



DRAFT WORKING DOCUMENT
Australian Government
The Treasury

TSY/AU

INFORMATION NOTE

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Power) Bill 2018

Exposure Draft – July 2018

Following careful consideration of the submissions received in respect of the exposure draft legislation released in December 2017, the Government has released a second exposure draft for consultation. To facilitate submissions, this information note provides a summary of key policy changes made in response to these considerations.

All references are to the *Corporations Act 2001*, unless otherwise specified.

Design and Distribution Obligations and Product Intervention Power

Coverage of Design and Distribution Obligations and Product Intervention Power

Schedule 2, subsections 764A(3), subsections 765A(3) and (4)

These provisions have been added to allow the regimes to cover additional products or exclude products. In particular, the provision that allows the coverage of additional products will allow the Government to act if a financial product is not currently regulated under the *Corporations Act 2001* but is causing, will cause, or is likely to cause significant consumer detriment.

At this stage, the Government is considering using the regulation-making power to allow ASIC to use the product intervention power with respect to:

- funeral expenses insurance;
- certain extended warranties that are functionally equivalent to add-on insurance; and
- short-term credit that is not regulated under the *National Consumer Credit Protection Act 2009* ('Credit Act').

Schedule 1, paragraph 994B(3)(d)

This provision has been amended so that the design and distribution obligations do not apply to fully paid foreign ordinary shares, but applies to unpaid ordinary shares.

Schedule 1, subsection 994B(4)

This provision has been amended so that the design and distribution obligations do not apply to ordinary shares that are convertible to preference shares, as long as there is no intention to convert those shares within 12 months of the date of issue of those shares.

This anti-avoidance mechanism is based on other provisions of the *Corporations Act 2001*.

Product Intervention Power

Schedule 2, section 1023N and section 301N of the Credit Act

These provisions have been amended so that a person subject to an intervention order only has to take 'reasonable steps' to notify retail clients of the order.

Design and Distribution Obligations

Issuer Obligations – Making a Target Market Determination

Schedule 1, paragraph 994B(8)(a)

This provision has been added to clarify that the distribution conditions identified in a target market determination must be such that if followed, they would likely result in the product being distributed to the target market only.

Schedule 1, paragraph 994B(8)(b)

This provision has been amended to clarify that a financial product must 'likely be consistent with the likely objectives, financial situation and needs' of the people in the target market.

This provision has been amended to address concerns that the previous provision required a financial product to meet 'all' of the objectives, financial situation and needs of the target market and issuers to know individual customers.

Schedule 1,

This provision has been added to require issuers to make target market determinations

INFORMATION NOTE

subsection 994B(9) available to the public free of charge.

Distributor Obligations – Scope of Regulated Distribution Activity

Schedule 1,
subsection 994A(1),
definitions of ‘retail
product distribution
conduct’ and ‘dealing’

A new term ‘retail product distribution conduct’ has been defined and the meaning of ‘dealing’ has been narrowed.

The intended effect of these definitional changes is that regulated distribution activity (that is, activity that must be consistent with target market determinations):

- includes providing disclosure documents, providing general advice and dealing;
- does not include secondary sales of financial products, or other variations to or cancellations of financial products; and
- only includes activity with respect to retail clients.

Schedule 1,
subparagraph 994D(c)(ii)

This provision has been added so that where a distributor reasonably concludes that a target market determination is not required for a product, they will not contravene the prohibition against distributing financial products without a target market determination.

This provision has been amended to address concerns that third party distributors might have to second-guess whether an issuer is complying with requirements to make a target market determination.

Schedule 1,
subsections 994E(1)
and (2)

These provisions have been amended/added to clarify that an issuer will not breach their distribution obligations merely because a third party distributor fails to distribute products in a manner consistent with the target market determination.

Distributor Obligations – Personal Advice

Schedule 1,
subsection 766B(3A)

This provision has been added to clarify that the mere asking of information to determine if someone is in a target market and informing them that they are or are not, does not constitute personal advice.

Schedule 1,
subsection 994A(1),
definition of ‘excluded
conduct’,
paragraph 994D(d)
subsections 994E(1)
and (3),
paragraph 994G(b) and
subsection 994J(2)

These provisions have been amended to clarify that personal advisers do not have design or distribution obligations, except with respect to record-keeping (see ‘Record-Keeping’ below).

Distributor Obligations – Non-Target Market Consumers

Schedule 1,
subsection 994E(4)

This provision has been added to clarify that a distributor does not breach requirements to take reasonable steps to distribute in a manner consistent with a target market determination for a product, merely because a consumer who is not in the target market acquires the product.

Issuer and Distributor Obligations – Record-Keeping Requirements

Schedule 1,
paragraph 994B(5)(h)
subsections 994B(6)
and (7), and
subsection 994F(1)

These provisions replace previous provisions which required every regulated distributor of a financial product to keep specified information.

These new provisions require issuers to specify the information that must be kept, who must keep it and, if kept by a third party distributor, how often that information must be provided to the issuer. The issuer must request sufficient information at sufficient frequency so that they can promptly determine if a review of a target market determination should be undertaken and record reasons for this decision.

This amendment has been made in response to concerns about the regulatory burden associated with record-keeping, that it was not clear who must keep what information, and that issuers will not have sufficient information to undertake reviews. The requirement is intended to be scalable and flexible according to the financial product, and result in the necessary information being collected as efficiently as possible.

Schedule 1,
subsections 994F(1) to (4)

Distributors must comply with issuer-determined and complaints record-keeping requirements, and where they are not the issuer, provide records to issuers.

As in the previous exposure draft, issuers and distributors must also comply with regulation-determined record-keeping requirements and keep records of the steps taken to comply with obligations to take reasonable steps to distribute to the target market (see subsections 994F(6) and (7), and paragraph 994F(2)(e)).

Issuer Obligations – Reviews

Schedule 1,
subsections 994C(4), (5)
and (7)

The provisions have been amended so that it is only possible for a civil penalty to apply where an issuer or distributor ought to have known to stop distribution because a review has been triggered (but did not). It also removes the obligations on issuers to notify distributors to cease distribution in these circumstances.

In the previous draft, a criminal penalty could have applied where an issuer or distributor ought to have, but did not know that the requisite circumstances existed.

Schedule 1,
subsections 994C(3)
and (4)

The provisions have been amended so that upon a review being triggered, distribution must stop as soon as practicable or within 10 business days.

In the previous draft, distribution had to cease immediately, allowing limited time to, for example, modify websites.

Issuer and Distributor Obligations – Notification of ASIC

Schedule 1, section 994D

The provision requiring issuers and distributors to notify ASIC if there has been distribution without a target market determination has been removed.

However, there is still an obligation on issuers to report to ASIC significant dealings that are inconsistent with a target market determination (see section 994G).

Issuer and Distributor Obligations – Consequences and Penalties

Schedule 1, section 994M

This provision has been amended to allow consumers to commence a civil action for losses resulting from an issuer's failure to notify, or a distributor failing to stop distributing when notification has occurred, in the event of a review being triggered. This is to be consistent with the availability of a civil action for other wrongful distributions.

In the previous exposure draft, consumers were only able to commence a civil action

INFORMATION NOTE

where a distributor distributed without a target market determination or failed to take reasonable steps to distribute in a manner consistent with a target market determination.

Schedule 1, item 9, table item 290CAC

The criminal penalty for failing to cease distribution where a distributor knows that an issuer has taken steps to inform distributors that distribution should cease has been increased to be consistent with the penalties for other wrongful distributions.

Penalties have been set with reference to analogous provisions in the *Corporations Act 2001*.

Schedule 1, item 9, table item 290CAF

The criminal penalty for failing to notify an issuer of a significant dealing outside the target market has been increased to be consistent with the penalties for other failures to provide information to the issuer.

Penalties have been set with reference to analogous provisions in the *Corporations Act 2001*.

Schedule 1, item 9, table items 290CAG and 290CAH

The criminal penalty for failing to notify ASIC of a significant dealing and for failing to provide ASIC with information on request has been increased to be consistent with analogous provisions in the *Corporations Act 2001*.

Issuer and Distributor Obligations – Transitional Period

Section 2

The application and transitional provisions have been amended such that the obligations will apply to all financial products two years after the legislation receives Royal Assent.

In the previous exposure draft, the obligations applied to new financial products one year after the legislation receives Royal Assent.