

Design and distribution obligations

ASIC's top enforcement priority for 2024, with insurers next in line

The design and distribution obligations (DDO) regime came into force in 2021 and ASIC is now moving towards active enforcement of the regime.

2022-2023 has seen ASIC issue 82 interim stop orders for non-compliance with the DDO regime. ASIC's Deputy Chair Karen Chester has confirmed that DDO stop orders have become a "go-to regulatory tool for ASIC to quickly disrupt and stem poor consumer outcomes."

Civil penalty proceedings set to test the DDO regime

2022-2023 has also seen ASIC test the parameters of the DDO regime before the Courts.

In total, four proceedings have been commenced by ASIC against American Express, Firstmac, eToro and Bit Trade. The cases against American Express and Firstmac are set down for trial in March and April 2024 respectively.

These proceedings provide an insight into the types of non-compliance which is likely to trigger a more stringent enforcement response from ASIC.

In these proceedings, ASIC alleges that the product distributors either:

- failed to prepare a target market determination (TMD) for products before distributing them to consumers (Bit Trade);
- adopted too broad a TMD for financial products for the nature of the product (eToro and American Express);
- adopted inadequate investment screening to assess whether potential investors fell within the target market (eToro);
- distributed investment products to persons outside the TMD (Firstmac); and
- failed to review the TMD when becoming aware of circumstances indicating the TMD was not appropriate, for example, high product cancellation rates and market confusion (American Express).

Enforcement ramping up in the insurance industry

In June and July 2023, ASIC issued its first insurance industry interim stop orders for not appropriately defining the target market using objective and tangible parameters that considered the objectives, financial situation and needs of the target market.

July 2023 also saw ASIC write to the Insurance Council of Australia on identified examples of poor DDO compliance practices in the insurance industry.

What will 2024 bring for the DDO regime?

DDO enforcement action has been earmarked as ASIC's top enforcement priority for 2024. ASIC has made clear that it is not shying away from pursuing litigated enforcement against companies flouting legal obligations.

With 2024 going to see the first court judgments testing the breadth of the DDO regime, and the size of penalties for non-compliance, the outcome of these judgments will significantly influence ASIC's future willingness to aggressively and frequently pursue litigated enforcement action.

Recommendations

With multiple examples of non-compliance challenged by ASIC in 2023, it is critically important that insurers continue to review whether their TMDs and distribution/screening channels remain fit-for-purpose.

Consideration should be given to examining whether internal governance, policies, procedures and controls overlaying an insurer's approach to compliance with the DDO regime remain fit for purpose.

Those reviews should have regard to the lessons from ASIC's 2023 enforcement action and the poor practices already flagged by ASIC in its communications to industry.