that we provide an exemption for each of these circumstances using our powers in s994L of the Corporations Act.

67 Respondents also queried how the design and distribution obligations will interact with the member outcomes reforms administered by the Australian Prudential Regulation Authority (APRA).

Investor directed portfolio services

68 Most respondents were supportive of our proposed guidance on how the TMD applies to IDPSs (Example 8 in draft RG 000). However, some respondents raised further questions for consideration.

69 These questions were focused on:

- (a) how the excluded conduct exemption applies to financial advisers where implementing advice on platforms; and
- (b) whether the example could be updated to provide further clarity on whether subsequent issues of the same product (e.g. investors acquiring additional units in an investment) would be captured.

Bundled products

70 Some respondents addressed the proposed guidance on bundled products. The majority supported the guidance, with some qualifications.

- 71 Some respondents expressed confusion as to whether separate TMDs for each product in a bundle would need to be created.
- 72 Some respondents requested further examples to illustrate how TMDs for bundled products will operate in practice, including further examples to show how a TMD will be affected if the act of bundling two or more products together changes a feature of one product.
- 73 Some respondents agreed that the target market for each product in a bundle is relevant, but also suggested that the target market for products sold in a bundle is likely to be narrower than the target market for any individual product in the bundle. These respondents also sought clarification on how complimentary products included in a bundle will be treated under the design and distribution obligations, raising concerns that if these products are not captured, this could encourage gaming by distributors.

Customisable products

- 74 Most respondents who commented on our proposed guidance on customisable products were supportive.
- 75 However, some respondents indicated that they interpreted the guidance to mean that multiple TMDs will be required for a single product if features of the product can be changed. Similarly, one respondent requested further guidance on how to treat variations of products within a class, and whether separate TMDs would be required if, for example, the level of cover for a car insurance product is altered.
- 76 Several respondents either raised queries about, or provided examples of, customisable products where choices or options might change the class of consumers for whom the product is likely to be appropriate. However, there was substantial disagreement among respondents as to whether particular choices or options would change the target market of a product.

ASIC's response

Superannuation

We appreciate the feedback provided on the example on how the TMD applies to superannuation. We have retained the example in [RG 274](#), but we have revised it to provide more clarity on how the TMD obligation applies to investment options within superannuation.

We have amended our guidance to further explain our view that investment options, when offered, are key attributes of a superannuation product. As such, the trustee should take these key attributes into account in defining the target market for the choice product.

In practice, this is likely to involve a single TMD for the choice product that describes multiple sub-markets for some investment options or groups of investment options offered as part of the product.

We do not consider that a modification of the law is required to further clarify the application of the law or to achieve the legislative intent.

Further superannuation-specific issues

We have considered submissions on providing further guidance on superannuation-specific issues, including the application of the obligations to reversionary pension interests, intra-fund transfers and superannuation splitting payments. We have further considered the request for modification in these circumstances.

We have not provided further, specific guidance on these matters. We consider that the guidance provided on the reasonable steps obligation for issuers and distributors, including the risk management principles, is sufficient for industry to consider what steps are appropriate in their particular circumstances.

We further consider that modification would be counter to the legislative intention for a broadly applicable regime. Therefore, we will not modify the obligations in these circumstances.

Interaction with member outcomes

In [RG 274](#), we have considered the requests for further information on the interaction between the design and distribution obligations and APRA's member outcomes framework. We will be releasing a joint communication with APRA on the subject shortly.

[RG 274](#) clarifies that while the member outcomes framework and the design and distribution obligations are distinct regimes, they are complementary. As such, trustees may find efficiencies in developing compliance practices for the two regimes.

Investor directed portfolio services

We have retained the example on IDPSs in [RG 274](#). The example has been updated to provide further guidance on IDPS-like schemes. The inclusion of IDPS-like schemes clarifies that these products are regulated by the primary legislation.

Bundled products

At RG 274.121, we have clarified that if an issuer sells multiple products in a bundle, the issuer can decide whether they will comply with the TMD content and appropriateness requirements for each product in the bundle in a single TMD or, alternatively, set out separate TMDs for each product within the bundle. Issuers that choose to set out a single TMD must still comply with the design and distribution obligations for each product in the bundle—that is, the form of the TMD can change but the obligations remain.

We have added an example to illustrate how an issuer can define a target market for a home loan product bundled with a credit

card. In this example, the issuer will need to identify the overlap between the target markets for each product when sold separately in order to identify the target market for the bundle.

Customisable products

When a financial product is customisable by the consumer at point-of-sale, including through options that add, remove or change key attributes of the product, the issuer must consider these choices and options in defining the target market for the product.

Whether or not certain choices or options impact on the class of consumers for whom the product is likely to be appropriate, will be for issuers to determine. In [RG 274](#) at RG 274.126, we provide guidance that this should be based on data, including consumer outcomes.

Taking reasonable steps in relation to distribution: Issuers

77 In [CP 325](#), we proposed to give guidance on the reasonable steps obligation for issuers. We set out our view in draft RG 000 on the factors that may be relevant to the obligation.

78 In providing this guidance, we used product and sector-specific examples to illustrate key principles. Our examples focused on:

- (a) superannuation;
- (b) IDPSs;
- (c) mortgage funds; and
- (d) listed investment companies (LICs).

Stakeholder feedback

79 Respondents made a range of comments on our proposed guidance. The key matter raised was a concern that a requirement that issuers monitor and supervise distributors is not required by the law and, in their view, may be impractical to implement.

80 Respondents also made comments on the product and sector-specific examples, particularly for superannuation and LICs. Some requested further specific examples, including for banking products, insurance, and exchange traded products (ETPs).

Superannuation

81 Some respondents sought clarification on Example 9 in draft RG 000, which provided information on the reasonable steps a superannuation trustee may take in relation to various distribution channels. In particular, they raised

concerns around whether taking reasonable steps as described in the example could be considered providing personal advice.

- 82 Some respondents suggested that having issuers establish mechanisms for preventing consumers moving into an option that they may not be in the target market for is unlikely to work in practice, due to the limited information available to issuers. One respondent raised a concern that Example 9 appeared to suggest that the design and distribution obligations operate at the investment option level, rather than at the choice product level.

Listed investment companies

- 83 Some respondents made comments on Example 11 in draft RG 000, which dealt with LICs that issue shares listed on a licensed exchange and are closed-ended.
- 84 Some respondents recommended that the guidance provide additional examples that cover other kinds of products that are traded on a financial market, such as open-ended ETPs.

ASIC's response

We have considered the feedback received, which falls into three main categories:

- concern around ASIC's expectations that issuers monitor and supervise their distributors;
- concern around whether in taking reasonable steps issuers need to consider the individual circumstances of consumers; and
- comments on our examples relating to superannuation and LICs.

Monitoring and supervising distribution

When administering the issuer's reasonable steps obligation, we will consider whether an issuer has adequately supervised and monitored distribution. This will include consideration by the issuer of the distributor's processes, having regard to the target market for the financial product and the potential for harm that may result from a consumer outside of the target market acquiring the product.

Some issuers, in roundtable conversations and written submissions, put forward the view that this expectation will be difficult for them to meet given existing arrangements with their distributors.

[RG 274](#) addresses this, clarifying that issuers may need to consider whether the nature of their existing relationship with their distributors is appropriate and will enable them to meet their obligations. Issuers may need to take steps to improve communication or oversight of distribution, including through

formalising the relationship. This is consistent with the [Revised Explanatory Memorandum](#) at paragraph 1.98.

Considering consumers' individual circumstances

The design and distribution obligations do not require an issuer to consider and meet the personal circumstances and needs of individual consumers. Instead, the obligations require issuers to develop products, such that those products (including their key attributes) are likely to be consistent with the likely objectives, financial situation and needs of the class of consumers to whom the product will be distributed.

We have amended our guidance to clarify this point.

Superannuation: Issuers' reasonable steps

We have amended the superannuation example in [RG 274](#) (Example 9 in draft RG 000) to clarify that the superannuation trustee may consider the use of filters as part of the arrangements that it puts in place to meet its reasonable steps obligation.

We have also amended the example to clarify that, due to the regulations, employers are not subject to the reasonable steps obligation when complying with certain superannuation guarantee obligations.

LIC: Issuers' reasonable steps

We have clarified in [RG 274](#) that the design and distribution obligations apply to any initial offering of a LIC, or in the event of a subsequent issuance, such as a capital raising.

Exchange traded products

We have modified the obligations that apply to ETP issuers and distributors where ETP issuers are required to prepare a TMD (either as a result of reg 7.8A.09 or s994B(1)(a) or (b)) to ensure that consistent obligations apply where these products are traded on financial markets. We have provided guidance and a further example (Example 19) to explain how issuers and distributors of ETPs can comply with their obligations in these circumstances. This guidance is contained in the appendix of [RG 274](#) at RG 274.254–RG 274.263.

Reviewing the TMD

Specifying review triggers and reasonable maximum review periods

- 85 In [CP 325](#), we proposed to give guidance on the issuer's obligation to review the TMD periodically and in response to review triggers to ensure that the TMD remains appropriate for the financial product over time.

Stakeholder feedback

- 86 Most respondents did not directly address the issue of review triggers and maximum review periods. However, those who did make comments were generally supportive of our proposal, with some qualifications.
- 87 Some respondents, while being generally supportive of our approach, requested more detail in the guidance on review triggers, including how detailed the review triggers need to be in a TMD.
- 88 One respondent disagreed with our position in draft RG 000 at RG 000.126 that, if a review trigger has occurred, the issuer must stop issuing the financial product and direct its distributors to cease distribution until the review has been completed.
- 89 Some respondents recommended that ASIC set standard review triggers and minimum and maximum review periods, in order to encourage industry cooperation and facilitate rapid identification of harmful products. One industry respondent suggested that three-year review periods would be appropriate for low-risk products.
- 90 One respondent recommended that enforcement and legal action, default rates, feedback from stakeholders and data collected through credit applications should be included in the guidance as additional example triggers.

ASIC's response

We have amended our guidance in [RG 274](#) on specifying reasonable review periods to provide more detailed information on how an issuer can determine what is reasonable. We have explained that the requirement that review periods be reasonable is designed to encourage an issuer to adopt a risk management approach, including by considering the risk of detriment to consumers if the TMD is no longer appropriate.

While we have not prescribed review periods, they are likely to be shorter when:

- a product is complex and its risk profile increases;
- an issuer has limited experience issuing similar products; or
- the issuer is yet to establish a proven distribution network.

It is important for issuers to retain flexibility in setting review periods because a reasonable period may differ based on the product and may differ for the same product over time.

We have clarified that consumer advocates, as well as consumers themselves, may be sources of relevant information for an issuer conducting a review of its TMD.

[RG 274](#) states that the data sources listed could provide relevant information for issuers, but it does not mandate that issuers consider each source, nor does it restrict potential data sources to just those listed.

Specifying required information from distributors and reporting periods

91 In [CP 325](#), we proposed to provide guidance on what information an issuer must collect from its distributors, and how frequently, to help meet its review obligations.

Stakeholder feedback

92 Some respondents, while not disagreeing directly with our proposed guidance, requested further standardisation of required information and reporting periods. They raised concerns that a lack of standardisation will lead to confusion, higher costs for smaller distributors, and a negative impact on competition as distributors are incentivised to work with issuers that have lower requirements (and in some cases are distributing products for competitors). Some respondents were also concerned that distributors will not be able to meet information requirements using their current systems and infrastructure.

93 Some respondents provided examples of existing information collected by distributors that they believe will be relevant to issuers reviewing the TMD. This included complaints data, geographical data, portfolio data, financial metrics, incentive programs, lapse rates by distributors, and subjective feedback on claims management capability.

94 Some respondents requested that our guidance clarify whether ‘complaints data’ includes the substance of complaints, rather than just volume.

ASIC's response

We agree that some standardisation may be useful for industry. However, we do not agree that ASIC guidance is the appropriate vehicle for this.

Industry is best placed to work together to determine what degree of standardisation will benefit it and enable it to best meet the legal requirements under the design and distribution obligations.

We have provided further guidance to issuers on considerations that are relevant when setting the information required to be provided by distributors under the TMD. Issuers should consider the information they already hold or can obtain from other sources in determining what is reasonable and necessary to obtain from distributors.

Industry should consider any mechanisms it may need to meet the new design and distribution obligations, giving consideration to how products and controls currently operate.

We have clarified in [RG 274](#) at RG 274.117 that we expect that issuers will find it necessary to require distributors to provide not only the number, but also the substance of complaints and general feedback relating to the product and its performance.

Notifying ASIC of 'significant dealings'

- 95 In [CP 325](#), we proposed to give guidance on 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 TMD. These factors included:
- (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 TMD.

Stakeholder feedback

- 96 We asked stakeholders whether there are any additional factors issuers should consider. Some suggested additional factors, such as:
- (a) the proportion of consumers in the negative target market who are acquiring the product;
 - (b) the proportion of consumers who are part of consumer cohorts that are likely to suffer detriment as a result of acquiring the product; and
 - (c) the proportion of gross income or premium from the product in respect of consumers outside the target market.
- 97 One respondent was not supportive of our approach, recommending that the table outlining the content of a written notification of significant dealing (Table 4 in draft RG 000) be removed from final guidance on the grounds that the law did not provide specific support for the table as set out in draft RG 000. This respondent suggested that the table was too prescriptive, goes further than the legal obligations, and that it will be difficult for issuers to provide the level of detail recommended by guidance in the timeframe provided for notices of significant dealings to be made.
- 98 Most respondents did not raise objections to the draft guidance but did make varied comments. There were no overarching themes to these comments.
- 99 One respondent requested we clarify the time period over which a significant dealing occurs and considered that this could also be a factor indicating significance.
- 100 Some respondents noted that there may be legitimate reasons for consumers who fall outside of a target market to purchase the product, and that these sales should not be considered when determining whether a significant dealing has occurred.

ASIC's response

In [RG 274](#), we have provided additional guidance on the factors that may be relevant to issuers in determining whether a significant dealing has occurred and is reportable to ASIC. We have also provided guidance on the consideration relevant to determining whether a dealing is significant, noting that consideration of whether a dealing is significant will likely vary between issuers and distributors. Issuers, who have an aggregate view of the distribution of their product, will take a more systemic approach to determining whether a dealing is significant.

We have noted in guidance that it may assist issuers in meeting their obligations if they set objective criteria based on the nature and risk profile of their product. These objective criteria may also assist distributors in understanding the dealings they must notify to the issuer.

Feedback on Table 4, content of a written notification of significant dealings was weighted towards the view the table was useful, so we have included it in [RG 274](#) (now Table 5) as a useful guide.

The requirement for issuers to notify ASIC of significant dealings only excludes excluded conduct: see s994G. All other significant dealings must be reported to ASIC, irrespective of the circumstances (for example even in circumstances where the issuer and distributor complied with their reasonable steps obligation). We have provided guidance on circumstances where consumers outside of the target market seek to acquire a product: see RG 274.195–RG 274.199.

Significant dealings relating to excluded conduct that are reported by distributors to issuers under s994F(6) are likely to be informative for issuers in reviewing their TMDs: see the [Revised Explanatory Memorandum](#), paragraph 1.115-116.

D Feedback on obligations for distributors

Key points

This section outlines the feedback received on our proposed guidance on the design and distribution obligations for distributors.

Specifically, the feedback from respondents related to:

- how the 'reasonable steps' obligation applies to distributors;
- how a distributor may form a reasonable view on whether a consumer is in the target market;
- the interaction of the design and distribution obligations with personal advice obligations; and
- a distributor's obligation to retain and provide certain information to the issuer.

Taking reasonable steps in relation to distribution: Distributors

101 In [CP 325](#), we set out in draft RG 000 that distributors must take reasonable steps that will, or are reasonably likely to, result in distribution consistent with the TMD for the financial product (reasonable steps obligation): see s994E(3) of the Corporations Act.

Factors relevant to our administration of the reasonable steps obligation

102 In [CP 325](#), we proposed 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 TMD;
- (f) whether the distributor has given staff involved in distribution operations sufficient training; and
- (g) how the distributor forms a reasonable view that a consumer is reasonably likely to be in the target market.

Stakeholder feedback

103 Some respondents agreed 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. One respondent noted the factors are consistent with existing obligations under the Corporations Act and the Australian financial services (AFS) licensing regime.

Marketing and promotional materials

104 One respondent expressed concerns that the factors relating to marketing and promotional materials in Table 5 of draft RG 000 may be too specific. This respondent was of the view that a reference to banner advertising (a mass market advertising tool) may become problematic for innovative products and solutions, where technology improvements may allow for more targeted marketing.

105 Another respondent proposed a distinction between generic promotional material and promotional material that refers the audience to seek advice from their financial adviser as to the product's appropriateness. For example, this respondent felt that in circumstances where a banner advertisement is used to alert potential investors of an investment product, a mitigating consideration should be that the banner directs investors to their adviser to seek further advice as to the product's appropriateness, based on their specific and personal circumstances. In contrast, the respondent agreed that generic promotional material would not generally be appropriate to directly facilitate an investment application.

106 Another respondent suggested that guidance on marketing and promotional material should be consistent with existing [Regulatory Guide 234 Advertising financial products and services \(including credit\): Good practice guidance](#) (RG 234), rather than issuing additional guidance specifically for the design and distribution obligations specifying that advertising channels should be restricted.

ASIC's response

Our list of factors relevant to our administration of the distributor's reasonable steps obligation in Table 5 of draft RG 000 drew comparatively few comments in contrast to some other proposals in [CP 325](#). The comments provided focused primarily on our approach to marketing and promotional material.

Marketing and promotional material

We have taken into account the feedback on banner advertising, and consider that it is appropriate to provide guidance on the role of marketing in the context of DDO, given the reasonable steps obligation includes proactive steps to reduce the risk of distribution to persons not in the target market: see the [Revised](#)

[Explanatory Memorandum](#), paragraph 1.102. We consider that these proactive steps include approach to marketing.

To assist, we have also included a reference to [RG 234](#), which provides general guidance on marketing and promotional material for financial products. A complex or high-risk product with a narrow target market should generally not be marketed widely without appropriate controls in place, such as by making it clear in the content of the advertising that the product is of limited suitability.

Renewal of general insurance policies

107 In [CP 325](#), we proposed to include an example to illustrate, at the time of renewal for general insurance policies, how an insurer (in its role as distributor) can approach the reasonable steps obligation to ensure that the renewal process results in outcomes that are consistent with the TMD. Our proposed guidance suggested that, at the time of renewal, an insurer should:

- (a) analyse information it holds, such as:
 - (i) information it gathered when the consumer 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.

108 We also noted that, 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.

109 We sought feedback on what other factors or steps to take into account when considering whether a distributor has met the reasonable steps obligation generally and what reasonable steps should be taken at renewal.

Stakeholder feedback

110 While most respondents who addressed this issue were generally supportive of the inclusion of Example 14 in draft RG 000, some respondents were of the view that it required clarification, specifically regarding:

- (a) when in the process the insurer should contact the consumer and how much information they should be provided with;
- (b) confirmation that the distributor would not be prevented from renewing the policy for the consumer, provided reasonable steps are taken;
- (c) whether any claims made under the policy have been approved or refused;

- (d) taking into account the geographical location of claims made and whether there is any difference in the rates of claim approvals and/or refusals between different states, or between different geographical areas within states; and
- (e) confirmation that, when a consumer is outside the target market for a product, it would not be a breach of the anti-hawking rules if the consumer is offered another product if the consumer is likely to be inside the target market, and the making of this offer is not considered personal advice.

- 111 Some respondents disagreed with the inclusion of Example 14 in draft RG 000, putting forward a view that:
- (a) it restricts consumer choice; and
 - (b) the design and distribution obligations should not operate at such a granular level to require an issuer or distributor to offer renewal only after examining the personal circumstances of the consumer.
- 112 One respondent did not support any ability for an insurer to deem that a consumer is in a target market without making contact. This respondent felt that an insurer as distributor should actively engage with consumers at renewal time to confirm whether circumstances have changed. In addition, the respondent suggested that we give guidance on how insurers should contact consumers at renewal and the expected timeframe in which to make contact in certain circumstances, such as when a consumer is unlikely to still be in the target market.
- 113 One respondent suggested relief should be provided for the renewals process.

ASIC's response

We have considered the feedback provided and have amended our example in [RG 274](#) to clarify that 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 the consumer's consent.

We also wish to address concerns regarding consumer choice. The purpose of the obligations is to ensure specifically that consumers receive products that meet their objectives, financial situation and needs. Consumers are not restricted from accessing products by the obligations.

When distributing products, distributors are, as a matter of course, interacting with individual consumers. The design and distribution obligations require distributors to put in place controls to provide products to these consumers having regard to the TMD which has considered consumer objectives, financial situation and needs on a class basis. Conversely financial advice for example, involves considering an individual consumers' circumstances and providing a tailored service to the individual consumer.

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

- 114 In [CP 325](#), we proposed to provide guidance:
- (a) that, in most cases, a distributor should have sufficient information about a consumer through its existing sales processes to form a reasonable view on whether the consumer is reasonably likely to be in the target market for a financial product;
 - (b) that the ways a distributor's processes could assist it to form a reasonable view that a consumer is reasonably likely to be in the target market for a financial product include:
 - (i) the inclusion of 'knockout questions' within application processes;
 - (ii) analysis of data held on the consumer or a class of consumers; and
 - (iii) in some cases, asking the consumer direct questions to determine whether they are reasonably likely to be in the target market; 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.

- 115 We also proposed 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.

Asking additional, specific questions of consumers

- 116 In [CP 325](#), we sought feedback on:
- (a) whether stakeholders 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;
 - (b) what data stakeholders consider would help distributors reasonably conclude that a consumer is reasonably likely to be in the target market for a financial product;

- (c) whether stakeholders consider our guidance should identify 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, and what other approaches could be taken; and
- (d) whether stakeholders have any comments on our proposed guidance on how a distributor could reduce the likelihood of leaving a consumer with the impression that their personal circumstances have been considered.

Stakeholder feedback

Sufficient information from existing sales processes

- 117 While most respondents who commented on this issue agreed that a distributor may have sufficient information about a consumer through its existing sales processes, some raised queries about the amount of knowledge available for investment products, general insurance, superannuation, IDPSs, and platform products issued directly to consumers (i.e. in circumstances when the issuer is also the distributor).
- 118 One respondent noted that full service stockbroking and advice firms will have different levels of information for clients depending on the nature of advice given.
- 119 Another respondent recommended that guidance should specify that particular issuers and distributors, such as 'buy now, pay later' providers, should not be able to rely on existing information collected, given that, in the respondent's view, such issuers and distributors collect very little information about consumers.
- 120 Some respondents noted that while larger distributors may have enough existing information on consumers, this may not be the case for smaller distributors.

Consumer data

- 121 Respondents suggested that the following types of consumer data would help a distributor to reasonably conclude that a consumer is reasonably likely to be in the target market for a financial product:
- (a) consumer data, such as:
 - (i) age;
 - (ii) current employment status;
 - (iii) employment history;
 - (iv) geographical data;
 - (v) capacity for loss;

- (vi) attitude to risk; and
- (vii) existing diversification; and
- (b) data on other products that the consumer holds, such as:
 - (i) income;
 - (ii) growth;
 - (iii) capital preservation;
 - (iv) retirement planning; and
 - (v) decumulation.

122 Some respondents submitted that the consumer data required by a distributor to reasonably conclude that a consumer is reasonably likely to be in the target market for a financial product would vary depending on the size of the distributor and the product type.

Distribution process

123 One respondent noted it will be important to ensure that ‘knockout’ questions do not expose proprietary or confidential information, and that the approach is not seen as discriminatory. Another respondent noted that, while knockout questions may be appropriate in some cases, there is potential for false negatives and that this process may fail to consider all relevant matters.

124 Another respondent requested additional guidance on ways a distributor’s sales processes can assist in assessing whether a consumer is in the target market, including examples of the types of data to be considered.

125 In respect of asking questions without providing personal advice, one respondent suggested that the guidance should require a distributor to clearly inform the consumer that the purpose of the inquiries is solely to assess whether they are in the target market and, in asking the questions, the distributor is not providing any advice (general or personal).

126 Some respondents expressed concern that asking specific questions of a consumer in the later stages of the sales process—after the consumer has already made the decision to acquire the product—could lead to a poor consumer experience and result in confusion. One respondent emphasised that asking specific questions later in the process is limited in value to avoid the impression that personal advice has been given. Another respondent submitted that requiring licensees to put systems in place to hold off on asking specific questions until a consumer has decided to acquire the product will be difficult in practice.

127 Similarly, another concern raised by some respondents was that consumers may still be left with the impression that their personal circumstances have been considered, and it would be very difficult for distributors to ask

questions of consumers to determine if they are in the target market without giving that impression.

- 128 One respondent recommended that distributors could avoid the issue of personal advice by expressly telling consumers that their personal circumstances have not been taken into account. This, in turn, could encourage distributors to use plain and clear language when communicating.

Reliance on existing information about the consumer

- 129 Some respondents considered that reliance on existing information held on a consumer, and determining whether it is appropriate to seek further information from a consumer, could blur the line between general advice and personal advice.
- 130 Some respondents expressed a concern that the use of existing consumer information could breach privacy laws unless a consumer gives consent. Specifically, when a distributor uses existing consumer information to meet its reasonable steps obligation, these respondents were of the view that this will need to be permitted under the *Privacy Act 1988* or the privacy safeguards of the [consumer data right](#).
- 131 Some respondents suggested that reliance on existing information held about a consumer should not be a factor, or should be clarified, specifically around making assumptions about whether a consumer is in the target market. Some respondents suggested that allowing distributors to make assumptions encourages a level of conjecture that could lead to adverse consumer outcomes.
- 132 One respondent noted that permitting reliance on existing consumer information conflicts with the fact that the design and distribution obligations are not part of an individual product suitability regime.

ASIC's response

In most cases, a distributor should have sufficient existing controls or information about a consumer or class of consumers to form a reasonable view on whether the consumer is reasonably likely to be in the target market for a financial product.

We recognise that, in some circumstances, a distributor may need to ask further, specific questions of the consumer. Some respondents raised a view in submissions and roundtable discussions that their existing systems do not provide them with enough data to enable them to meet the expectations in our guidance. We acknowledge that this may be the case now, but our expectation is that issuers and distributors subject to the design and distribution obligations will change their processes and controls if needed to meet their obligations.

Consumer data

In [RG 274](#) at RG 274.180, we provide examples of consumer data that may assist a distributor to reasonably conclude that a consumer is reasonably likely to be in the target market for a financial product. The examples are non-exhaustive and are intended to be high-level rather than prescriptive, so that they can be tailored by a distributor to suit its own circumstances.

Distribution process

The design and distribution obligations are about consumer outcomes. These outcomes should not be confused with a smooth sales or marketing experience, particularly if that experience comes at the expense of good consumer outcomes. At RG 274.176, we provide further information on the distribution process and the ways that a distributor could form a reasonable view that a consumer is reasonably likely to be in the target market for a financial product.

Reliance on existing information about consumers

It will be useful for distributors to consider the existing information that they have about a prospective consumer or class of consumers before distribution. While we have retained this principle, we have amended our guidance to clarify that this does not equate to an individual product suitability test. We have also removed this factor from Table 6 in draft RG 000 on the 'Factors relevant to our administration of the distributor's reasonable steps obligation'. Instead, in [RG 274](#) at RG 274.179–RG 274.185, we have provided further guidance on how existing information held about a consumer might be useful in determining whether a consumer is reasonably likely to be in the target market for the product.

Using existing information to check whether a consumer is in the target market for a product will not constitute personal financial advice.

If a distributor has information about a consumer that indicates they do not fall within a product's target market (e.g. the product's target market includes only employed people and the distributor's records indicate the consumer is unemployed), it would be inconsistent with its reasonable steps obligation for the distributor to sell the product to the consumer.

Consumers outside the target market

133 In [CP 325](#), we sought feedback on our proposed guidance in draft RG 000 on:

- (a) the content of the reasonable steps obligation for distributors selling a financial product to consumers who are outside the target market for the product; and
- (b) whether there are any specific methods 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.

Stakeholder feedback

- 134 Most respondents sought:
- (a) examples where it would be reasonable for a distributor to sell a product to a consumer outside the target market, and the reasonable steps a distributor should take;
 - (b) examples of how digital and self-service channels of financial products may meet a distributor's reasonable steps obligation;
 - (c) elaboration on how a consumer acquiring a product who is outside the target market relates to the significant dealing obligation; and
 - (d) more guidance on the 'nature and degree of harm' to allow distributors to assess and address the issue.
- 135 Some respondents emphasised the importance of distributors maintaining records of the interactions and discussions with consumers outside the target market, with one respondent noting records should be contemporaneous.
- 136 Conversely, one respondent did not support any requirement to keep specific records for consideration of the TMD, except in cases where the product is unusual, and the target market is narrow.
- 137 One respondent queried whether, in the instance that a consumer is introduced to a lender by a referrer, the initial screening by the referrer could be considered as part of the distributor's steps. We have amended our guidance to address referrer conduct and distributor reasonable steps. This is discussed earlier in this report on page 33.
- 138 Another respondent queried whether our proposed guidance, in suggesting that a distributor might have to recommend a more suitable product to a consumer as a reasonable step, might have personal advice, hawking and competition implications.

ASIC's response

Issuers and distributors should implement product governance arrangements that make it unlikely consumers will actively seek to acquire financial products that are not consistent with their likely objectives, financial situation and needs.

If a distributor becomes aware that it is interacting with a consumer who is outside the target market for the product that the consumer seeks to acquire, the distributor will need to take steps that are reasonably likely to avoid distribution of the product to the consumer. Our guidance sets out what the distributor must consider in determining what steps are reasonable in these circumstances.

The design and distribution obligations do not impose restrictions on consumers outside a particular target market from having the

choice to acquire that particular product. However, a product being sold to consumers outside of the target market on multiple occasions when consumer harm is likely to result can indicate a failure to meet reasonable steps obligations.

Interaction with personal advice obligations

139 In [CP 325](#), we outlined that, when providing and implementing personal advice, a financial 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 TMD: see the definition of ‘excluded conduct’ in s994A(1) and 994E(3) of the Corporations Act. This is because 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.

140 We sought feedback on whether a TMD for a financial product should be considered by a financial adviser in providing the advice and meeting their best interests duty.

Stakeholder feedback

141 There was some divergence of views as to whether financial advisers should be required to consider a TMD for a financial product in providing the advice and meeting their best interests duty.

142 Most respondents were supportive of our approach in draft RG 000 at RG 000.231.

143 However, some respondents were of the view that because financial advisers are already required to consider a consumer’s personal circumstances and are subject to the best interests duty, it may not be valuable to require consideration of the TMD in every case—or at all.

Implementing personal advice

144 Some respondents sought further guidance on the steps that distributors needed to take when implementing personal advice from non-associated advisers. Submissions questioned whether the definition of ‘excluded dealing’ provided an advantage to distributors implementing advice in vertically integrated businesses.

ASIC’s response

At RG 274.202 we have retained our guidance that a financial adviser should consider the TMD for a financial product in

providing compliant personal advice and meeting their best interests duty. Most respondents were supportive of this approach.

Implementing personal advice

In RG 274.204–RG 274.206, we have included further guidance on s996E(6), a provision that is intended to facilitate the implementation of personal advice by a non-associated distributor.

Providing information to issuers

145 In [CP 325](#), we did not propose to provide specific guidance on the practical aspects of the relationship between the issuer and the distributor regarding information exchange. However, we sought feedback on whether guidance should be provided on:

- (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.

146 We also sought feedback on whether there are other considerations that need to be taken into account in the collection and exchange of information between an issuer and a distributor.

Stakeholder feedback

147 Most respondents were supportive of our principles-based approach and agreed that less prescriptive guidance on arrangements between issuers and distributors would allow both the issuer and distributor to design the terms of their arrangement in a way that will be most appropriate in the circumstances.

148 Some respondents submitted that guidance should be expanded to provide some standardisation of the nature, format and transmission of information from distributors to issuers. One respondent noted that without such standardisation, distributors may receive many requests for different information requirements and the process may become time consuming and onerous, particularly for distribution channels that may support the same type of product across multiple issuers.

149 Another respondent also considered that guidance should be provided on the information requirements that should be set out within an agreement between the issuer and the distributor, as this would provide a central point of agreement that clarifies the obligations of each party. However, the respondent did not consider a need for guidance to be provided on the format

of the information exchange or on the mode of delivery and communication of information.

ASIC's response

We agree that some degree of standardisation may be useful for logistical issues that industry identifies. Industry is best placed to determine what degree of standardisation will benefit it and enable it to best meet requirements as part of the design and distribution obligations.

E Feedback on our administration of the design and distribution obligations

Key points

This section outlines the feedback received on our proposed guidance on our administration of the design and distribution obligations.

Specifically, the feedback from respondents related to the interaction with disclosure relief and relief from the design and distribution obligations.

Interaction with disclosure relief

- 150 In [CP 325](#), we proposed 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 would consider whether to grant relief from the design and distribution obligations as a separate matter to our consideration of the disclosure relief.

Stakeholder feedback

- 151 Most respondents agreed with our proposed approach.
- 152 One respondent submitted that the principles that underpin relief from disclosure should apply to the design and distribution obligations, and that we should consider whether the proposed approach applies to products currently the subject of disclosure relief, particularly those products that pose minimal potential detriment.

ASIC's response

We have considered the feedback on products that are subject to existing disclosure relief. There are limited circumstances in which we have granted disclosure relief for products through legislative instruments with the result that the design and distribution obligations will not apply.

For the most part, having regard to the circumstances in which this relief is provided, we do not expect to amend the operation of this relief and will consult if this changes. This is particularly the case where the relief is consistent with the legislative intent of the design and distribution obligations. For example, we note that employee share schemes are exempted from the design and distribution obligations and would not expect to amend the operation of the existing employee incentive scheme relief: see [Regulatory Guide 49 Employee incentive schemes](#) (RG 49).

While any relief we give is established under the same principles, the policy applying to the design and distribution obligations is different from the policy applying to the disclosure obligations. Therefore, even if a product has qualified for relief from disclosure, it does not automatically hold that that product will qualify for relief from the design and distribution obligations. In that case, a product's eligibility for exemption from the design and distribution obligations needs to be assessed separately by ASIC from the assessment of disclosure relief.

Appendix: List of non-confidential respondents

- Actuaries Institute
- ANZ
- Association of Financial Advisers Ltd
- Association of Securities and Derivatives Advisers of Australia
- ASX
- Australian Banking Association
- Australian Finance Industry Association
- Australian Institute of Superannuation Trustees
- Australian Retail Credit Association
- Australian Securitisation Forum
- Australian Timeshare and Holiday Ownership Council
- Baker & McKenzie
- Business Council of Co-operatives and Mutuals
- Chi-X Australia Pty Ltd
- Consumer Action Law Centre, Financial Counselling Australia, Financial Rights Legal Centre and CHOICE (joint submission)
- ClearView Wealth Limited
- Customer Owned Banking Association
- Equity Trustees
- FE fundinfo
- Finance Brokers Association of Australia Limited
- Financial Planning Association of Australia
- Financial Services Council
- GAIN Capital Australia Pty Ltd
- IG Markets Limited
- Industry Super Australia
- Insurance Australia Group Limited
- Insurance Council of Australia
- Law Council of Australia
- Legal Aid Commission of New South Wales
- Legal Aid Queensland
- Listed Investment Companies & Trusts Association Ltd
- Mackay, Max
- MSC Trustees
- Mills Oakley
- Morgans Financial Limited
- Mortgage & Finance Association of Australia
- National Insurance Brokers Association
- Pepperstone Group Limited
- Platinum Investment Management Limited
- RACQ Insurance
- Skyjed
- Westpac
- Zurich Financial Services Australia Limited