

3 December 2021

Retail Complex Products and Investor Protection
Market Supervision
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: market.supervision.otc@asic.gov.au

Dear Sir/Madam

RE: CONSULTATION PAPER 348 - EXTENSION OF THE CFD PRODUCT INTERVENTION ORDER

Eightcap Pty Ltd (Eightcap, we, our, us) appreciate the opportunity to comment on the proposals on the Australian Securities and Investments Commission Consultation Paper 348 – Extension of the CFD Product Intervention Order.

D1Q1. Do you agree with our proposal to extend the CFD Order so that it would remain in force until revoked? If not, why not? Should the CFD Order instead be extended for a set period of three or five years until 1 April 2031 (when the Product Intervention Order sunsets)?

We do not agree with ASIC's proposal to extend the CFD Order in its current form. This is because we believe that the CFD Order has (on balance) had a negative impact on retail clients in Australia. Furthermore, since the commencement of the CFD Order, alternative investor protections such as the design and distribution obligations¹, and the anti-hawking restrictions² have come into force, which we believe more adequately address the consumer protection concerns that ASIC have in respect of CFD products. These regimes appear to be a more targeted method of mitigating against mis-selling by requiring products to be distributed only to those within a precisely defined target market, and preventing the unsolicited approach of vulnerable investors.

While some aspects of the CFD Order are broadly seen to be positive (i.e. negative balance protection, margin stop outs), these were already a standard feature of the product offering of most CFD providers. Others (in particular the leverage component of the CFD Order), have materially changed the design of the CFD product we offer our clients. We consider this almost contradictory to the consumer-centric aim of the design and distribution rules, which require issuers to design financial products that are *"likely to be consistent with the likely objectives, financial situation and needs of the consumers for who they are intended"*.

The industry has seen continued (and increasing) demand for higher leverage options and has driven retail consumers to either seek out unregulated entities or providers based in offshore

¹ *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019.*

² *Financial Sector Reform (Hayne Royal Commission Response) Act 2020.*

jurisdictions to trade unrestricted CFDs, losing regulatory protection entirely, or opt-up to become a wholesale client, resulting in fewer investor protections.

If a further extension is required, it should be proportionate to the time required to conduct a comprehensive study on the impact of the CFD Order. Under the circumstances we believe that a period of 3-6 months is appropriate. This should represent an adequate timeframe in which to examine the performance of the CFD Order thoroughly. The objective should then be to either remove the CFD Order or ameliorate the offending parts of the CFD Order that represent additional risk for retail clients. We would be supportive of making those elements that truly meet the consumer protection objective (such as negative balance protection and margin stop-outs) permanent by instituting them to Australian law.

In the event the order is extended, in our view it is necessary that an 'experienced' retail client category carveout be introduced which allows retail consumers with 12 months CFD trading experience to trade at higher leverage levels than inexperienced clients. This will allow providers to differentiate between levels of knowledge, experience, and wealth among retail clients. It is our view that retail clients who understand trading risks should be able to access higher leverage. Such clients would continue to benefit from the additional protections retail clients are afforded, which they would lose if they became a wholesale client or traded with an offshore provider. We propose in respect of this carveout that experienced retail clients should receive up to 200:1 leverage for the least volatile assets (e.g. major FX pairs).

It should be noted that ESMA's equivalent power to introduce product intervention measures is for a period of three months³. Before the end of the three months, ESMA must review the product intervention measures and consider the need to extend them for a further three months. Whilst we appreciate that these ESMA powers are designed to be temporary in nature, we consider this shorter timeframe to be a more proportionate approach.

D1Q2. In your view, has the CFD Order been effective to date in reducing the risk of significant detriment to retail clients? Please provide evidence and data in support of your view where possible.

We do not believe the CFD Order has been effective. Instead, the CFD Order has inadvertently increased the risk of significant detriment to retail clients. As foreshadowed in the lead up to its introduction, the CFD Order has encouraged negative outcomes by requiring retail clients to either lose the retail protections or use offshore platforms. We estimate that as many as 1 in 3 Australian traders are conducting part or all their trading activity using offshore platforms. Prior to the CFD Order, it was virtually unheard of for an Australian trader to seek the services of an offshore platform.

D1Q3. For CFD issuers and distributors, if the CFD Order is not extended, would you change your business model and what costs would that incur?

³ <https://www.esma.europa.eu/policy-activities/mifid-ii-and-investor-protection/product-intervention>

Our business model (i.e., the way we derive our income) would not change. The expiration of the order would, however, result in a return to growth for the Australian arm of our global business and better outcomes for retail clients more generally. Any associated costs would not be material.

D1Q4. For CFD issuers and distributors, what impact has the CFD Order had on your business? What ongoing impact to your business would you expect if the CFD Order is extended?

The CFD Order has materially diminished the appeal of our product. Since its commencement, we have seen an 80% reduction in revenue over a 7-month period from April 2021. As Australian clients continue to use the services of offshore platforms, and overseas investors no longer see Australia as a viable jurisdiction, we anticipate that the revenue will continue to decline at a rate of 5% per year.

D1Q5. If the CFD Order is extended, what annual ongoing costs do you anticipate you would incur? What other costs do you anticipate you would incur?

With the implementation costs associated with the CFD Order already absorbed, the costs associated costs of maintaining compliance with the CFD Order we estimate to be approximately 10,000 to 15,000 AUD per month in staffing and technical requirements.

D1Q6. For retail clients of CFD issuers, has the CFD Order changed your trading?

Not Applicable.

D1Q7. What effects (if any) do you consider the CFD Order has had on competition in the financial system? What effects are likely if the CFD Order is extended?

The CFD Order has materially changed the design of the product that we provide. This has created a situation where a large number of platforms are competing for a smaller number of clients. While this may – in theory - be considered a boon for competition, it is decidedly negative in the longer term with competition likely to dramatically reduce resulting in more Australian traders using offshore trading platforms.

Conclusion

We maintain that the net impact of the CFD Order has been overtly negative for the OTC derivatives sector and, more importantly, Australian traders. At its essence, the perceived success of the CFD Order is contingent on the reclassification and relocation of clients and, as such, the conclusions prematurely reached by ASIC are in our view, deeply flawed.

ASIC's analysis to support the extension is informed by the use of limited data, gathered over a very short 3-month period. It fails to consider, or adjust for, the negative impact of the use of offshore platforms, and the re-categorization of retail to wholesale clients. It is wholly unsurprising that there has been a significant reduction in client losses, and trading activity more generally. This reduction should not be confused with a reduction in negative outcomes for consumers.

Furthermore, it is reasonable to conclude that this limited data set used has positively impacted ASIC's regression analysis. Under the circumstances, it is also important that ASIC provides transparency in relation to the model and methodology used in its analysis.

It is our view that data taken from a period of (at least) 12-months is used to properly assess the merits of the CFD Order. Furthermore, the analysis should be objective, and designed to properly consider the broader impact of the order.

Should you have any questions, feel free to call or email.

Yours faithfully



Joel Murphy
Chief Executive Officer
Eightcap Pty Ltd