



# **Design and distribution obligations (DDO) and the target market determination (TMD)**

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# Agenda

- Overview of DDO
- Go through the template TMD



## DDO

- DDO is about making sure that financial products are only being offered and sold to an appropriate target market
- Begins 5 October 2021



## Legislation and guidance

- *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* passed on April 2019
- ASIC Regulatory Guide 274, *Product design and distribution obligations*, December 2020
- The Government has announced it intends to make some amendments



# Products subject to DDO

- products that require a PDS or a disclosure document to investors about securities
- credit contracts regulated by the National Credit Code and credit that is not regulated by the Code
- simple corporate bonds and depository interests in simple corporate bonds
- debentures of an ADI or registered life insurance company
- basic banking products (basic deposit products; non-cash payment facilities)
- investor-directed portfolio services
- exchange traded funds
- custodial arrangements that are not already subject to DDO



# Products exempt from DDO

- mySuper products
- margin lending facilities
- fully paid ordinary shares in a company or foreign company (with some exceptions)
- securities under an employee share scheme
- financial products issued or offered for sale by an exempt body or exempt public authority
- interests in eligible rollover funds
- defined benefit interests
- medical indemnity insurance products



## More products exempt from DDO

- depository interests in foreign fully paid ordinary shares, if DDO would not otherwise apply to the shares
- bank drafts (and Australia Post money orders)
- financial products not received in Australia and not already excluded from DDO
- credit facilities not issued in the course of a business of providing credit
- credit provided for business purposes
- some 'credit facilities' that do not involve debt – e.g. consumer lease
- providing a mortgage (but not a credit contract secured by the mortgage)
- credit provided by pawnbrokers



## Existing and new products

- DDO covers any existing products as well as new products
- Legacy products (no longer offered) are not affected





## Who is subject to DDO?

- Product issuers
- Product distributors
- An issuer may be a distributor too, if it distributes its own products



## Who is an issuer?

Any person who issues or sells a regulated product to a retail client, or who is required to prepare a PDS or disclosure document for the product.



# Who is a distributor?

- AFS licensees and authorised representatives
- Credit licensees and credit representatives
- Persons exempt from holding an AFSL or ACL – e.g. referrers, POS exemption for credit
- A distributor subject to *ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682*) for a basic deposit product, a general insurance product, or a bundled consumer credit insurance product.



# What is distribution?

- “Retail product distribution conduct”:
  - dealing in the financial product
  - giving a disclosure document in relation to offering a financial product
  - providing a PDS
  - providing financial product advice



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# Product design obligations



## Design obligations

- Make a publicly available target market determination (TMD)
- Review the TMD as required to ensure it remains appropriate
- Keep records of decisions in relation to DDO
- Notify ASIC of significant dealings in a product that are not consistent with a product's TMD



# Target market determination (TMD)

- In writing, publicly available
- Content:
  - Describe class of retail clients that comprise the target market
  - Conditions and restrictions on retail product distribution conduct
  - Events and circumstances that would reasonably suggest TMD is no longer appropriate
  - Maximum review periods
  - Information needed to promptly determine that TMD may no longer be appropriate, which distributors should provide those kinds of information, and reporting periods for when it should be provided by distributors to issuer



# TMD appropriateness requirements

Reasonable to conclude that:

- Consumer buying the product will be in the target market (if sold as per distribution conditions)
- If consumer is in the target market, the product is likely to be consistent with the likely objectives, financial situation and needs of the consumer.





# Defining the product for the TMD

- Key attributes
- Customisable products – TMD must address if there are different target markets for different forms of the product
- Bundled products – e.g. home cover and contents insurance - TMD can be for separate products, or bundle



## ASIC guidance



- Issuer must describe target market with objective, tangible parameters and with sufficient granularity.
- A TMD based only on a broad objective or preference is unlikely to be sufficient.
- It may be simpler or necessary to define target market as including some classes of consumers and excluding other classes.
- Persons who would not benefit from product should not be included in target market.



## ASIC guidance



- DDO does not require issuer to assess suitability of product for individual consumers, but does require consideration of likely objectives, financial situation and needs of consumers in target market.
- Consider characteristics such as likely common income levels, savings levels and employment status.
- Consumer's life stage may also assist in defining target market.
- Objectives to be considered should include both likely short-term and long-term objectives, financial situations and needs.



## Reviewing the TMD

- Issuers must review the TMD:
  - periodically;
  - in response to review triggers; or
  - when other events or circumstances reasonably suggest that the TMD is no longer appropriate.



## Record keeping

- An issuer must keep complete and accurate records of decisions made in relation to the issuer's TMDs and associated reviews, together with the reasons (and underlying data) for those decisions, for up to seven years.



## Notice to ASIC

- Issuer must notify ASIC of a significant dealing (except excluded dealings) in a financial product that is not consistent with the product's TMD.
- Must notify ASIC in writing as soon as practicable, and in any case within 10 business days after becoming aware.
- 'Significant dealing' is not defined in the legislation.



# ASIC guidance on significant dealing

RG 274.159 We expect that the following factors will be relevant for issuers when determining whether a significant dealing has occurred (these are not intended to be an exhaustive list of potentially relevant factors):

- (a) of those consumers who acquire the product, the proportion of consumers who are **not in the target market**, including the proportion of consumers who are part of a class that has been excluded from the target market acquiring the product;
- (b) the actual or potential **harm to consumers**, including the amount of any financial loss, resulting from consumers who are not in the target market acquiring the product;
- (c) the nature and extent of the **inconsistency of distribution with the TMD** (noting that distribution to a consumer can be either more or less consistent with a target market along a continuous spectrum);
- (d) the proportion of gross **income or premium** obtained from the product in respect of consumers who are not in the target market acquiring the product; and
- (e) the **time period** in which these acquisitions outside the target market occurred.



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# Product distribution obligations





# Distribution obligations

- Not engage in ‘retail product distribution conduct’ (offering, selling, advising, or giving PDS) in relation to a regulated product if a TMD has not been made or may no longer be appropriate
- Take reasonable steps so that retail product distribution conduct is consistent with the TMD
- Collect information specified by the issuer and complaints related to a product and provide to the issuer
- Notify the issuer of any significant dealings in a product that are not consistent with the TMD



## Must have a TMD

- If a TMD has not been made for a product on offer or sale, you must not engage in retail product distribution conduct unless:
  - you have made all reasonable inquiries and after doing so, believe on reasonable grounds that a TMD had been made or it was not required; or
  - giving personal advice or arranging for the purpose of implementing personal advice



## Reasonable steps – consistent with TMD

- Issuer and distributors must take reasonable steps that will (or are reasonably likely to) result in retail product distribution conduct that is consistent with the TMD.



# What are reasonable steps?

- Reasonable steps are steps that (in the circumstances) a person is reasonably able to take that will (or are reasonably likely to) result in retail product distribution conduct that is consistent with the TMD, taking into account all relevant factors, including:
  - **risk**: the likelihood of the distribution being inconsistent with the TMD;
  - **harm**: the nature and degree of harm that might result from the financial product being issued otherwise than in accordance with the TMD; and
  - **mitigation steps**: steps that can be taken to eliminate or minimise the likelihood of the distribution being inconsistent with the TMD and the harm that might result.



# Reasonable steps for distributors

- Factors that ASIC may take into account:
  - compliance with distribution conditions
  - distribution method
  - marketing and promotional materials
  - effectiveness of product governance
  - inappropriate incentives
  - training
  - assessment of whether consumer is in target market



## Reporting

- A distributor of a financial product must notify the issuer of a significant dealing in the product that is not consistent with the product's TMD.
- If a distributor becomes aware of such a dealing, it must notify the issuer in writing as soon as practicable, and in any event within 10 business days after becoming aware.



# Records

- Distributors must keep records of distribution information in relation to products that are currently being issued, for up to seven years.
- 'Distribution information' includes:
  - the number of complaints the distributor receives in relation to the financial product;
  - the steps the distributor has taken to ensure that its distribution is consistent with the TMD;
  - any information that the distributor is required to report to the issuer (for the purpose of prompting a review), as specified in the TMD;
  - the dates on which the distributor reported to the issuer the following:
    - the number of complaints received during a specified reporting period;
    - other information specified in the TMD that the distributor must report; and
    - any significant dealings in the product;
  - the substance of its reporting to the issuer; and
  - any further information prescribed by the Corporations Regulations.



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# Enforcement





## ASIC powers

- Require an issuer or distributor to provide distribution information.
- Require an issuer to provide records relating to the TMD.
- Make stop orders if satisfied that DDO has been contravened: specified conduct must not be engaged in.



# Penalties

- Non-compliance is an offence
- Civil penalties may also apply



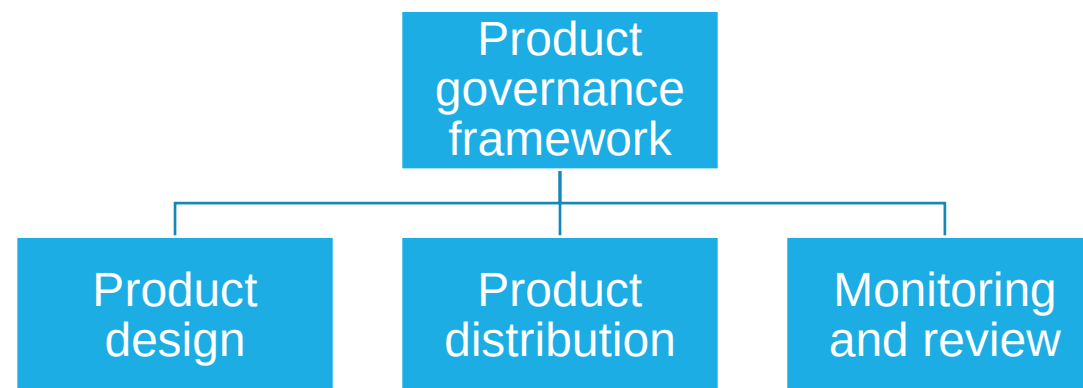
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# Action steps



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# Product governance framework





## Action steps

- Document a product governance framework
- Identify affected products
- For issuers: prepare TMDs for those products
- For distributors: make sure there is a TMD for all products you distribute
- Ensure that information collection and conduct monitoring mechanisms are sufficient to meet DDO
- Review and amend issuer/distributor agreements so that they are consistent with DDO requirements
- Make sure that actions in relation to DDO are properly recorded



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# TMD template



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# Target Market Determination

This document is a target market determination (“TMD”) made by [NAME OF ISSUER] ABN [ABN OF ISSUER] AFSL [AFSL NUMBER OF ISSUER] Australian Credit Licence [ACL NUMBER OF ISSUER] (the “Issuer”), the issuer of the product covered by this TMD (the “Product”). The Issuer is required by section 994B of the *Corporations Act 2001* (Cth) to make this TMD.

This TMD was made or last updated on [DATE].



# 1. Product

Name of the Product: [NAME]

Type of the Product: [TYPE – E.G. PERSONAL LOAN]

Key attributes of the Product:

[LIST THE KEY ATTRIBUTES]





## 2. Target market

The retail clients who comprise the target market for the Product are:

[DESCRIBE]

The likely objectives, financial situation and needs of consumers in the target market for the Product are:

**Objectives: [DESCRIBE]**

**Financial situation: [DESCRIBE]**

**Needs: [DESCRIBE]**

The Product is likely to be consistent with the likely objectives, financial situation and needs of consumers in the target market for the Product because:

[DESCRIBE]



### 3. Distribution

The conditions and restrictions on retail distribution of the Product are:

[DESCRIBE]

These distribution conditions will make it likely that the consumers who acquire the Product are in the target market, because:

[DESCRIBE]



## 4. When this TMD may no longer be appropriate

The events or circumstances that would reasonably suggest that this TMD is no longer appropriate (a “Review Trigger”) are:

[DESCRIBE]



## 5. TMD review periods

After the TMD is made, the first review of the TMD will be made within [NUMBER OF MONTHS] months.

After the first review of the TMD, each following review of the TMD will be made within [NUMBER OF MONTHS] months.

The Issuer will also review the TMD if a Review Trigger has occurred or if any other event or circumstance has occurred that would reasonably suggest that the TMD is no longer appropriate, and the Issuer knows about this event or circumstance. The Issuer will review the TMD within 10 business days after it first knows about the event or circumstance.



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## 6. Complaints reporting

The reporting period for the reporting of information by distributors about the number of complaints about the Product is [MONTHLY OR WEEKLY OR DAILY].



## 7. Information needed by the Issuer

The Issuer needs the information set out below to identify promptly whether a Review Trigger for the TMD has occurred or whether another event or circumstance has occurred that would reasonably suggest that the TMD is no longer appropriate:

[DESCRIBE]

The distributors of the Product who must provide this information to the Issuer (if any) are:

[DESCRIBE]

The reporting periods for when this information should be provided by distributors to the Issuer are:

[DESCRIBE]