



**ASIC**  
Australian Securities &  
Investments Commission

**REPORT 736**

# **Response to submissions on CP 362 Extension of the binary options product intervention order**

September 2022

## **About this report**

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 362](#) *Extension of the binary options product intervention order* (CP 362) and details our responses to those issues.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy.

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## A Overview

### Background

- 1 In April 2021, we made [ASIC Corporations \(Product Intervention Order—Binary Options\) Instrument 2021/240](#) (Binary Options Order), a product intervention order prohibiting the issue and distribution of over-the-counter (OTC) binary options to retail clients. We made the instrument after finding that binary options were resulting in, and were likely to result in, significant detriment to retail clients. The Binary Options Order became effective on 3 May 2021 (Effective Date).
- 2 In [Consultation Paper 362 Extension of the binary options product intervention order](#) (CP 362), we summarised our analysis of the impact of our Binary Options Order and consulted on our proposal to extend it so that it will remain in force until it is revoked or sunsets on 1 October 2031.
- 3 Unless the Binary Options Order is extended, it will lapse on 7 October 2022. We can extend the Binary Options Order for a period of time, or until it is revoked, by declaration in a legislative instrument with the approval of the Minister.

### Assessing the impact of the Binary Options Order

- 4 In [CP 362](#), we set out our analysis of data obtained from five Australian financial services (AFS) licensees that had issued binary options to retail clients over a 21-month period. The period spanned approximately 13 months before and eight months after the Effective Date. One of the licensees did not issue any binary options during this period.
- 5 We explained that we considered that the Binary Options Order was operating efficiently and effectively to reduce the risk of significant detriment to retail clients resulting from binary options.

#### Significant losses before the Binary Options Order

- 6 Before the Effective Date, we observed that retail clients incurred significant aggregate net losses trading binary options. In total:
  - (a) between 74% and 77% of active retail clients lost money trading binary options in each quarter between April 2020 and the Effective Date (Prior Period);

- (b) in aggregate, retail client accounts made net losses of \$14 million in the Prior Period; and
- (c) loss-making retail client accounts made net losses totalling \$15.7 million in the Prior Period, compared with \$1.74 million total net profits of profit-making retail client accounts.

### **No retail trading of binary options after the Effective Date**

- 7 One issuer informed us that in error it issued eight binary options to one retail client on 3 May 2021. These contracts were voided and the consideration was returned to the client. We excluded these transactions from our analysis.
- 8 No other issuers reported issuing any binary options to retail clients in the period from the Effective Date to 31 December 2021 (Effective Period).
- 9 As a result of the Binary Options Order, there were no losses (or profits) for any retail client from trading binary options after the Effective Date.

### **Wholesale client losses**

- 10 The Binary Options Order does not apply to wholesale clients.
- 11 A small number of wholesale clients made significant losses in the Prior Period, with more wholesale clients making a loss than a profit. This continued after the Effective Date where, on average, 68% of wholesale client accounts made a loss in each of the two full quarters after the Effective Date.
- 12 Very few retail clients were reclassified by the AFS licensees as wholesale clients. The quarterly average of active wholesale clients in the full four quarters before the Effective Date was 45, compared with a quarterly average of 114 active wholesale clients in the two full quarters after the Effective Date. The quarterly average number of active wholesale clients over the full two quarters after the Effective Date was 5% of the quarterly average number of active retail clients over the full four quarters before the Effective Date.

## **Responses to consultation**

- 13 We received three submissions to [CP 362](#)—from IG Australia Pty Ltd (IG) (a contracts-for-difference (CFD) issuer, securities dealer and former binary options issuer), consumer advocate CHOICE and the Law Council of Australia (Law Council). We are grateful to respondents for taking the time to send us their comments.

- 14 The submissions are available on the [CP 362](#) page on the ASIC website. We did not receive any confidential submissions. This report summarises the key issues raised in the submissions received and our responses to those issues. It is not meant to be a comprehensive summary of all responses received.
- 15 In summary, the submissions were supportive of our proposal to extend the Binary Options Order so that it would remain in force until it is revoked or sunsets on 1 October 2031.
- 16 IG, while supportive of our proposal, sought to distinguish between ‘volatility’ binary options and ‘fifty-fifty’ binary options. It noted that ‘volatility’ binary options can meet a clear investment need for clients and are not particularly susceptible to mis-selling (as opposed to ‘fifty-fifty’ binary options). The Binary Options Order captures both types of binary options.
- 17 On balance, having considered the feedback and our data analysis, we consider that:
- (a) the Binary Options Order is achieving its objectives effectively and efficiently; and
  - (b) it is appropriate to extend the Binary Options Order so that it will remain in force until it is revoked or sunsets on 1 October 2031.
- 18 We have obtained the Minister’s approval to declare that the Binary Options Order remains in force for the period ending at the end of 1 October 2031.

## B Extending the Binary Options Order

### Key points

This section outlines the feedback on our proposal to extend the Binary Options Order and our response to the submissions.

Issues raised related to:

- the effectiveness of the Binary Options Order in reducing the risk of significant detriment to retail clients and whether the Binary Options Order should be extended (see paragraphs 19–24);
- the regulatory approach to ‘volatility’ binary options versus ‘fifty-fifty’ binary options (see paragraphs 25–28);
- the impact of the Binary Options Order on issuers, including the regulatory compliance burden (see paragraphs 29–34) and the impact on competition in the financial system (see paragraphs 35–38); and
- the length of the extension of the Binary Options Order (see paragraphs 39–40).

### Extension of the Binary Options Order

- 19 In [CP 362](#), we sought feedback on:
- (a) whether the Binary Options Order has been effective in reducing the risk of significant detriment to retail clients; and
  - (b) our proposal to extend the Binary Options Order so that it will remain in force until it is revoked or sunsets on 1 October 2031.

Note: Our proposal was subject to our consideration of the feedback to CP 362 and obtaining the approval of the Minister.

- 20 All respondents agreed about the effectiveness of the Binary Options Order and supported our proposal to extend it.
- 21 IG agreed that the extension of the Binary Options Order is warranted in the interests of consumers, but expressed disappointment that an alternative solution was not found to the ‘mis-selling problem that plagued the industry’. In the absence of providers in the industry that engage in poor conduct, IG said it views binary options as a legitimate trading tool for a suitable audience of traders.
- 22 Consumer advocate CHOICE welcomed the proposal to extend the Binary Options Order because it prevents widespread harm to the Australian community. CHOICE stated that binary options ‘are extremely high-risk

financial products that serve no meaningful benefit to the Australian community’, given they share many characteristics with high-risk gambling products and regularly result in large losses to consumers. CHOICE agreed that the Binary Options Order was effective given the high-risk nature of these products and was of the view that significant consumer harm will recommence if it is not extended.

- 23 The Law Council agreed with our proposal to extend the Binary Options Order until 1 October 2031. It considered that the Binary Options Order has been effective in reducing the risk of significant detriment to retail clients because it is likely that:
- (a) some retail clients would have entered into binary options in spite of clear warnings about the risks of binary options trading published by ASIC; and
  - (b) many of those clients would be likely to have lost money had they done so.
- 24 We did not receive any submissions from retail clients.

*ASIC’s response*

Based on our analysis (summarised in [CP 362](#)), and the support for our approach, we consider that the Binary Options Order has been effective in reducing the risk of significant detriment to retail clients resulting from binary options.

## Regulatory approach to volatility binary options

- 25 IG gave feedback distinguishing between two types of binary options:
- (a) ‘fifty-fifty’ binary options, which have ‘floating’ strike prices that are set when the client trades, at a level of the underlying market at that moment, with the trader predicting only whether the market will go up or down over the contract term; and
  - (b) ‘volatility’ binary options, which are offered at a variety of strike prices and are priced with a two-way, bid–ask spread.
- 26 IG noted that the differences between fifty-fifty and volatility binary options mean that a separate regulatory approach for volatility binary options would not be unreasonable. IG noted that volatility binary options are ‘not particularly susceptible to mis-selling and meet a clear investment need for clients who want to hedge, or speculate, on market volatility in a controlled, limited risk manner’, although clients ‘roughly lose transaction costs in aggregate’. IG noted that exchange-traded binary options of this kind are available to retail investors in the United States and Japan.



27 IG further noted that the sophistication required to price volatility binary options, along with their limited appeal to inexperienced clients, means they were rarely offered by ‘dishonest firms’.

28 Despite these differences, IG concluded that an extension of the Binary Options Order is warranted in the interests of consumers.

#### *ASIC’s response*

We remain of the view that the Binary Options Order should include all binary options.

As noted in the [Public notice—Product intervention order in relation to binary options](#) (PDF 141 KB), evidence that volatility binary options are likely to result in significant detriment to retail clients included the following:

- In our 2017 review of the retail OTC derivatives sector—where we looked at the size and nature of the Australian market for binary options and CFDs—we found that the proportion of retail clients who lost money trading volatility binary options was similar to retail clients trading up-down or fifty-fifty binary options.
- Aggregate data obtained by the European Securities and Markets Authority (ESMA) for three firms in 2015 and 2016 shows that volatility binary options have similar negative outcomes for retail clients as other types of binary options—83.3% of retail clients who traded up-down or fifty-fifty binary options with ‘Firm B’ in Europe lost money and 73.7% of retail clients who traded volatility binary options with ‘Firm B’ in Europe lost money. See ESMA, [Product intervention analysis: Measure on binary options](#) (ESMA50-162-214), 1 June 2018, p. 25.

## Impact on binary options issuers

### Regulatory compliance burden

29 In [CP 362](#), we noted that the total implementation cost of the Binary Options Order was approximately \$64,250 for binary options issuers that continued to issue other financial products after the Effective Date. Ongoing costs of compliance with the Binary Options Order were minimal, with only three binary options issuers noting any costs, totalling \$6,000.

30 One binary options issuer ceased business and had the substantial cost of winding down its business. Other binary options issuers noted the difficulty in assessing their costs.

- 31 In [CP 362](#), we further noted that the main cost to business of the Binary Options Order is the loss of opportunity to derive profit from issuing and distributing binary options to retail clients who lose money.
- 32 In CP 362, we sought feedback from binary options issuers about whether, if the Binary Options Order is not extended, they would change their business model and what benefit and costs would they incur. We also sought feedback on the impact that the Binary Options Order has had on the financial services businesses of binary options issuers.
- 33 IG said it is unlikely that it would change its business model if the Binary Options Order was not extended. It explained that binary options are not a material part of its business and therefore the Binary Options Order has had minimal impact on its business.
- 34 No other submissions were received from binary options issuers.

#### *ASIC's response*

We acknowledge the regulatory costs as summarised in [CP 362](#), noting that while ongoing compliance costs to the implementation of the Binary Options Order have been minimal, there is the loss of opportunity for binary options issuers to derive profit from issuing and distributing binary options to retail clients who lose money.

In balancing the impacts of the Binary Options Order with the aim of reducing the risk of significant detriment to retail clients, we remain of the view that the benefits to retail clients and additional regulatory benefit from improved trust and confidence in the Australian financial system and economy over time outweigh the business impact of the Binary Options Order.

Further, we consider that the Binary Options Order is operating effectively and efficiently. The aims of the Binary Options Order are being achieved in an efficient, least-cost way, evidenced in part by consistency between the measures in the Binary Options Order and binary options regulations in force in other jurisdictions.

### **Competition in the financial system**

- 35 In [CP 362](#), we sought feedback on the effects (if any) that the Binary Options Order has had on competition in the financial system. We also asked what effects are likely if the Binary Options Order is extended.
- 36 None of the respondents raised concerns about the effect that the Binary Options Order would have on competition.
- 37 IG noted that it did not believe that the Binary Options Order would have a material effect on competition within the financial system.

38 CHOICE noted that it was supportive of the implementation of the Binary Options Order in 2019 because it brought Australia in line with international best practice in consumer financial protection. CHOICE also noted that money not lost to binary options is money that can be used by consumers to engage with legitimate products and services in the Australian financial services market. Further, CHOICE noted that the Australian financial system will be better off by enabling consumer investments in products that improve their financial wellbeing and not in products that are designed to harm them.

*ASIC's response*

Based on the feedback received, we consider that there is no significant effect on competition in the financial system as a result of the Binary Options Order. We do not expect to see any such effect if the Binary Options Order is extended. Further, we did not observe any material effect from the Binary Options Order on underlying financial markets.

If the Binary Options Order is extended, binary options would continue to be available for wholesale clients.

## Length of the extension

39 In [CP 362](#), we proposed to extend the Binary Options Order so that it would remain in force until it is revoked (noting if it was so extended, it would sunset on 1 October 2031).

40 All three respondents agreed with ASIC's proposal. The Law Council noted that it does not consider the continuation of the Binary Options Order as a controversial matter and therefore cannot see a strong justification for our decision to be revisited every three or five years. The Law Council noted that consultation processes such as CP 362 consume ASIC resources and, rather than undertaking more frequent and uncontroversial consultation, the Law Council would prefer to see ASIC resources being used to pursue other important regulatory outcomes. The Law Council noted that ASIC could seek to revoke or vary the Binary Options Order at any time if it wished to, subject to obtaining the Minister's approval.

*ASIC's response*

We remain of the view that extending the Binary Options Order until 1 October 2031 (unless it is revoked earlier) is preferable to a shorter extension, such as three or five years. This is because:

- We are concerned that binary options do not provide meaningful investment or risk management utility for retail clients because the characteristics of binary options are incompatible with those uses and result in a high likelihood of cumulative financial losses over time.

- We consider that the Binary Options Order is operating effectively and efficiently. Our analysis shows that there has been an immediate and significant reduction in retail client detriment in the Effective Period. This reduction was expected and is consistent with the effect of similar interventions that remain in force abroad. We expect to see these effects continue.
- A shorter extension of the Binary Options Order would require a further process to consider whether it should be extended again and would come at additional cost and effort to ASIC and industry. It would also require additional consultation and create uncertainty when developing new products. Due to the ban, there will be no retail client trading data after the Effective Date available for analysis.
- An order with the maximum permitted duration is appropriate having regard to the nature and extent of the detriment to retail clients resulting from binary options and the objective to reduce the risk of significant detriment.

## Appendix: List of respondents

- CHOICE
- IG Australia Pty Ltd
- Law Council of Australia