ASIC Corporations (Product Intervention Order—contracts for difference) Instrument 2019/<Number>

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2019

[DRAFT ONLY – NOT FOR SIGNATURE]

<signature>

<insert name>

Contents

Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Product Intervention Order—contracts for difference) Instrument 2019<Number>*.

2 Commencement

This instrument commences on the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsection 1023D(3) of the *Corporations Act 2001*.

4 Interpretation

(1) In this instrument:

Act means the *Corporations Act 2001*.

CFD means an arrangement that is an over-the-counter derivative in relation to which the following apply:

(a) the parties to the derivative are:

(i) a person (***CFD issuer***) who carries on a business of offering to issue, and issuing, derivatives of that type to other persons (***holders***); and

(ii) a holder;

(b) the value of the derivative, or the amount of consideration to be provided under the derivative, is ultimately determined, derived from or varies by reference to (wholly or in part) the change, between the acquisition and termination of the derivative, in the amount or value of an underlying specified under the terms of the derivative;

Note 1: For example, a derivative under which, at termination, the amount of consideration payable depends (wholly or in part) on the change in the level of a stock market index over the term of the derivative.

Note 2: There may be other factors that affect the value of the derivative. For example, fees and costs.

(c) the derivative:

(i) does not have a fixed termination date; or

(ii) if the derivative has a fixed termination date—derivatives of that type are typically terminated before the fixed termination date;

Note 1: For example, the derivative may have a fixed termination date if the underlying has a fixed termination date.

Note 2: This means that options, futures, swaps and forward rate agreements will generally not be CFDs.

(d) the holder has the right to terminate the derivative;

Note: The terms of the derivative may provide for its termination in other circumstances. For example, on the occurrence of an event of default or on the CFD issuer exercising a right to terminate the derivative.

(e) on termination, the obligations of the parties are settled in cash or by set-off between the parties.

CFD issuer: see the definition of ***CFD***.

CFD trading account means a trading account that a holder has with a CFD issuer, through which the holder can place orders to acquire and dispose of CFDs.

client money account means, in relation to CFD issuer, an account maintained by the CFD issuer for the purposes of section 981B of the Act.

cryptoasset includes cryptocurrency.

financial product means either of the following:

(a) a financial product (within the meaning of section 761A of the Act);

(b) an ASIC Act financial product (within the meaning of section 1023B of the Act).

general risk warning means a risk warning in the form set out in item 3 of Schedule 1.

holder: see the definition of ***CFD***.

initial margin means the margin which a CFD issuer requires to be provided by a holder in relation to the issue, or proposed issue, of a CFD to the holder.

issuer-specific risk warning means a risk warning in the form set out in item 1 of Schedule 1.

Loss Making Account Percentage has the meaning given by item 5 of Schedule 1.

net equity, in relation to a CFD trading account of a retail client, means the sum of:

(a) derivative retail client money held both:

(i) in a client money account for the benefit of the retail client; and

(ii) in relation to the CFD trading account; and

(b) any other money:

(i) held both:

(A) in the client money account for the benefit of the retail client; and

(B) in relation to the CFD trading account; and

(ii) that was paid into the client money account by the CFD issuer in relation to a dealing in a CFD by the retail client; and

(c) the value of derivative retail client property held for the benefit of the retail client and in relation to the CFD trading account; and

(d) to the extent not referred to in (a) or (b)—the unrealised profits (if any) of the retail client less the unrealised losses (if any) of the retail client for all of the retail client's open CFDs that are connected to the CFD trading account.

Note: The amount referred to in paragraph (d) and the amount of net equity may be negative.

over-the-counter in relation to a derivative, means a derivative that is not able to be traded on a licensed market.

open in relation to a CFD means a CFD that has not been terminated.

short general risk warning means a risk warning in the form set out in item 4 of Schedule 1.

short issuer-specific risk warning means a risk warning in the form set out in item 2 of Schedule 1.

terminated in relation to a derivative includes the derivative being closed out.

underlying means an asset (including a financial product or a cryptoasset), rate (including an interest rate or an exchange rate), index, commodity or other thing.

Note: Unless a contrary intention appears, a term that is defined in section 761A of the Act has the same meaning in this instrument: see sections 761A and 761H of the Act.

(2) For the purposes of this instrument, a reference to offering to issue a derivative includes a reference to inviting an application for the issue of the derivative.

Part 2—Order

5 Conditional prohibition on dealing in CFDs in relation to retail clients

Conditional prohibitions

(1) A CFD issuer must not issue a CFD to a retail client except in accordance with the conditions specified in subsections 7(3) to (15).

(2) A person who carries on a business of arranging for the issue of CFDs must not arrange for the issue of a CFD by a CFD issuer to a retail client except in accordance with the conditions specified in subsections 7(3) to (7).

(3) A person who carries on a business of applying for, or acquiring, CFDs as an agent must not apply for, or acquire, a CFD from a CFD issuer on behalf of a retail client except in accordance with the conditions specified in subsections 7(3) to (7).

(4) A person who carries on a business of arranging for persons to apply for, or acquire, CFDs must not arrange for a retail client to apply for, or acquire, a CFD from a CFD issuer except in accordance with the conditions specified in subsections 7(3) to (7).

Application of conditional prohibitions

(5) Subsections (1) to (4) apply on and from 20 business days after commencement of this instrument.

Note 1: The application of the orders in section 5 is subject to the limitations in section 1023C of the Act.

Note 2: Subject to the Court making an order staying or otherwise affecting the operation of the orders in section 5, the orders will remain in force for 18 months from the day this instrument commences: see subsection 1023G(2) of the Act.

Note 3: The conditions in subsection 7(4), paragraph 7(8)(b) and subsections 7(13) to (15) only apply in relation the issue of, or a dealing in, a CFD that takes place at least 3 months after commencement of this instrument.

6 Prohibition on providing inducements to retail clients in relation to CFDs

Prohibition

(1) A person must not, in the course of carrying on a business, give or offer a prohibited benefit to a retail client or prospective retail client of a CFD issuer.

(2) In this section, a ***prohibited benefit*** in relation to a retail client or prospective retail client of a CFD issuer means a gift, rebate, trading credit or reward that is given or offered as an inducement to the retail client or prospective retail client to do any of the following:

(a) open a CFD trading account with the CFD issuer;

(b) pay the CFD issuer money that is derivative retail client money in relation to a CFD;

(c) give the CFD issuer property that is derivative retail client property in relation to a CFD;

(d) acquire a CFD from the CFD issuer.

(3) Despite subsection (2), neither of the following is a ***prohibited benefit***:

(a) the provision of, or access to, an information service or an educational or research tool;

(b) a gift, rebate, trading credit or reward that is given in relation to any of the matters referred to in paragraphs (2)(a) to (d) to the extent that the matter was done by the retail client before the day that is 20 days after commencement of this instrument.

Application of prohibition

(4) Subsections (1) to (3) apply on and from 20 business days after commencement of this instrument.

Note 1: The application of the order in section 6 is subject to the limitations in section 1023C of the Act.

Note 2: Subject to the Court making an order staying or otherwise affecting the operation of the order in section 6, the order will remain in force for 18 months from the day this instrument commences: see subsection 1023G(2) of the Act.

7 Conditions applying to dealings in CFDs in relation to retail clients

Conditions applying to a CFD issuer that issues a CFD to a retail client

(1) The conditions in subsections (3) to (15) are specified for the purposes of subsection 5(1) in relation to the issue of a CFD to a retail client.

Conditions applying to other persons that deal in a CFD in relation to a retail client

(2) The conditions in subsections (3) to (7) are specified for the purposes of subsections 5(2) to (4) in relation to a dealing in a CFD in relation to a retail client that is referred to in subsections 5(2) to (4).

Leverage and margin restrictions

(3) The terms of the CFD must require the retail client to provide an initial margin of at least:

(a) if the underlying for the CFD is gold or an exchange rate for currencies—5% of the notional value of the CFD at the time of issue; and

(b) if the underlying for the CFD is a stock market index—6.67% of the notional value of the CFD at the time of issue; and

(c) if the underlying for the CFD is a commodity other than gold—10% of the notional value of the CFD at the time of issue; and

(d) if the underlying for the CFDs is a cryptoasset—50% of the notional value of the CFD at the time of issue; and

(e) if the underlying for the CFD is not referred to in paragraphs (a) to (d)—20% of the notional value of the CFD at the time of issue.

Margin close out protection

(4) Subject to subsection (6), the terms of the CFD must provide that if at any time the net equity of the retail client's CFD trading account is less than the aggregate close out protection amount for the retail client's open CFDs that are connected to that account, the CFD issuer must, as soon as market conditions allow, terminate one or more of the following:

(a) the retail client's open CFDs that were issued at least 3 months after the commencement of this instrument;

(b) any other of the retail client's open CFDs that are specified in the terms of the CFD for the purposes of this subsection (4);

until the first to occur of:

(c) the net equity of the retail client's CFD trading account being equal to or greater than the aggregate close out protection amount for the retail client's remaining open CFDs that are connected to that account;

(d) all the following being terminated:

(i) the retail client's open CFDs that were issued at least 3 months after the commencement of this instrument;

(ii) any other of the retail client's open CFDs that are specified in the terms of the CFD for the purposes of this subsection (4).

Note 1: The CFD issuer must do all things necessary to ensure that it acts efficiently, honestly and fairly in terminating open CFDs: paragraph 912A(1)(a) of the Act.

Note 2: Before specifying, in the terms of the CFD for the purposes of this subsection, a CFD (***other CFD***) that was issued earlier than 3 months after commencement of this instrument, the CFD issuer will need to ensure that specifying the other CFD (meaning that the other CFD may be terminated in the circumstances contemplated by subsection (4)) is consistent with the terms of the other CFD.

(5) In subsection (4):

aggregate close out protection amount means, in relation to open CFDs of a retail client, an amount that is at least 50% of the aggregate initial margin required under paragraphs (3)(a) to (e) for those open CFDs.

(6) Subsections (5) and (6) only apply if the issue of, or dealing in, the CFD is at least 3 months after the commencement of this instrument.

Negative balance protection

(7) The terms of the CFD must provide that if the retail client incurs a liability under the CFD, the recourse of the CFD issuer is limited to the following:

(a) derivative retail client money held both:

(i) in a client money account for the benefit of the retail client; and

(ii) in relation to the retail client's CFD trading account;

(b) any other money:

(i) held both:

(A) in the client money account for the benefit of the retail client; and

(B) in relation to the CFD trading account; and

(ii) that was paid into the client money account by the CFD issuer in relation to a dealing in a CFD by the retail client;

(c) derivative retail client property held for the benefit of the retail client and in relation to the CFD trading account.

Risk warnings

(8) Subject to subsections (9) to (11), at the time the CFD issuer issues the CFD, there must be:

(a) an issuer-specific risk warning:

(i) on the front page of the Product Disclosure Statement for the CFD; and

(ii) at or near the start of any current application form (including an online form) for opening a CFD trading account with the CFD issuer; and

(iii) in a prominent position on any webpage maintained by the CFD issuer that relates to CFDs that may be acquired or terminated by a retail client; and

(b) if the CFD is issued at least 3 months after commencement of this instrument—a short issuer-specific risk warning or an issuer-specific risk warning displayed in a prominent position on any CFD trading platform maintained by the CFD issuer and made available for use by its retail clients.

(9) If the CFD issuer has not been issuing CFDs to retail clients for at least 6 months at the time the CFD issuer issues the CFD, subsection (8) applies as if references to:

(a) an issuer-specific risk warning were references to a general risk warning; and

(b) a short issuer-specific risk warning were references to a short general risk warning.

(10) If the CFD issuer has been issuing CFDs to retail clients for between 6 and 7 months at the time the CFD issuer issues the CFD, subsection (8) applies as if references to:

(a) an issuer-specific risk warning were references to a general risk warning or an issuer-specific risk warning; and

(b) a short issuer-specific risk warning were references to a short general risk warning or a short issuer-specific risk warning.

(11) If a document, webpage or trading platform referred to in subsection (8) is in a language other than English, the risk warnings required to be included in the document, webpage or trading platform under subsection (8), (9) or (10) (as the case may be) must be given in that other language.

(12) The CFD issuer must maintain records detailing its calculation of each Loss Making Account Percentage used in an issuer-specific warning or a short issuer-specific warning.

Real time disclosure of total position size

(13) If the CFD is issued at least 3 months after commencement of this instrument, the CFD issuer must, in a prominent position on each CFD trading platform maintained by the CFD issuer and made available for use by the retail client, display to the retail client the total notional value, calculated and updated on a real-time basis, of all of the open CFDs in relation to the retail client's CFD trading account.

Real time disclosure of overnight funding costs

(14) If:

(a) the CFD is issued at least 3 months after commencement of this instrument; and

(b) under the terms of the CFD, a fee is payable by the retail client if the CFD remains open beyond a specified time;

the CFD issuer must, in a prominent position on each CFD trading platform maintained by the CFD issuer and made available for use by the retail client, display to the retail client:

(c) if the fee is determined by reference to a fixed rate—the fee expressed as an annualised rate; and

(d) if the fee is determined by reference to a floating rate—an estimate, calculated and updated on a real-time basis, of the fee expressed as an annualised rate; and

(e) an estimate, calculated and updated on a real-time basis, of the value of the fee expressed in the currency denomination of the CFD.

Note: For example, the terms of the CFD may provide that a fee is payable if the CFD remains open overnight.

Transparent pricing and execution

(15) If the CFD is issued at least 3 months after commencement of this instrument, the CFD issuer must maintain, and make available for download from any webpage it maintains that relates to the prices at which CFDs may be traded by retail clients:

(a) a methodology for pricing CFDs which explains how the CFD issuer determines prices at which CFDs are issued and terminated, including the following:

(i) whether and how the CFD issuer uses independent and externally-verifiable price sources;

(ii) whether and how the CFD issuer applies any spread or mark-up to a price;

(iii) any circumstances in which, if a retail client offers to acquire or terminate a CFD based on a price for the acquisition or termination displayed to the retail client by the CFD issuer:

(A) the retail client may acquire or terminate the CFD at a price that is less favourable to the retail client than the displayed price; or

(B) the CFD issuer may not issue or terminate the CFD at the displayed price;

Note: For example, where the CFD issuer requotes the displayed price following the offer by the retail client.

(iv) how the CFD issuer monitors the effectiveness of the methodology and the fairness of prices at which CFDs are issued and terminated;

(v) how the CFD issuer will notify retail clients of any changes to the methodology;

(vi) any circumstances in which the determination of CFD prices may vary from the methodology; and

(b) a policy that explains how the CFD issuer deals with offers by retail clients to acquire or terminate CFDs and effects CFD transactions, including the following:

(i) a summary of the arrangements the CFD issuer has in place to ensure that the CFD issuer deals with retail clients' offers, and issues and terminates CFDs, efficiently, honestly and fairly;

(ii) the circumstances in which the CFD issuer may reject a retail client's offer or only partially accept a retail client's offer;

(iii) any other factors which may affect whether and how the CFD issuer deals with a retail client's offer or issues or terminates CFDs, for example:

(A) the prevailing market conditions; and

(B) the size and nature of the offer; and

(C) any impact on the market for the underlying that might be expected to result from the CFD issuer accepting the offer;

(iv) the circumstances in which the CFD issuer may terminate a CFD and how the CFD issuer would give effect to such a termination (including the close out of open CFDs in accordance with the terms required under subsection 7(4));

(v) how the CFD issuer monitors the effectiveness of the arrangements described in the policy;

(vi) how the CFD issuer will notify retail clients of any changes to the policy;

(vii) any circumstances in which the CFD issuer's handling of CFD orders may vary from the policy.

8 CFD issuers to notify retail clients of the product intervention order

A CFD issuer that has issued a CFD to a retail client in the period of 12 months before commencement of this instrument must take reasonable steps to notify each such retail client of the terms of this instrument as soon as practicable and in any case within 5 business days after commencement of this instrument.

Schedule 1—Risk warnings

1 Issuer-specific risk warning

CFDs are complex financial products and come with a high risk of losing money. ***[Loss Making Account Percentage in relation to the issue of the CFD referred to in subsection 7(8)]*% of retail client accounts lose money trading CFDs with this provider.** You should consider whether you can afford to take the high risk of losing your money.

2 Short issuer-specific risk warning

***[Loss Making Account Percentage in relation to the issue of the CFD referred to in subsection 7(8)]*% of retail client accounts lose money trading CFDs with this provider.** You should consider whether you can afford to take the high risk of losing your money.

3 General risk warning

CFDs are complex financial products and come with a high risk of losing money. **Most retail client accounts lose money trading CFDs.** You should consider whether you can afford to take the high risk of losing your money.

4 Short general risk warning

Most retail client accounts lose money trading CFDs. You should consider whether you can afford to take the high risk of losing your money.

5 Definitions

In this Schedule:

applicable 12 month period means, in relation to the issue of a CFD by a CFD issuer, a period of 12 months that:

(a) is determined by the CFD issuer; and

(b) ends no earlier than 3 months before the issue of the CFD.

Loss Making Account Percentage means, in relation to the issue of a CFD by a CFD issuer, the percentage of CFD trading accounts held by retail clients of the CFD issuer that lost money over the applicable 12 month period, where:

(a) a CFD trading account of a retail client is taken to have lost money if the following amount is negative:

  (i) all profits realised by the retail client during the 12 month period on CFDs connected to the CFD trading account; plus

  (ii) all unrealised profits of the retail client on CFDs connected to the CFD trading account as at the end of the 12 month period; less

  (iii) all losses realised by the retail client during the 12 month period on CFDs connected to the CFD trading account; less

  (iv) all unrealised losses of the retail client on CFDs connected to the CFD trading account as at the end of the 12 month period; and

(b) any costs (including all charges, fees and commissions) relating to the CFDs connected to the CFD trading account that are paid or payable by the retail client are to be included as losses for the purposes of the calculation in paragraph (a); and

(c) any CFD trading account that did not have an open CFD connected to it during the 12 month period is not to be taken into account when determining the percentage of CFD trading accounts that lost money.