



Design and distribution another ASIC enforcement priority

ASIC's product intervention powers have begun to make a real impact on its enforcement activities. We expect that this will continue in the coming 12 months as the regulator ramps up its monitoring of the product design and distribution obligations (DDO) regime.

The DDO regime imposes various requirements on product issuers of financial products to make a "target market determination" (TMD) for a product, disclose the TMD to customers, keep such TMDs under review and notify ASIC of significant dealings inconsistent with the TMD.

In conjunction with the introduction of the DDO regime, ASIC was given a range of enforcement powers, including product intervention powers that permit ASIC to proactively intervene to reduce harm to consumers before a breach occurs. Where a product is determined by ASIC to cause significant detriment to consumers, ASIC is able to issue a stop order and take other action that it considers appropriate. ASIC also has the power to make a stop order to protect consumers from breaches of the DDO obligations.

In July 2022, ASIC issued its first DDO stop orders to prevent the offering of financial products to consumers, in response to deficiencies identified in the TMDs for managed investment scheme interests and shares being issued to retail investors by three financial firms. Throughout 2022, 22 DDO stop orders were issued by ASIC. In December 2022, ASIC launched its first Federal Court proceedings against American Express Australia seeking civil penalties over alleged breaches of

DDO obligations in relation to TMD failings for two credit cards co-branded with retailer David Jones where some consumers were unclear as to whether they had applied for a loyalty card or a credit card.

As ASIC shifts into targeted risk-based surveillance as part of the DDO regime, we anticipate that ASIC will continue to use their product intervention powers and stop order powers in 2023 to enforce compliance with the DDO regime.

Relevantly, ASIC has stated that they will be focusing on defective TMDs, as well as product issuers who have not made TMDs or not made them publicly available. ASIC is also reviewing how product issuers interact with their distributors to confirm they are not straying beyond their target market.

Recommendations

In light of the greater regulatory scrutiny by ASIC, insurers should review any TMDs to ensure that they continue to remain appropriate for the product or updated to align with any changes since the TMDs were first issued as part of the implementation of the DDO regime.

It is critically important that insurers engage with, and monitor, their distribution channels to ensure that they are providing all required information (such as complaints information) in relation to the product and demonstrating a consumer-centric approach to distribution of the product within the parameters of the TMDs.