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Monday, 30 September 2019

OTC Intermediary Compliance
Market Supervision
Australian Securities & Investment Commission
Level 7, 120 Collins Street
Melbourne VIC 3000

BY EMAIL: Market.Supervision.OTC@asic.gov.au

RE: OANDA AUSTRALIA PTY LTD RESPONSE TO CONSULTATION PAPER 322

1. On behalf of Oanda Australia Pty Ltd ("**Oanda, we, our**"), we wish to express our appreciation at being given the opportunity to provide feedback in relation to Consultation Paper 322: OTC binary options and CFDs ("**Consultation Paper**").

2. Oanda is an issuer of OTC Contract for Difference ("**CFDs**") and margin foreign exchange contracts based in Sydney, Australia. Oanda is an Australian Financial Services ("**AFS**") Licensee (No. 412981) and is authorised by the Australian Securities and Investments Commission ("**ASIC**") to (inter alia) provide general advice, dealing in and making a market for foreign exchange contracts and derivatives to retail and wholesale clients.

3. Oanda supports efforts to enhance consumer protections. The Consultation Paper indicates that the products we provide will be subject to product intervention. Therefore, we wish to put forward a practical view of ASIC's proposals as set out in the Consultation Paper.

4. Oanda has not elected to respond to every area in which ASIC is seeking a response. Instead, we have limited our response to areas we believe we can provide meaningful feedback and where we consider further clarification is needed for proper implementation of the Consultation Paper throughout the industry.

5. **Response to Proposal and Questions**

   F1Q1 Do you agree with our proposal to make a market-wide product intervention order which imposes Conditions 1-8 on the issue and distribution of CFDs to retail clients?

   a. **Condition 1**

      i. **Proposed Leverage Ratio**

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We believe ASIC should consider increasing the proposed leverage ratio of 20:1 for CFDs over currency pairs given key jurisdictions in the CFD market currently provide higher levels of leverage. Failing to align with other jurisdictions (as further articulated below) will allow for regulatory arbitrage. As stated in the Consultation Paper, the European Securities and Markets Authority distinguished between major and non-major currency pairs, gold and major indices, stating the former holds a 30:1 minimum ratio leverage while the latter is 20:1. Cyprus has a leverage ratio of 50:1; while CFTC and the National Futures Association in the United States has granted a leverage ratio of 50:1 for major currency pairs; and 20:1 for other currency pairs. In the United Kingdom, the Financial Conduct Authority has provided CFD issuers with a leverage ratio of 30:1 for CFDs referencing certain government bonds.

ASIC's response to potential regulatory arbitrage highlights issues already facing Australia in regard to retail clients being relabelled as wholesale clients, thus resulting in clients having reduced protections and international regulations amounting to Australia acting as the current loophole for CFD issuers in other jurisdictions. However, if ASIC's proposed instruments are implemented in their current form, Australia's CFD issuers will look to other jurisdictions to be licensed and operate under in order to avoid revenue and product loss. This may cause financial detriment for the Australian financial system and to Australian clients as they will not be receiving products from institutions regulated by Australian authorities and thus clients will not have the same rights, complaint or dispute resolution mechanisms as they do currently. Further, Australian clients will look to go offshore to countries with no leverage restrictions or may move their business to the United Kingdom, Cyprus or the USA with higher leverage available to them. This creates further detriment to the Australian economy and Australian CFD issuers' ability to operate in Australia.

ii. Attachment 2 of CP 322: Draft Instruments

Further, Attachment 2 of CP 322: Draft Instruments, does not provide a clear provision in relation to clients that still have a position open under a CFD when the new instruments take effect. Thus, CFD issuers are not clear on their requirements for previously issued products.

Oanda seeks clarification on:

- whether the existing CFD terms (in particular leverage) will remain applicable for these open positions;
- the CFD will be required to be amended to apply the new lower leverage ratio; or
- whether the position will have to be immediately closed.

Oanda's interpretation of the current drafting is that ASIC seeks to implement the first option. However, if it is option 2 or 3, Oanda is of the view that this has the potential to result in a forced margin closeout event and thus, amount to a serious detriment for the client. The ambiguity of this provision in its current form will result in CFD issuers implementing this in differing ways resulting in further arbitrage opportunities for clients.

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Oanda proposes ASIC should provide clarity in regard to Condition 1.

Oanda's recommendation is that:

i. that all current positions remain at the higher current leverage levels until closeout; and
ii. all new positions are at the new lower leverage levels from 20 days after ordered intervention.

Clearly stating this position on grandfathering in the instrument, will allow the client to be better protected while allowing for operational ease for CFD issuers.

We note that this position is in line with the position taken by the Financial Conduct Authority in the United Kingdom for similar product intervention measures that it implemented.

F1Q2 Do you agree with Condition 2 or would it be better for clients (and operationally easier) if the CFD issuer is required to close all of the retail client's open CFD positions?

It is our view that CFD issuers should be required to close out all open positions when the instrument is introduced. ASIC's proposed condition requires "one or more of a retail client's open CFD positions" to be closed if the retail client's funds in their CFD trading account falls to less than 50% of their total initial margin required for all of their open CFD positions on that account," allows CFD issuers to have a level of discretion. As a result, Oanda proposes that any doubt for retail clients should be removed by requiring all open positions to be closed if the account falls below the 50% requirement. This will avoid positions being closed on the basis of trade performance or on a first-in, first-out ("FIFO") basis. We are of the view that any level of discretion could lead to winning trades being closed and losing trades remaining open and ultimately increasing losses or amounting to greater detriment to clients.

Kind Regards,

Anthony Griffin on behalf of Oanda Australia Pty Ltd
Managing Director
Oanda Australia Pty Ltd