

# Insights for funds – shining a light on ASIC focus areas

**Reporting update**  
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## **Financial product issuers to ensure compliance with the design and distribution obligations**

### Highlights

- Deficiencies in target market determinations
- Improving marketing oversight
- Improving breach reporting and remediation
- Greenwashing
- Crypto-asset based products

Consistent with ASIC 2022-23 strategic priorities, there has been an observable increase in surveillance activity by ASIC in the funds sector, focussing on design and distribution obligations, greenwashing and crypto-asset offerings. This Reporting Update provides a summary of the findings from the surveillance.

### Deficiencies in target market determinations

As part of the design and distribution obligations (DDO) which commenced on 5 October 2021 set out by ASIC ([RG274](#)), financial product issuers must prepare a target market determination document (TMD). TMD is a mandatory public document that sets out the class of consumers (target market) a financial product is likely to be appropriate for and other matters relevant to the product's distribution and review.

ASIC has recently issued interim stop orders from offering or distributing products to a number of fund managers/responsible entities largely in relation to breaches of design and distribution obligations (deficiencies in the target market disclosures). To date, deficiencies identified by ASIC include:

- Funds/investment managers/responsible entities have not appropriately considered the product features and risks in determining the target markets for the funds.
- TMDs did not adequately describe the objectives, financial situation and needs of consumers likely to be in the target market in an objective manner. Instead, it primarily focussed on the features of the offer and consumers' understanding of the offer.
- Distribution conditions in the TMDs did not meet the appropriateness requirement under the DDO because these conditions were not specific enough to make it likely for the Funds/Trusts to reach consumers in the target market.

## First civil penalty court case

ASIC has also recently commenced proceedings in the Federal Court in ASIC's first civil penalty case alleging breaches of design and distribution obligations.

ASIC reminds financial product issuers that under DDO, they must define the target markets for their products appropriately, having regard to the risks and features of their products. Issuers also need to consider how their product will reach the target market and have appropriate distribution conditions in place to ensure the product is directed towards the target market.

ASIC is also urging superannuation trustees to review and, if necessary, improve the effectiveness of TMD for their products. They identified some poor practices during a sample review across the various sectors for both accumulation and retirement products.

## Responsible entities' oversight of the marketing to investors

### Improving marketing oversight

An ASIC surveillance identified marketing representations made by some funds were not consistent with regulatory guidance. Areas of concern identified include inadequate warnings or disclaimers about past or future performance, comparing the product to lower-risk products, indices or benchmarks and the downplaying of other risks when promoting fund benefits.

In response to ASIC's observations, some responsible entities have voluntarily amended, or arranged for the investment manager to amend, their marketing materials and/or practices. They also amend their compliance plans to enhance their approval and ongoing supervision of fund marketing.

ASIC reminds responsible entities the need to monitor, supervise and approve the fund's marketing to investors to ensure they are accurate and reliable.

## Insights from the reportable situations regime

### Improving breach reporting and remediation

The reportable situations regime, often referred to as breach reporting, is a cornerstone of the financial services and credit regulatory regimes, and the reports are a critical source of regulatory intelligence for ASIC. The new regime, which applies to Australian Financial Services (AFS) Licensees and Credit Licensees, commenced on 1 October 2021.

ASIC has released its first publication of information lodged under the reportable situations regime for the period between 1 October 2021 and 30 June 2022. Observations identified in the publication include:

- a much smaller proportion of licensees have reported under the regime than anticipated;
- licensees are still taking too long to identify and investigate some breaches;
- more work needs to be done to appropriately identify and report the root cause of breaches; and
- further improvements are needed to licensees' practices towards remediating impacted customers.

The data collected under the regime shows ASIC how the industry is monitoring and responding to non-compliance and highlights where compliance with the regime requires greater regulatory attention. Some actions include ASIC strengthening compliance with the reportable situations regime and engaging with licensees that have failed to remediate a breach on a timely and proactive manner.

## Enforcement action against greenwashing

## ASIC remains concerned that potential investors in crypto-assets may not fully appreciate the risks involved

### Greenwashing

Greenwashing is the practice of making false, misleading or untrue action or set of claims that company products or investment strategies are environmentally friendly, sustainable or ethical.

Consistent with ASIC priority on enforcement action against greenwashing, ASIC has issued infringement notices against an investment manager and superannuation trustee for greenwashing where it alleged that certain product disclosure statements may have been liable to mislead the public.

ASIC's Information Sheet 271 ([INFO 271](#)) provides information about how to avoid greenwashing when offering or promoting sustainability-related products. It includes questions to consider when offering sustainability-related products and encourages voluntary disclosure that is in accordance with the Financial Stability Board's Task Force on Climate-related Financial Disclosures (TCFD) framework.

### Crypto-asset based products

Undertaking surveillance of crypto-asset offerings for potential misleading or deceptive conduct that may result in consumer harm is one of ASIC's strategic priorities in 2022.

Recently, ASIC has commenced civil penalty proceedings in the Federal Court alleging companies:

- making false, misleading or deceptive representations regarding crypto-asset based products; and
- providing unlicensed financial services in relation to crypto-asset based products.

ASIC's Information Sheet 225 ([INFO 225](#)) provides guidance about obligations to consider under the Corporations Act 2001 and the Australian Securities and Investments Commission Act 2001 to businesses involved in crypto-assets.

***"The introduction of the design and distribution obligations (DDO) legislation and the reportable situations regime has given ASIC additional powers and information to monitor and enforce regulations. We expect ASIC will continue to conduct surveillance and identify failings and areas for improvement on these and topical issues such as greenwashing and crypto asset products."***

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## Get in touch

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