

EXPOSURE DRAFT EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations Act 2001

Corporations Amendment (Design and Distribution Obligations) Regulations 2019

Section 1364 of the *Corporations Act 2001* ('the Corporations Act') provides that the Governor-General may make regulations prescribing matters required or permitted by the Corporations Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Corporations Act.

The *Corporations Amendment (Design and Distribution Obligations) Regulations 2019* ('the Regulations') complement the operation of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* ('the Act'). The Act amends the Corporations Act to introduce design and distribution obligations ('the DDO') in relation to financial products. The Act also amends the Corporations Act and the *National Consumer Credit Protection Act 2009* ('the Credit Act') to introduce a product intervention power for ASIC to prevent or respond to significant consumer detriment.

The purpose of the Regulations is to enhance the DDO regime by altering the products and persons in relation to which the DDO regime applies. The amendments:

- extend the DDO to additional persons;
- extend the DDO to additional products; and
- exclude certain products from the DDO.

These Regulations exclude the following products from the DDO regime:

- interests in eligible rollover funds (ERFs);
- defined benefit interests;
- medical indemnity insurance products;
- depository interests in foreign fully paid ordinary shares, being shares in relation to which, if they were offered directly to retail clients, the DDO obligations in the Act would not apply;
- bank drafts (and money orders issued by or for Australia Post);
- credit facilities not issued in the course of a business of providing credit;
- credit provided for business purposes;
- certain 'credit facilities' that do not involve the provision of credit;
- credit provided by pawnbrokers;
- the provision of a mortgage (as distinct from the credit contract secured by the mortgage); and

- financial products not received in this jurisdiction that are not already excluded from the DDO.

These Regulations extend the DDO regime so that it applies in relation to the following products:

- simple corporate bonds depository interests in simple corporate bonds, where the simple corporate bonds are, or are to be, issued under a 2 part simple corporate bonds prospectus;
- debentures of a body that is an ADI (authorised deposit-taking institution) or registered under section 21 of the *Life Insurance Act 1995*;
- basic banking products;
- custodial arrangements that are not already subject to the new regime, including an interest in an investor directed portfolio service (IDPS); and
- products sold in certain situations where the DDO could be avoided.

The Regulations extend the DDO to additional persons in situations where the DDO could be avoided by those persons. The regulations also extend the DDO to certain distributors of financial products where the product is currently not subject to the DDO. Both of these measures ensure that the DDO operates as intended.

The Regulations commence on the later of the day after registration of these Regulations or the commencement of the DDO amendments in the Act (which commence on 5 April 2021, two years after the Act received Royal Assent).

The Corporations Act does not specify any conditions that need to be met before the power to make regulations may be exercised.

Public consultation was undertaken on an earlier version of proposed regulations from 23 October 2018 to 13 November 2018. These revised regulations reflect parliamentary amendments incorporated into the Act which extended both the DDO and product intervention powers to cover additional financial products regulated under the *Australian Securities and Investments Commission Act 2001* ('the ASIC Act').

Details of the Regulations are set out in the [Attachment](#).

ATTACHMENT

Details of the Corporations Amendment (Design and Distribution Obligations) Regulations 2019

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Corporations Amendment (Design and Distribution Obligations) Regulations 2019* ('the Regulations').

All references in this Attachment relate to the Regulations unless stated otherwise.

Section 2 – Commencement

The Regulations commence on the later of the day after the Regulations are registered, or the day on which Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* ('the Act') commences. Schedule 1 to the Act commences on 5 April 2021, being the day after the end of the period of 2 years beginning on the day the Act received the Royal Assent.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001* ('the Corporations Act'). Note that these regulations may be made prior to the commencement of Schedule 1 to the Act in reliance on section 4 of the *Acts Interpretation Act 1901*.

Section 4 – Schedules

Schedule 1 – Amendments

Item 1

Item 1 of Schedule 1 makes amendments to the *Corporations Regulations 2001* (the Corporations Regulations). It inserts a new Part 7.8A into the Corporations Regulations which includes provisions that are related to the design and distribution obligations (DDO) regime in Part 7.8A of the Corporations Act, which will be inserted into the Corporations Act when Schedule 1 to the Act commences.

Item 1, Regulation 7.8A.01 – Definitions

The Regulations insert new definitions for the purposes of the new Part 7.8A of the Corporations Regulations. They provide that:

- 'credit' has the same meaning as in subregulation 2B(3) of the *Australian Securities and Investments Commission Regulations 2001* ('the ASIC Regulations');
- 'credit facility' has the same meaning as in subregulation 2B(1) of the ASIC Regulations; and
- 'extended operation financial product' means a financial product covered by paragraph 994AA(1)(b) of the Act.¹ That paragraph extends the DDO beyond financial products regulated under the Corporations Act to those that are regulated under the *Australian Securities and Investments Commission Act 2001* ('the ASIC Act'), including credit products.

Item 1, Regulation 7.8A.02 – Additional persons subject to the DDO

The Regulations extend the DDO regime by declaring that certain additional persons are regulated persons for the purposes of paragraph (c) of the definition of regulated

¹ As will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

person in subsection 994A(1) of the Corporations Act.² Regulated persons are subject to the distribution obligations when they engage in ‘retail product distribution conduct’ as defined in subsection 994A of the Corporations Act.³

Sales Amounting to Indirect Issue and Sales Amounting to Off-Market Sales by Controller

The DDO regime applies to primary or initial offerings of financial products to retail clients. They do not apply to trading of products on secondary markets because such trading behaviour does not trigger an obligation to prepare a disclosure document. In some cases, however, the primary issuance of a project can occur through a secondary market via an indirect issue which may trigger the obligations under the DDO regime if they are covered by the provisions relating to indirect issues in the Corporations Act (subsection 1012C(6)).

For the avoidance of doubt, the Regulations make changes to ensure the DDO regime applies as intended to indirect issues or indirect off-market sales by a controller. The DDO regime generally applies to offers of products that require disclosure to retail clients. Sales of products in situations that could avoid disclosure are also covered so that the regime cannot be avoided. The Regulations make two changes to ensure that such sale situations are covered by the regime. First, the Regulations declare that the obligation to make a target market determination applies in relation to financial products sold in these circumstances that are intended to be subject to the DDO. That declaration is described further below in the explanatory material for Item 1, Regulation 7.8A.03 of the Regulations. Second, the Regulations prescribe the two following additional categories of regulated person to ensure that persons involved in such sales are subject to the distribution obligations under the DDO regime:

- the offeror of the financial product, if the sale would have taken place in the circumstances described in subsection 1012C(6) of the Corporations Act but for a voluntary issue of a Product Disclosure Statement or a document purporting to be a Product Disclosure Statement; (Schedule 1, item 1, subregulation 7.8A.02(2))
- the offeror of the financial product, if the sale would have taken place in the circumstances described in subsection 1012C(8) of the Corporations Act but for a voluntary issue of a Product Disclosure Statement or a document purporting to be a Product Disclosure Statement. (Schedule 1, item 1, subregulation 7.8A.02(3))

Product Distributors

The Regulations declare authorised distributors of basic bank deposit products and risk insurance products (which comprise general insurance and bundled consumer credit insurance⁴ products) to be regulated persons for the purposes of the DDO

² As will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

³ As will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

⁴ A bundled consumer credit insurance product is defined in the *ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682* as a facility that is a consumer credit insurance product, as defined by regulation 7.1.15 of the Corporations Regulations, and constitutes both a general life insurance product and a life risk insurance product. This is consistent with the definition of such products used in ASIC orders.

regime. This means that the distribution obligations in the DDO regime will extend to these distributors. (Schedule 1, item 1, subregulation 7.8A.02(4))

The term ‘product distributor’ is used in the Regulations to describe the distributors affected by this extension of the DDO regime. ‘Product distributor’ is defined in section 910A of the Corporations Act as modified by the *ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682*, as in force from time to time. That instrument provides relief to these distributors, so that they do not need to comply with the administrative requirements of the authorised representative regime.

Because of this relief, the distribution obligations in the DDO regime would not apply to these distributors in the absence of the Regulations. Specifically, the distribution obligations apply to ‘regulated persons’, which is defined to include ‘authorised representatives’.⁵ However, ‘product distributors’ are not ‘authorised representatives’ due to the relief provided by the specified ASIC instrument. As such, the amendments made by the Regulations are necessary to ensure that these distributors are subject to the distribution obligations within the DDO regime.

Credit licensees and representatives

The Regulations extend the definition of regulated person to include credit licensees and credit representatives within the meaning of the Credit Act. (Schedule 1, item 1, paragraphs 7.8A.02(5)(a) and (b))

They also extend the definition of regulated person to a person who is exempt from the obligation to hold a credit licence under section 29 of the Credit Act because of an exemption under sections 109 and 110 of the Credit Act. In relation to exemptions under sections 109 and 110 that relate to a credit activity, the regulations cover a person who engages in the credit activity (within the meaning of section 6 of the Credit Act) on their own behalf. (Schedule 1, item 1, paragraphs 7.8A.02(5)(c) and (d))

They also extend the definition of regulated person to a person who contravenes section 29 of the Credit Act which prohibits a person from engaging in credit activities without a licence authorising the person to engage in the credit activity. (Schedule 1, item 1, paragraph 7.8A.02(5)(e))

These provisions ensure that equivalent distribution obligations apply to credit licensees and credit representatives as apply to Australian Financial Services Licensees and their authorised representatives.

Issuers and sellers of extended operation financial products

The Regulations extend the definition of regulated person to include issuers of extended operation financial products and sellers of extended operation financial products under a regulated sale. This means that a person who issues an extended operation financial product and such sellers of ‘extended operation financial products’

⁵ See paragraph (d) of the definition of regulated person in section 1011B of the Corporations Act, and paragraph (b) of the definition of regulated person in subsection 994A of the Corporations Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

must comply with the distribution obligations when engaging in retail product distribution conduct. (Schedule 1, item 1, subregulation 7.8A.02(6))

Item 1, Regulation 7.8A.03 - Additional products subject to the DDO

The Regulations apply the DDO regime in Part 7.8A of the Corporations Act to the following additional products:

- simple corporate bonds depository interests in simple corporate bonds, where the simple corporate bonds are, or are to be, issued under a two-part simple corporate bonds prospectus ('depository interests in simple corporate bonds');
- debentures of a body that is an ADI or registered under section 21 of the *Life Insurance Act 1995*;
- basic banking products (as defined in the Act);
- investor directed portfolio services (IDPSs);
- custodial arrangements that are not already subject to the new regime; and
- sales of financial products in situations that amount to indirect issue and off-market sales.

A simple corporate bonds depository interest, where the simple corporate bonds are to be issued under a 2-part simple corporate bonds prospectus

The Regulations apply the DDO regime in Part 7.8A of the Corporations Act to simple corporate bonds depository interests, which are defined in section 9 of the Corporations Act. In particular, the Regulations extend the obligation to make a target market determination under Part 7.8A of the Corporations Act to simple corporate bonds depository interests. The issuer of the depository interest must make the target market determination before any person engages in 'retail product distribution conduct'.⁶ (Schedule 1, item 1, item 1 in the table in subregulation 7.8A.03(2))

Simple corporate bonds are bonds that meet the legislative criteria set out in section 713A of the Corporations Act. A depository interest in a simple corporate bond is a beneficial interest in the bond that is issued by the acquirer of the bond (a 'depository nominee') to a retail client, with the permission of the issuer.

Without the amendments made by the Regulations, depository interests in simple corporate bonds would not be subject to the DDO regime. In relation to securities, the DDO regime generally applies to offers of products that require disclosure under Part 6D.2 of the Corporations Act.⁷ However, simple corporate bonds depository interests where the simple corporate bonds were issued under a 2-part simple

⁶ Paragraph 994B(2)(b)(ii) of the Corporations Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

⁷ Section 994B of the Corporations Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

corporate bonds prospectus are excluded from this disclosure regime by paragraph 700(1)(b) of the Corporations Act.

Debentures of a body that is an ADI or registered under section 21 of the Life Insurance Act 1995

The Regulations extend the target market determination obligation to debentures⁸ of a body that is an ADI (authorised deposit-taking institution) within the meaning of the *Banking Act 1959* or a body that is registered under section 21 of the *Life Insurance Act 1995*. The issuer⁹ of the debenture must make the target market determination before any person engages in ‘retail product distribution conduct’.¹⁰ (Schedule 1, item 1, item 2 in the table in subregulation 7.8A.03(2))

Without the amendments made by the Regulations, offers of debentures of a body that is an ADI or registered under section 21 of the *Life Insurance Act 1995* would not be subject to the DDO regime. In relation to securities, the DDO regime generally applies to offers of products that require disclosure under Part 6D.2 of the Corporations Act.¹¹ Offers of these debentures are exempt from needing such disclosure by subsection 708(19) of the Corporations Act.

These obligations are only extended to debentures for which a person would be required to prepare a disclosure document under Part 6D.2 of the Corporations Act if subsection 708(19) of the Corporations Act did not apply.¹² This ensures that the obligations are not extended to wholesale issuances that do not require disclosure to investors.

Basic banking products

The Regulations extend the obligation to make a target market determination to a basic banking product within the meaning of section 961F of the Corporations Act. The issuer of the product must make the target market determination before any person engages in ‘retail product distribution conduct’.¹³ (Schedule 1, item 1, item 3 in the table in subregulation 7.8A.03(2))

⁸ What constitutes a debenture is defined in section 9 of the Corporations Act.

⁹ Issuer has a meaning affected by section 761E of the Corporations Act (see section 761A of the Corporations Act).

¹⁰ Paragraph 994B(2)(b)(ii) of the Corporations Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

¹¹ Section 994B of the Corporations Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

¹² Subsection 708(19) is the carve-out for the requirement to give a disclosure document for ADIs. If it did not apply, wholesale issuances of debentures would avoid the disclosure requirement through other exemptions (e.g. for sophisticated and professional investors), but where the product is issued to retail clients a disclosure document would be required, triggering the requirement to make a target market determination under the Act.

¹³ Subparagraph 994B(2)(b)(ii) of the Corporations Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention*

A basic banking product includes a basic deposit product (which is defined in section 761A of the Corporations Act), a facility for making non-cash payments, a facility for providing traveller's cheques and any other product prescribed by the Corporations Regulations for the purposes of that definition.

Without the amendments made by the Regulations, basic banking products would not be subject to the DDO regime. In relation to financial products which are not securities but are regulated under the Corporations Act, the DDO regime generally applies in relation to products that require disclosure under Part 7.9 of the Corporations Act.¹⁴ Under regulation 7.9.07FA of the Corporations Regulations, such disclosure is not required for most basic banking products when specified conditions are met.

Investor Directed Portfolio Services

The Regulations extend the obligation to make a target market determination to a financial product that consists of the rights of a retail client in connection with an investor-directed portfolio service ('IDPS'). The operator of the IDPS must make the target market determination before any person engages in 'retail product distribution conduct'.¹⁵ (Schedule 1, item 1, item 4 in the table to subregulation 7.8A.03(2))

An IDPS is an unregistered managed investment scheme for holding and dealing with investments selected by investors. In broad terms, it provides custodial, transactional and reporting services where the investor makes all of the investment decisions.

Under this table item platform operators who are regulated persons:

- are not required make a target market determination in relation to financial products offered or available on their platform (unless they are themselves the issuer); however
- they are required to make a target market determination in relation to the platform itself (as the platform is a separate financial product).

Without the amendments made by the Regulations, IDPSs would not generally be subject to DDO regime. In relation to financial products which are not securities but are regulated under the Corporations Act, the DDO regime generally applies in

Powers) Act 2019, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as will be defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

¹⁴ Section 994B of the Corporations Act as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

¹⁵ Paragraph 994B(2)(b)(ii) of the Corporations Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as will be defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

relation to products that require disclosure under Part 7.9 of the Corporations Act.¹⁶ Under ASIC Class Order [CO 13/763], such disclosure is not required in relation to IDPSs when certain conditions are met by IDPS operators.¹⁷

The Regulations identify an IDPS and its operator by reference to the meanings of those terms as set out in ASIC Class Order [CO 13/763], as in force from time to time.¹⁸ This ensures that the obligation to make a target market determination only extends to IDPSs and operators that are covered by the relief from disclosure given by the order. (Schedule 1, item 1, subregulation 7.8A.03(4), definitions of ‘IDPS’ and ‘operator’)

Custodial or Depository Services

The Regulations extend the obligation to make a target market determination to a financial product that includes a custodial or depository service that is provided to a retail client. The issuer of the product must make the target market determination before any person engages in ‘retail product distribution conduct’.¹⁹ (Schedule 1, item 1, item 5 in the table to subregulation 7.8A.03(2))

A custodial or depository service is an arrangement where a provider holds financial products or interests on trust or on behalf of a client or the client’s nominee. A financial product that includes such a service may be anything that meets the definition of a financial product in Division 3 of Part 7.1 of Chapter 7 of the Corporations Act and also includes the provision of those services.

An example of such a product is an arrangement where a provider manages a client’s portfolio of assets on behalf of a retail client on an individual basis at the provider’s discretion. The arrangement would be a financial product as it would fall within the definition of a financial investment in section 763B of the Corporations Act by virtue of the provider using the arrangement to generate a return for the investor; and would include the provision of a custodial or depository services through the terms of the arrangement which allow the provider to hold the assets on the client’s behalf.

The amendments made by the Regulations only extend the DDO regime to financial products that include a custodial or depository service where those products would not otherwise be subject to DDO regime. Such a product would generally not be subject to the DDO regime if it does not require disclosure under Part 7.9 of the Corporations Act, for example, because of ASIC relief from the relevant disclosure obligations.

¹⁶ Section 994B of the Corporations Act as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

¹⁷ IDPSs that do require disclosure are already subject to the DDO and not captured by the regulation (an IDPS may require disclosure because it does not satisfy the terms of the ASIC relief).

¹⁸ The definitions of IDPS and IDPS operator are in subsection 912AD(42) of the Corporations Act as modified by that order.

¹⁹ Paragraph 994B(2)(b)(ii) of the Corporations Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as will be defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

Financial Products Offered by way of Sale Amounting to Indirect Issue and Off-Market Sale by Controller

The Regulations extend the obligation to make a target market determination to ensure that it applies in relation to a financial product that is offered in situations that amount to an indirect issue or off-market sale by a controller as described above in relation to subregulations 7.8A.02(2) and (3) above. The issuer of the product must make the target market determination before: the seller acquires the product in the case of an indirect issue; and before the product is offered to the retail client in the case of an off-market sale by a controller. (Schedule 1, item 1, items 6 and 7 in the table to subregulation 7.8A.03(2))

Exception – products not available in this jurisdiction

Subregulation 7.8A.03(2) only applies in relation to financial products that are available for acquisition by issue or by regulated sale in this jurisdiction. This ensures that the scope of the subregulation is consistent with that of the obligation to make a target market determination under the Act. (Schedule 1, item 1, paragraph 7.8A.03(3)(b))

Under the Act, a target market determination must be prepared for a financial product where, under Part 6D.2 of the Corporations Act, a person is required to prepare a disclosure document for the product, or, under Part 7.9 of the Corporations Act, the person is required to prepare a Product Disclosure Statement for the product. However, the geographical coverage of these obligations is limited to this jurisdiction by subsection 700(4) and section 1011A of the Corporations Act respectively. The obligation to make a target market determination under Regulation 7.8A.02 has the same geographical scope.

Exception – securities offered under a recognised offer in relation to a recognised jurisdiction

Subregulation 7.8A.03(2) does not apply to securities offered under a recognised offer in relation to a recognised jurisdiction. This ensures that the scope of the subregulation is consistent with that of the obligation to make a target market determination under the Act. (Schedule 1, item 1, paragraph 7.8A.03(3)(a))

Recognised offers are exempt from the requirement to make a target market determination under the Act because they are not subject to the requirement in Part 6D.2 of the Corporations Act to prepare a disclosure document or the requirement in Part 7.9 to prepare a Product Disclosure Statement.²⁰ The exemption applies to recognised offers of shares, debentures, and interests in managed investment schemes (or rights, interests or options in them) where the recognised offer is in relation to a recognised jurisdiction. This reflects that such offers are subject to the mutual recognition scheme in Chapter 8 of the Corporations Act.

‘Recognised jurisdiction’, ‘recognised offer’ and ‘securities’ have the meanings given by subsection 1200A(1) of the Act. (Schedule 1, item 1, subregulation 7.8A.03(4), definitions of ‘recognised jurisdiction’, ‘recognised offer’ and ‘securities’)

²⁰ See subsection 1200F(1) of the Corporations Act

Item 1, Regulation 7.8A.04 - Products excluded from the DDO

The Regulations exclude the following financial products from the requirement to make a target market determination under Part 7.8A of the Corporations Act in relation to a financial product. This has the effect that the DDO will not apply to these products.

Eligible Rollover Funds

The Regulations exempt interests in eligible rollover funds (ERFs), as defined in the *Superannuation Industry (Supervision) Act 1993*, from the requirement to make a target market determination under the DDO regime in Part 7.8A of the Corporations Act.²¹ (Schedule 1, item 1, item 1 in the table in regulation 7.8A.04)

Superannuation funds are required by law to nominate an ERF to hold the balances of their lost or ineligible members. ERFs are intended to be a temporary repository for transferred super benefits, with the expectation that members will find their lost superannuation and transfer their balances to their main super account. ERFs are regulated and tend to rely on passive investment strategies with no fees.

Given that ERFs are required by law and operate in circumstances such as where contact has been lost with the account holder (e.g. inactive accounts), it is not necessary to apply the DDO regime in relation to them.

Defined Benefit Interests

The Regulations exempt defined benefit interests, as defined in the *Superannuation Industry (Supervision) Regulations 1994*, from the requirement to provide a target market determination under the DDO regime in Part 7.8A of the Corporations Act.²² This exemption applies in relation to superannuation interests that are defined benefit in nature only. Where a superannuation fund issues both defined benefit interests and other interests, the exemption only applies with respect to the defined benefit interests. (Schedule 1, item 1, item 2 in the table in regulation 7.8A.04)

A defined benefit interest is defined in regulation 1.03AA of the *Superannuation Industry (Supervision) Regulations 1994* as: a superannuation interest where benefits are payable by reference to salary, specified amounts or specified factors; or an unfunded public sector superannuation scheme with at least one defined benefit member.

Offers of defined benefit interests are only available through employer arrangements. As such, it is unlikely that such interests are inappropriately distributed. It is not necessary to apply the DDO in relation to those interests.

²¹ See subsections 994B(1) and (2) of the Corporations Act as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

²² See subsections 994B(1) and (2) of the Corporations Act as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

Medical Indemnity Insurance

The Regulations exempt medical indemnity insurance products from the requirement to provide a target market determination under the DDO regime in part 7.8A of the Corporations Act.²³ (Schedule 1, item 1, item 3 in the table in regulation 7.8A.04)

A ‘medical indemnity insurance product’ is currently defined in regulation 1.0.02 of the Corporations Regulations. That regulation defines medical indemnity insurance product to mean an arrangement to which the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* applies, under which medical indemnity cover is provided to a medical practitioner as defined in section 4 of that Act or to a registered health professional prescribed under that Act.

Medical indemnity insurance is already subject to an existing regulatory regime and has a target market that is obliged to purchase the product. Therefore, it is not necessary to apply the DDO regime to medical indemnity insurance.

Depository interests in foreign fully paid ordinary shares

The Regulations exempt depository interests in foreign fully paid ordinary shares from the requirement to make a target market determination under the DDO regime in Part 7.8A of the Corporations Act.²⁴ However, the exemption only operates where the requirement (and Part 7.8A of the Corporations Act more generally) would not apply if the shares were offered directly to retail clients. (Schedule 1, item 1, item 4 in the table in regulation 7.8A.04)

Foreign fully paid ordinary shares are already exempt from the DDO. Depository interests in those shares are a means by which foreign shares are held, and so are exempted on the same basis.

Bank drafts and Australia post money orders

The regulations exempt bank drafts, including (but not limited to) a cheque drawn by a financial institution on itself or a cheque drawn by a financial institution on a financial institution other than itself, from the DDO. Similarly, a money order issued as a money order by or for Australia Post is carved out of the DDO. (Schedule 1, item 1, items 5 and 6 in the table in regulation 7.8A.04)

Provision of credit not issued in the course of a business of providing credit

The regulations exempt a credit facility that is not issued in the course of a business that is wholly or partly a business of providing credit. This excludes from the operation of the DDO regime individuals that provide credit for social or family reasons (for example, a parent that lends money to a child) and credit that is merely incidental to the operation of a non-credit business.

²³ See subsections 994B(1) and (2) of the Corporations Act as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

²⁴ See subsections 994B(1) and (2) of the Corporations Act as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

This is necessary given the breadth of the arrangements in the definition of credit facility in the ASIC Regulations. (Schedule 1, item 1, item 7 in the table in regulation 7.8A.04)

Credit provided for business purposes

The regulations exclude from the scope of the DDO a credit facility (within the meaning of the *Australian Securities and Investments Commission Regulations 2001*) under the terms of which the credit is, or must be, applied wholly or predominantly for business purposes. This means that business loans and other credit provided for business purposes are outside of the scope of the DDO. (Schedule 1, item 1, item 8 in the table in regulation 7.8A.04)

Credit facilities that do not involve the provision of credit

Paragraph (b) of the definition of credit in the ASIC Regulations (see subregulation 2B(1)) lists a number of arrangements that fall within the definition of credit and therefore within the definition of a financial product for the purposes of the ASIC Act. This item ensures that these arrangements will only be covered by the DDO when they also fall within paragraph (a) of the definition of credit. That is, the arrangements listed in paragraph (b) must also involve the incurring of a deferred debt or payment of a deferred debt to fall within the scope of the DDO. This is necessary given the breadth of the arrangements listed in paragraph (b) of the definition of credit facility in subregulation 2B(1) of the ASIC Regulations. (Schedule 1, item 1, item 9 in the table in regulation 7.8A.04)

Pawnbroking

The regulations exclude pawnbroking from the scope of the DDO on the basis that the regulation of pawnbroking is the responsibility of States and Territories.

Pawnbroking is defined as a credit facility (within the meaning of the *Australian Securities and Investments Commission Regulations 2001*) that involves the provision of credit by a pawnbroker in the ordinary course of a pawnbroker's business (being a business which is being lawfully conducted by the pawnbroker). (Schedule 1, item 1, item 10 in the table in regulation 7.8A.04)

The provision of a mortgage

The regulations exclude the provision of mortgages from the scope of the DDO. This carve out only extends to the provision of the mortgage itself. For example, where a loan is secured by a mortgage over a property, the loan itself may still be subject to the DDO, however, the mortgage will not be, noting that the mortgage is generally provided by the person taking out the credit (as opposed to the credit provider). (Schedule 1, item 1, item 11 in the table in regulation 7.8A.04)

Extended operation financial products not received in this jurisdiction

The regulations also ensure that the DDO only applies to products if the offer to issue or sell the product is received in this jurisdiction. Table item 12 excludes extended operation financial products where offers are not received in this jurisdiction. This limit already applies to other financial products covered by the DDO, being financial

products requiring disclosure under Chapter 6D.2 and Part 7.9 of the Corporations Act (see subsection 700(4) and section 1011A of the Corporations Act). (Schedule 1, item 1, item 12 in the table in regulation 7.8A.04)