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NEWS

How will ASIC flex its new product intervention power?

ASIC's newly published approach to administering its product intervention power (PIP) for financial products offered to retail clients provides more flexibility to ASIC and less certainty to industry about when and how ASIC will make a product intervention order.

Funds Management consultant Jeunesse Meldrum says ASIC has continued its 'high-level guidance' approach, which sets no benchmarks or thresholds, so industry will have to wait and see how ASIC flexes its new muscle. In the meantime, Jeunesse shares some observations which may shed a glimmer of light on how ASIC intends to exercise its new power.

WHAT IS THE PRODUCT INTERVENTION POWER?

The PIP means ASIC can make a product intervention order when a financial product (or class of product) has resulted, will result, or is likely to result, in significant consumer detriment.

In 2019, ASIC made a product intervention order in relation to short term credit (currently subject to appeal), and consulted on using PIP to address over-the-counter (OTC) binary options and CFDs and the sale of add-on financial products by car yards.

ASIC's new policy in Regulatory Guide 272—*Product intervention power* (RG 272) is broadly consistent with the approach outlined in its draft regulatory guide released in June 2019 as part of the consultation process.

Please click here for our article providing background information about ASIC's new power.

HOW WILL ASIC EXERCISE ITS NEW POWER?

Here are some observations about how ASIC will exercise its new power.

1. ASIC can make a product intervention order even where there is no breach of the fundraising laws. Whether there has been a breach of the law is not relevant in assessing significant consumer detriment so ASIC can exercise the power even if a person has complied with the disclosure requirements and design and distribution obligations (DDOs) in the Corporations Act.
2. The PIP is not limited to cases where products are inherently harmful nor to new products. ASIC says significant consumer detriment can arise throughout the life cycle of a product and the age of a product is not relevant to whether there would be significant consumer detriment.
3. ASIC may make a market-wide product intervention order even if the practice is not currently relatively widespread on the basis there is a risk the practice will be 'phoenixed' or could be adopted by others.

4. ASIC may order a person to take reasonable steps to notify their existing customers about the terms of the product intervention order.
5. ASIC no longer specifically says it will balance its regulatory objectives when exercising the PIP. The draft regulatory guide referred to ASIC considering, for example, its obligations to improve the performance of the financial system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy and having regard to competition in the financial system. These considerations do not appear in RG 272.
6. ASIC has increased its flexibility in the consultation process. Previously, ASIC said that before making a product intervention order it 'must' consult with persons reasonably likely to be affected by the order. It also said it will set out reasons for its assessment that a significant consumer detriment will, or is likely to, occur. RG 272 now provides ASIC 'proposes to' consult affected persons. There is no mention ASIC will provide reasons for its assessments. Also, the terms of a final order made by ASIC may now be different from the draft version of the order ASIC consulted on.
7. ASIC will not list the type of evidence it will have regard to in assessing products for significant consumer detriment. The nature and type of information gathered and relied on will depend on the circumstances of the case.
8. In determining the appropriate intervention, ASIC will focus on identifying the specific product features, conduct, or other factors that have contributed, or are likely to contribute, to the significant consumer detriment or likely significant consumer detriment. ASIC has shied away from confirming it will specifically consider whether an intervention is likely to inhibit consumer choice, stifle competition between product issuers, or provide an advantage to certain product issuers.
9. ASIC says it is not required to confidentially engage with or notify firms before formally consulting on a proposed product intervention order.
10. And finally, one for our night and weekend warriors—if ASIC's consultation document contains information it says is market sensitive, ASIC will publish the document overnight or on a weekend, when the markets are not trading.

UP NEXT

Watch this space for ASIC's policy on the DDOs which were originally scheduled to commence on 5 April 2021 but have been deferred to 5 October 2021 because of the COVID crisis. ASIC is expected to release this regulatory guidance mid-2020.

For advice or assistance on ASIC's new product intervention power please contact a member of our Funds Management team.

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