



**ASIC**  
Australian Securities &  
Investments Commission

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## **ASIC Corporations (Product Intervention Order—Contracts for Difference) Instrument 2020/986**

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I, Oliver Harvey, delegate of the Australian Securities and Investments Commission, being satisfied that CFDs (as defined in the following legislative instrument) are a class of financial products that:

- (a) is available for acquisition by issue to persons as retail clients; and
- (b) has resulted in and is likely to result in significant detriment to retail clients;

make the following legislative instrument.

Date 22 October 2020

Oliver Harvey

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## Part 1—Preliminary

### 1 Name of legislative instrument

This is the *ASIC Corporations (Product Intervention Order—Contracts for Difference) Instrument 2020/986*.

### 2 Commencement

This instrument commences on the later of:

- (a) 23 November 2020; and
- (b) the day after it is registered on the Federal Register of Legislation.

Note: The register may be accessed at [www.legislation.gov.au](http://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 a derivative that:

- (a) is a contract for difference; and
- (b) is provided by a person (**CFD issuer**) who carries on a business of issuing contracts for difference to other persons (**holders**).

**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.

**contract for difference** means a derivative to which the following apply:

- (a) 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.

- (b) the derivative is not able to be traded on a licensed market;
- (c) the derivative:
  - (i) does not terminate on a fixed date; or
  - (ii) if the derivative terminates on a fixed date—it is a derivative of a kind that are typically terminated before the fixed 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 contracts for difference.

- (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 issuer (other than the holder) 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.

Note: *derivative* is defined in section 761D of the Act.

***cryptoasset*** includes cryptocurrency.

***exchange rate for a major currency pair*** means an exchange rate for a pair of currencies that consists of any two of the following:

- (a) Australian dollar;
- (b) British pound;
- (c) Canadian dollar;
- (d) euro;
- (e) Japanese yen;
- (f) Swiss franc;
- (g) US dollar.

**exchange rate for a minor currency pair** means an exchange rate for a pair of currencies that is not an exchange rate for a major currency pair.

**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.

**major stock market index** means any of the following stock market indices:

- (a) CAC 40;
- (b) DAX;
- (c) Dow Jones Industrial Average;
- (d) EURO STOXX 50 Index;
- (e) FTSE 100;
- (f) NASDAQ-100 Index;
- (g) NASDAQ Composite Index;
- (h) Nikkei Stock Average;
- (i) S&P 500;
- (j) S&P/ASX 200.

**minor stock market index** means a stock market index that is not a major stock market index.

**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.

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

***terminate***, in relation to a derivative, includes the derivative being closed out.

***underlying***, in relation to a derivative, means any thing (of any nature whatsoever and whether or not deliverable) other than the derivative, including, for example, one or more of the following:

- (a) an asset;
- (b) a rate (including an interest rate or exchange rate);
- (c) an index;
- (d) a commodity.

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 CFD includes a reference to inviting an application for the issue of the CFD.

## 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(2) to (5).
- (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(2) to (5).
- (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(2) to (5).
- (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(2) to (5).

#### *Application of conditional prohibitions*

- (5) Subsections (1) to (4) apply on and from 29 March 2021.
- (6) Subsection (1) applies only if one or both of the following apply:
  - (a) the CFD issuer is:
    - (i) a body corporate incorporated or carrying on business in Australia; or
    - (ii) an Australian citizen; or
    - (iii) ordinarily resident in Australia;
  - (b) the issue of the CFD occurs in this jurisdiction, or an offer to issue the CFD, or to apply for the issue of the CFD, is received in this jurisdiction.
- (7) Subsection (2) applies only if one or both of the following apply:
  - (a) the person who carries on a business of arranging for the issue of CFDs is:
    - (i) a body corporate incorporated or carrying on business in Australia; or

- (ii) an Australian citizen; or
    - (iii) ordinarily resident in Australia;
  - (b) the arranging for the issue of the CFD takes place in circumstances where:
    - (i) the issue of the CFD occurs in this jurisdiction; or
    - (ii) an offer to issue the CFD or to apply for the issue of the CFD is received in this jurisdiction.
- (8) Subsection (3) applies only if one or both of the following apply:
  - (a) the person who carries on a business of applying for, or acquiring, CFDs as an agent is:
    - (i) a body corporate incorporated or carrying on business in Australia; or
    - (ii) an Australian citizen; or
    - (iii) ordinarily resident in Australia;
  - (b) the applying for, or acquiring, the CFD on behalf of the retail client takes place in circumstances where:
    - (i) the issue of the CFD occurs in this jurisdiction; or
    - (ii) an offer to issue the CFD or to apply for the issue of the CFD is received in this jurisdiction.
- (9) Subsection (4) applies only if one or both of the following apply:
  - (a) the person who carries on a business of arranging for persons to apply for, or acquire, CFDs is:
    - (i) a body corporate incorporated or carrying on business in Australia; or
    - (ii) an Australian citizen; or
    - (iii) ordinarily resident in Australia;
  - (b) the arranging for the retail client to apply for or acquire the CFD takes place in circumstances where:
    - (i) the issue of the CFD occurs in this jurisdiction; or
    - (ii) an offer to issue the CFD or to apply for the issue of the CFD is received in this jurisdiction.



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.

## 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 in circumstances where the issue of a CFD to the client by the CFD issuer would be covered by the conditional prohibition in subsection 5(1) (assuming that the issue occurred at a time when the conditional prohibition was in force under subsection 5(5)).
- (2) In this section, a ***prohibited benefit*** in relation to a retail client or prospective retail client of a CFD issuer means a gift, discount, 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), none 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 discount in costs or fees (including a volume-based discount) that is offered to all retail clients and prospective retail clients;
  - (c) a gift, discount, 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 or prospective retail client before 29 March 2021.

### *Application of prohibition*

- (4) Subsection (1) applies on and from 29 March 2021.

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**

- (1) The conditions in subsections (2) to (5) are specified for the purposes of subsections 5(1) to (4).

### *Leverage and margin restrictions*

- (2) 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 an exchange rate for a major currency pair—3.33% of the notional value of the CFD at the time of issue; and
  - (b) if the underlying for the CFD is a major stock market index, an exchange rate for a minor currency pair or gold—5% of the notional value of the CFD at the time of issue; and
  - (c) if the underlying for the CFD is a minor stock market index or 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*

- (3) 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 at that time 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 are connected to the retail client's CFD trading account and that were issued on or after 29 March 2021;
  - (b) any other of the retail client's open CFDs that are connected to the retail client's CFD trading account and that are specified in the terms of the CFD for the purposes of this subsection (3);

until the time (*later time*) at which the first of the following occurs:

- (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 at the later time that are connected to that account;
- (d) all the following being terminated:
  - (i) the retail client's open CFDs that are connected to the retail client's CFD trading account and that were issued on or after 29 March 2021;
  - (ii) any other of the retail client's open CFDs that are connected to the retail client's CFD trading account and that are specified in the terms of the CFD for the purposes of this subsection (3).

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 before 29 March 2021, 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 (3)) is consistent with the terms of the other CFD.

- (4) In subsection (3):

**aggregate close out protection amount** means, in relation to open CFDs of a retail client at a time, an amount that is one of the following:

- (a) in any case—at least 50% of the aggregate initial margin required under paragraphs (2)(a) to (e) for those open CFDs;
- (b) if the margin (**current margin**) which the CFD issuer requires to be provided by the holder in relation to the holding of each open CFD at that time is equal to or greater than the initial margin that would have been required under paragraphs (2)(a) to (e) if the open CFD had been issued at the time the current margin was determined—at least 50% of the aggregate current margin for those open CFDs.

*Negative balance protection*

- (5) 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.

## **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 in circumstances which would be covered by the conditional prohibition in subsection 5(1) (assuming that the issue occurred at a time when the conditional prohibition was in force under subsection 5(5)) 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 10 business days after commencement of this instrument.