



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240

This is the Explanatory Statement for ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240 (the *instrument*).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (*ASIC*).

Summary

1. The instrument is a product intervention order made under subsection 1023D(3) of the *Corporations Act 2001* (the *Act*). The instrument prohibits specified dealing in over-the-counter (OTC) binary options in relation to retail clients and requires that a binary option provider take reasonable steps to notify its retail clients of the terms of the instrument.

Legislative authority

2. The instrument is made under subsection 1023D(3) of the Act.
3. Under subsection 1023D(3) of the Act, if ASIC is satisfied that a class of financial product:
 - (a) is, or is likely to be, available for acquisition by issue, or for regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); and
 - (b) has resulted in, or will or is likely to result in, significant detriment to retail clients;

ASIC may, by legislative instrument, order that a person must not engage in specified conduct in relation to the class of financial products, either entirely or except in accordance with conditions specified in the order.

4. A description of the significant detriment is set out in Attachment A, the Product Intervention Order Notice.
5. The instrument is a disallowable legislative instrument.

Purpose of the instrument

6. ASIC has made the instrument to reduce the risk of significant detriment to retail clients resulting from OTC binary options.

Operation of the instrument

Name

7. Section 1 of the instrument provides that the instrument is the *ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240*.

Commencement

8. Section 2 of the instrument provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.

Authority

9. Section 3 of the instrument provides that the instrument is made under subsection 1023D(3) of the *Corporations Act 2001*.

Interpretation

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

11. Subsection 4(1) of the instrument provides that, in the instrument:

Act means the *Corporations Act 2001*.

binary option means:

- (a) an arrangement that is an over-the-counter derivative in relation to which the following apply:
 - (i) the parties to the arrangement are:
 - (A) a person (*binary option provider*) who carries on a business of offering to issue, and issuing, derivatives of that type to other persons (*holders*); and
 - (B) a holder;
 - (ii) an amount is paid or payable by the holder to the binary option provider in consideration for the binary option provider entering into the arrangement;
 - (iii) under the arrangement, a condition (*condition*) is specified in relation to the value or amount of any of the following at or before a specified time (*expiry time*):
 - (A) an asset (including a financial product or a cryptoasset);
 - (B) a rate (including an interest rate or an exchange rate);

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- (C) an index;
 - (D) a commodity;
 - (iv) if the condition is satisfied and the arrangement has not been terminated earlier, a predetermined fixed amount, or no amount, is payable by the binary option provider to the holder;
 - (v) if, at the expiry time, the condition has not been satisfied and the arrangement has not been terminated earlier, a predetermined fixed amount, or no amount, is payable by the binary option provider to the holder; and
- (b) without limiting the scope of paragraph (a), includes such an arrangement where:
- (i) the holder has, or may have, a right to terminate the arrangement before the expiry time; and
 - (ii) if the arrangement is so terminated, the binary option provider must or may pay an amount to the holder (whether or not the amount is a predetermined fixed amount and whether or not the holder has a legally enforceable right to such a payment).

binary option provider: see the definition of **binary option**.

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).

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

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

12. After paragraph (a)(iii) of the definition of binary option in the instrument, a note is included identifying that the condition, for example, may be that the value of a share exceeds a specified value at a specified time. Alternatively, the condition may be that the value of a share exceeds a specified value at or before a specified time.
13. Subsection 4(2) of the instrument provides that, for the purposes of the instrument, a reference to offering to issue a derivative includes a reference to inviting an application for the issue of the derivative.

Prohibitions on dealing in binary options in relation to retail clients

14. Subsection 5(1) of the instrument provides that a binary option provider must not issue a binary option to a retail client.
15. Subsection 5(2) of the instrument provides that a person who carries on a business of arranging for the issue of binary options must not arrange for the issue of a binary option by a binary option provider to a retail client.
16. Subsection 5(3) of the instrument provides that a person who carries on a business of applying for, or acquiring, binary options as an agent, must not apply for, or acquire, a binary option from a binary option provider on behalf of a retail client.
17. Subsection 5(4) of the instrument provides that a person who carries on a business of arranging for persons to apply for, or acquire, binary options must not arrange for a retail client to apply for, or acquire, a binary option from a binary option provider.
18. Subsection 5(5) of the instrument provides that subsections 5(1) to 5(4) of the instrument apply on and from 3 May 2021.
19. Subsection 5(6) of the instrument provides that subsection 5(1) of the instrument applies only if one or both of the following apply:
 - (a) the binary option provider is:
 - (i) a body corporate incorporated or carrying on business in Australia; or
 - (ii) an Australian citizen; or
 - (iii) ordinarily resident in Australia; or
 - (b) the issue of a binary option occurs in this jurisdiction, or an offer to issue a binary option, or to apply for the issue of a binary option, is received in this jurisdiction.
20. Subsection 5(7) of the instrument provides that subsection 5(2) of the instrument applies only if one or both of the following apply:
 - (a) the person who carries on a business of arranging for the issue of binary options is:
 - (i) a body corporate incorporated or carrying on business in Australia; or
 - (ii) an Australian citizen; or
 - (iii) ordinarily resident in Australia; or
 - (b) the conduct is arranging for the issue of a binary option:

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- (i) where the issue of the binary option occurs in this jurisdiction;
or
 - (ii) where an offer to issue the binary option or to apply for the issue of the binary option is received in this jurisdiction.
 - 21. Subsection 5(8) of the instrument provides that subsection 5(3) of the instrument applies only if one or both of the following apply:
 - (a) the person who carries on a business of applying for, or acquiring, binary options 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; or
 - (b) the conduct is applying for or acquiring a binary option as an agent:
 - (i) where the issue of the binary option occurs in this jurisdiction;
or
 - (ii) where an offer to issue the binary option or to apply for the issue of the binary option is received in this jurisdiction.
 - 22. Subsection 5(9) of the instrument provides that subsection 5(4) of the instrument 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, binary options is:
 - (i) a body corporate incorporated or carrying on business in Australia; or
 - (ii) an Australian citizen; or
 - (iii) ordinarily resident in Australia; or
 - (b) the conduct is arranging for a person to apply for or acquire a binary option:
 - (i) where the issue of the binary option occurs in this jurisdiction;
or
 - (ii) where an offer to issue the binary option or to apply for the issue of the binary option is received in this jurisdiction.
 - 23. The application of the orders in section 5 of the instrument is subject to the limitations in section 1023C of the Act. For instance, the instrument does not apply to a binary option held by a person if the person acquired, or entered into

a contract for the acquisition of, the binary option before the instrument comes into force: see subsection 1023C(1) of the Act.

24. Subject to the Court making an order staying or otherwise affecting the operation of the orders in section 5 of the instrument, the orders will remain in force for 18 months from the day the instrument commences: see subsection 1023G(2) of the Act. The duration of the instrument may be extended beyond 18 months, but only in accordance with section 1023H of the Act (which requires a declaration, made by legislative instrument, in accordance with written approval from the Minister).

Binary option providers to notify retail clients

25. Section 6 of the instrument provides that a binary option provider that has issued a binary option to a retail client in the period of 12 months before commencement of the instrument in circumstances which would be prohibited by section 5 of the instrument (assuming that the issue occurred at a time when the prohibition was in force under subsection 5(5) of the instrument) must take reasonable steps to notify each such retail client of the terms of the instrument as soon as practicable and in any case within 15 business days after commencement of the instrument.
26. Conduct in contravention of the instrument can result in criminal and civil penalties. For individuals, such as directors, the criminal sanctions can result in imprisonment for up to 5 years.

Consultation

27. On 22 August 2019, ASIC published Consultation Paper 322 *Product intervention: OTC binary options and CFDs* (CP 322), calling for feedback by 1 October 2019. CP 322 included, inter alia, an outline of the significant detriment to retail clients that ASIC considered has resulted from, or will or is likely to result from, OTC binary options and attached a proposed product intervention order.
28. ASIC received over 400 submissions to CP 322. Of those, more than 50 submissions responded to the proposed order relating to OTC binary options, including submissions from providers of binary options, industry bodies, consumer groups, consumers of binary options and members of the public. Additionally, ASIC met with a number of consumer groups and binary option providers to discuss their submissions and to request cost estimates from binary option providers.
29. The submissions to CP 322 were taken into account in making the instrument. The submissions to CP 322 are publicly available on ASIC's website, excluding confidential submissions.

Office of Best Practice Regulation

30. ASIC has published a Regulatory Impact Statement (RIS) setting out its assessment of the regulatory and financial impacts of its proposal to make a

market-wide product intervention order to prohibit the issue and distribution of OTC binary options to retail clients. The RIS is available at <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-322-product-intervention-otc-binary-options-and-cfds/>.

31. The Office of Best Practice Regulation has assessed that the quality of the regulatory impact analysis in the RIS, and the process that underpinned it, is adequate (OBPR ID 25721).

Statement of Compatibility with Human Rights

32. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is set out in Attachment B.

PRODUCT INTERVENTION ORDER NOTICE

ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240

Introduction

1. The Australian Securities and Investments Commission (ASIC) publishes this notice under subsection 1023L(3) of the *Corporations Act 2001* (the Act).
2. Subsection 1023L(3) of the Act requires ASIC to publish on its website, with each product intervention order made by ASIC under subsection 1023D(1) or (3) of the Act, a notice that:
 - (a) describes the significant detriment to retail clients that has resulted from, or will or is likely to result from, the financial product or class of financial products to which the order relates, and sets out why the order is an appropriate way of reducing the detriment; and
 - (b) describes the consultation that ASIC undertook in relation to the order; and
 - (c) if the order comes into force after it is published—specifies the day it comes into force.
3. This notice relates to ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240 (the order), which is a product intervention order made by ASIC by legislative instrument under subsection 1023D(3) of the Act. The order relates to binary options.
4. The order, together with notification requirements imposed by section 6 of the order under section 1023N of the Act, commences the day after the order is registered on the Federal Register of Legislation. However, the substantive prohibitions relating to binary options that are contained in section 5 of the order apply on and from Monday 3 May 2021.

Binary options as a class of financial product

5. The order is made in respect of binary options. A ‘binary option’ is defined in the order as:
 - (a) an arrangement that is an over-the-counter derivative in relation to which the following apply:
 - (i) the parties to the arrangement are:
 - (A) a person (binary option provider) who carries on a business of offering to issue, and issuing, derivatives of that type to other persons (holders); and
 - (B) a holder;

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- (ii) an amount is paid or payable by the holder to the binary option provider in consideration for the binary option provider entering into the arrangement;
 - (iii) under the arrangement, a condition (condition) is specified in relation to the value or amount of any of the following at or before a specified time (expiry time):
 - (A) an asset (including a financial product or a cryptoasset);
 - (B) a rate (including an interest rate or an exchange rate);
 - (C) an index;
 - (D) a commodity;
- Note: For example, the condition may be that the value of a share exceeds a specified value at a specified time. Alternatively, the condition may be that the value of a share exceeds a specified value at or before a specified time.
- (iv) if the condition is satisfied and the arrangement has not been terminated earlier, a predetermined fixed amount, or no amount, is payable by the binary option provider to the holder;
 - (v) if, at the expiry time, the condition has not been satisfied and the arrangement has not been terminated earlier, a predetermined fixed amount, or no amount, is payable by the binary option provider to the holder; and
- (b) without limiting the scope of paragraph (a), includes such an arrangement where:
- (i) the holder has, or may have, a right to terminate the arrangement before the expiry time; and
 - (ii) if the arrangement is so terminated, the binary option provider must or may pay an amount to the holder (whether or not the amount is a predetermined fixed amount and whether or not the holder has a legally enforceable right to such a payment).

6. The order also contains definitions of ‘cryptoasset’, ‘financial product’, ‘over-the-counter’ and ‘terminated’, which are expressions used in the definition of ‘binary option’.
7. Binary options are a class of financial product, as defined in section 1023B of the Act. As defined in the order, binary options are derivatives. ‘Derivative’ is defined in section 761D of the Act. A derivative is a financial product (section 762A and paragraph 764A(1)(c) of the Act), unless it is specifically excluded by section 765A of the Act or by paragraphs (a) or (b) of the definition of financial product in section 1023B of the Act. Binary options are not specifically excluded from the definition of financial product by section 765A of the Act or by paragraphs (a) or (b) of the definition of financial product in section 1023B of the Act.

Binary options are available for acquisition by issue to retail clients

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8. At the time of making the order, binary options are available for acquisition by issue to retail clients by four Australian financial services licensees who are authorised to deal and make a market in derivatives to retail clients.

Consultation

9. On 22 August 2019, ASIC published a public consultation paper, [Consultation Paper 322](#) *Product intervention: OTC binary options and CFDs* (CP 322), setting out the proposal to exercise the product intervention power in Part 7.9A of the Act to make certain market-wide product intervention orders relating to the issue and distribution of over-the-counter (OTC) binary options and contracts for difference (CFDs) to retail clients.
10. CP 322 set out the following proposal and consultation questions in relation to binary options:

Proposal

- E1 We propose to exercise our product intervention powers in Pt 7.9 of the Corporations Act to make a market-wide product intervention order, in force for 18 months, which prohibits the issue and distribution of binary options to retail clients and requires that existing retail clients are notified of the terms of the order. We propose that the product intervention would take effect 10 business days after the day on which the legislative instrument is registered.

Your feedback

- E1Q1 Do you agree with our proposal to make a market-wide product intervention order which prohibits the issue and distribution of binary options to retail clients? If not, why not? If you disagree that binary options have resulted in, and are likely in future to result in, significant detriment to retail clients, please provide evidence and data in support of your view.
- E1Q2 Do you agree with our proposal that the order would remain in force for a period of 18 months? If not, why not?
- E1Q3 Do you agree that our proposed delayed commencement of the order is appropriate, balancing the time it will take to implement the order and the nature, likelihood and extent of the significant consumer detriment? If not, what is an appropriate period?
- E1Q4 Do you agree with our identification of the effects that making the proposed product intervention order will have on competition in the financial system? If not, why not?

Note: Attachment 1 to CP 322 sets out a draft market-wide product intervention order relating to binary options in substantially the same form as the order.

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11. ASIC received over 400 submissions to CP 322. Of those, more than 60 submissions responded to the Proposed Order for binary options, including submissions from providers of binary options, industry bodies, consumer groups, consumers of binary options and others. Additionally, ASIC met with consumer groups and binary option providers to discuss their submissions and to request cost estimates from binary option providers.
 12. The [submissions to CP 322](#) are publicly available on ASIC's website, excluding confidential submissions.
 13. Respondents' views on the proposal can be summarised as follows:
 - (a) *Binary option providers*—Four binary option providers supported the Proposed Order, including one that has since ceased dealing in binary options. While supportive, IG Markets pointed to differences between different types of binary options.
 - (b) *CFD issuers*—Six CFD issuers who do not deal in binary options supported the Proposed Order (other CFD issuers who gave feedback to CP 322 did not comment on the binary option proposals).
 - (c) *Industry bodies*—ACI Australia Limited, the Australian CFD and Margin FX Association, and the Australian Financial Markets Authority submitted individual responses that supported the proposed order. For example, ACI said it has 'always maintained that binary options serve no use to any end user. They have never been part of the wholesale market and can only be described as [a] tool to fundraise for the issuer. [ASIC's] intelligence that 80% of retail clients lose money is, in [ACI's] view conservative'.
 - (d) *Consumer groups*—Connect Health & Community and a joint submission by the Consumer Action Law Centre, Choice and the Financial Rights Legal Centre expressed strong support for the proposed order.
 - (e) *Individual consumers*—Forty-four consumer submissions gave feedback specific to binary options. Thirty-three consumers supported the proposed order and 11 were opposed. Responses from the 33 consumers who supported the Proposed Order included feedback that binary options do not provide meaningful investment or economic utility, are unsuitable for retail clients, are designed to put retail clients at a disadvantage and are predatory instruments. However, none of the consumers in support of the prohibition in the Proposed Order presented evidence that they had suffered harm from binary options. The responses from the 11 consumers who opposed the order included feedback that binary options are easy to understand, are less risky than CFDs, can serve a useful purpose for speculation or hedging and that the proposed order would be unduly restrictive of consumer choice. In addition to the 44 consumer submissions specific to binary options, five more consumers raised general objections to regulation that would restrict consumer choice, although it was unclear whether these submissions related to the Proposed Order or ASIC's proposals relating to CFDs or both. Another consumer said binary options are ridiculous but did not wish to comment on the Proposed Order.

(f) *Other stakeholders*—The Australian Financial Complaints Authority (AFCA) and stockbroker Bell Potter strongly supported the proposed order. AFCA submitted that the sale of binary options, their structure and the terms on which they are offered are the product of the provider taking unfair advantage of the consumer. It said that ‘in [AFCA’s] experience, these products [binary options] are marketed to consumers with little to no experience who are told they can “learn to trade” with the provider. In spite of this, [AFCA’s] experience suggests that issuers rarely educate, teach or equip consumers with the necessary skills and knowledge.’ The Australian Securities Exchange (ASX) said it did not believe the order would have a material effect on the operation, or integrity, of public markets in the underlying securities that some binary options reference. One respondent who opposed the order suggested alternative measures that would impose conditions or restrictions on the issue and distribution of binary options to retail clients, including additional disclosure, prohibition of certain inducements and requiring a client assessment before offering binary options.

14. The responses add to the evidence already available to ASIC that binary options are available for acquisition by issue to retail clients and as to the significant detriment to retail clients that has resulted, and is likely to result, from binary options.
15. ASIC has issued Regulation Impact Statement *Product intervention: OTC binary options* (RIS) which sets out the ASIC Market Supervision team’s analysis of the expected regulatory and financial impact of the order and alternative options considered as part of ASIC’s consultation. The RIS was prepared under the regulatory impact analysis framework administered by the Office of Best Practice Regulation. The regulatory and financial impact of the order is relevant to why the order is an appropriate way of reducing the significant detriment to retail clients resulting from binary options.

Significant detriment to retail clients

16. This notice now describes the significant detriment to retail clients.
17. Subsection 1023E(1) of the Act requires that ASIC must take into account the following factors in considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients:
- (a) the nature and extent of the detriment;
 - (b) without limiting paragraph (a), the actual or potential financial loss to retail clients resulting from the product;
 - (c) the impact that the detriment has had, will have or is likely to have on retail clients; and
 - (d) any other matter prescribed by the regulations.¹
18. The significant detriment to retail clients is conveniently described by reference to the matters referred to in paragraphs 1023E(1)(a)–(c).

Nature and extent of the detriment, including actual financial loss to retail clients

¹ As at the date of this notice, no matters are prescribed by the regulations.

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19. The nature of the detriment to retail clients resulting from binary options is primarily in the form of financial losses. Information available to ASIC indicates that binary options have resulted in significant financial losses to retail clients.
 20. The extent of the detriment to retail clients that has resulted from binary options is evidenced by the proportion of retail clients' trading accounts that lost money trading binary options and the quantum of financial losses to retail clients.
 21. In 2017, ASIC conducted a review (2017 review) of the size and nature of the Australian market for binary options and CFDs and published [Report 579 *Improving practices in the retail OTC derivatives sector*](#) (REP 579). Binary option providers reported in ASIC's 2017 review that approximately 80% of their binary options clients (including clients located in Australia and offshore) lost money trading binary options.
 22. Confidential submissions to CP 322 supported the conclusion that a significant majority of retail clients lose money trading binary options, showing individual client losses ranging from less than \$500 to more than \$100,000 in and around 2019.
 23. In CP 322, ASIC estimated that retail clients' (including retail clients located in Australia and offshore) net financial losses in 2018 from trading binary options with the five licensed providers in Australia were approximately \$490 million, based on reported gross trading revenue. The providers' gross trading revenue can largely be attributed to a combination of net client trading losses and spreads, fees and commissions charged to retail clients.
 24. Since ASIC issued a warning to OTC derivative issuers in April 2019 against providing unlicensed or unauthorised services to clients located in certain foreign jurisdictions, some binary option providers' subsequent actions to cease trading with such clients significantly reduced the number of retail clients from over 280,000 to under 12,000.
 25. Based on confidential submissions to CP 322, ASIC estimates that the net financial losses incurred by Australian retail clients from trading binary options in 2019 exceeded \$6.7 million. This data does not capture all licensed binary option providers and so likely underestimates net losses to Australian retail clients from trading binary options in that period.

Potential financial loss to retail clients resulting from binary options

26. Binary options are likely to result in significant detriment to retail clients in future having regard to historical financial losses discussed above and the features of binary options.
27. ASIC has conducted analysis which shows that binary options are likely to result in significant detriment to retail clients over time due to the following product characteristics:
 - (a) 'all or nothing' payoff structure, where one of the two possible outcomes for a binary option contract is that the retail client will lose their entire investment amount;
 - (b) short contract duration (e.g. for one provider, the average duration of binary options traded in 2018 was less than six minutes); and

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- (c) negative expected returns (i.e. the present value of the expected payoff for a binary option contract is lower than the initial investment).
28. As explained in CP 322, ASIC replicated a simulation run by the European Securities and Markets Authority (ESMA) as part of its quantitative analysis of the return distribution for retail clients in Europe making repeated \$100 trades in fifty-fifty or up-down binary options with a fixed payout of \$180% of the investment amount and a 50% probability of exercise.² The modelling shows that the more binary option trades a retail client makes, the greater the likelihood they will lose money overall, and the larger their expected loss.
29. ASIC's analysis is that fifty-fifty binary options offered in Australia share similar characteristics modelled in the simulation with fifty-fifty binary options offered in Europe. ASIC's analysis of binary option trades with licensed providers in Australia in 2018 supports the simulation in CP 322 and shows that the percentage of clients that lose money trading fifty-fifty binary options increases the more they trade. As such, ESMA's analysis of aggregate returns from binary option trading is highly relevant to the Australian market for fifty-fifty binary options.
30. Confidential submissions to CP 322 provide further support for ASIC's simulation findings, showing for a group of retail clients that the average proportion suffering an overall loss increased with longer periods of observed trading in and around 2019.
31. The simulation in CP 322 for fifty-fifty binary options does not apply to volatility binary options. Volatility binary options over an underlying asset are quoted at a range of strike prices with different probabilities of exercise. Evidence that volatility binary options similarly are likely to result in significant detriment to retail clients includes the following:
- (a) In ASIC's 2017 review, 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.
 - (b) Aggregate data obtained by ESMA for three firms in 2015 and 2016 shows that volatility binaries have similar negative outcomes for retail clients as other types of binary options—83.3% of retail clients that traded up-down or fifty-fifty binary options with 'Firm B' in Europe lost money and 73.7% of retail clients that traded volatility binary options with 'Firm B' in Europe lost money.³
32. Research into client outcomes from trading binary options in other jurisdictions, summarised in CP 322, provides further evidence that binary options are likely to result in significant detriment to Australian retail clients.⁴
33. IOSCO described these characteristics and risk in its 2018 [Report on retail OTC leveraged products](#) (p. 5):

² Figure 6 in [CP 322](#).

³ ESMA, [Product intervention analysis: Measure on binary options](#) (ESMA50-162-214), 1 June 2018, p. 25.

⁴ [CP 322](#), paragraph 71 which sets out findings of losses incurred by retail clients trading binary options from the UK Financial Conduct Authority, Cyprus Securities and Exchange Commission, Polish Komisja Nadzoru Finansowego and the Italian Commissione Nazionale per le Società e la Borsa.

‘For binary options, the following risks can be seen to arise:

- Although the products appear simple and therefore attractive to retail clients, firms use complex probability methodologies to calculate pay-offs that ensure that on aggregate, the firm always profits from the trades. This also makes it difficult for clients to fairly value the product and make an informed investment decision;
- The lack of transparency in the price of the underlying asset makes it often difficult for a retail client to assess the fairness of the price at the start of the contract and at expiry;
- The very short duration of many binary option contracts exacerbates the above risks.

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As set out above, binary options present significant information asymmetries, which are often exploited by firms to the detriment of the client, although they are sold as straightforward products and perceived as simple by retail clients.’

The impact the detriment has had, or will or is likely to have, on retail clients

34. Six of the 11 consumers who opposed the proposed order submitted that they are trading binary options on an informed basis in pursuit of profits. However, few retail clients trade binary options profitably over time. There was no support among the consumer submissions for the proposition that recreation or entertainment was a motivation for trading binary options.
35. Further, the inherent nature of the products and associated negative expected returns and data on retail client losses indicate that retail clients as a group suffer significant detriment rather than benefit from these products. In its submission, AFCA considered that the sale of binary options, their structure and the terms on which they are offered are the product of the provider taking unfair advantage of the consumer.
36. There is an opportunity cost of losing money trading binary options. Money lost by retail clients trading binary options cannot be used for other financial products and services in the Australian financial services markets, as acknowledged in the joint submission by the Consumer Action Law Centre, Choice and the Financial Rights Legal Centre.
37. Financial losses from trading binary options will affect individuals differently depending on their personal circumstances. Potential harms may flow from financial losses, such as difficulty meeting other financial commitments and family and relationship stresses (as described by Connect Health & Community in its submission).

Demographics of retail clients who trade binary options, marketing practices and complaints

38. One confidential respondent to CP 322 submitted that ASIC’s data on client demographics, aggressive marketing practices and complaints in Section B of CP 322 relate generally to the retail OTC derivatives market and do not demonstrate significant detriment to retail clients resulting from binary options. The information in Section B of CP 322 about client demographics, aggressive marketing practices and complaints is not evidence of significant detriment to retail clients resulting from binary options. Section B of CP 322 is relevant to provide market background and colour, and evidences that binary options are available for acquisition by issue to retail clients.

Why the order is an appropriate way of reducing the detriment

39. This notice now describes why the order is an appropriate way of reducing the detriment:

- (a) The order is expected to reduce the risk of significant detriment to retail clients comprehensively and systemically by prohibiting the issue and distribution of binary options to retail clients.
- (b) Maintaining the status quo would not achieve the objective of reducing the risk of significant detriment to retail clients resulting from binary options.
- (c) The suggested alternative measures would leave the inherent risks associated with trading binary options largely unchanged and would probably not be effective in reducing the risk of significant detriment to retail clients.
- (d) The expected benefits to retail clients from the order reducing the risk of significant detriment resulting from binary options outweigh the expected costs to retail clients (including reduced consumer choice of high-risk, speculative financial products).
- (e) Various substitute financial products may be used by retail clients desiring high-risk, short-term speculation or risk management.
- (f) Professional, sophisticated and other wholesale clients are not affected by the order because of subsection 1023C(2).
- (g) The order is consistent with regulatory measures in force in peer jurisdictions, which will promote trust and confidence in the Australian financial system more broadly.
- (h) The expected net benefits to retail clients from the order, and additional regulatory benefit from improved trust and confidence in the Australian financial system over time, are expected to outweigh the expected significant impact to binary option providers and other businesses dealing in binary options, including to their revenue from dealing in binary options in relation to retail clients and their costs of compliance with the order.
- (i) Compliance costs to binary option providers from the suggested alternative measures would be substantially higher than the modest compliance costs of the order.
- (j) The order is not expected to have any material effect on competition in the financial system.
- (k) The order is not expected to have any material effect on underlying financial markets.

40. The order is consistent with:

- (a) the objects of Chapter 7 of the Act, including the promotion of confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services (paragraph 760A(a) of the Act); and

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- (b) ASIC's regulatory objectives set out in subsection 1(2) of the *Australian Securities and Investments Commission Act 2001*, particularly ASIC's obligation to strive to:
- (i) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
 - (ii) promote the confident and informed participation of investors and consumers in the financial system.

41. The order strikes an appropriate balance between:

- (a) reducing the risk of significant detriment to retail clients resulting from binary options;
- (b) the financial and other impact of the order on retail clients and binary option providers and distributors; and
- (c) any likely effects on competition in the Australian financial system.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240

Overview

1. The instrument is a product intervention order made under subsection 1023D(3) of the *Corporations Act 2001* (the Act). The order prohibits specified dealing in over-the-counter (OTC) binary options (a class of financial product) in relation to retail clients and requires that a binary option provider take reasonable steps to notify its retail clients of the terms of the instrument.
2. Under subsection 1023D(3) of the Act, if ASIC is satisfied that a class of financial product:
 - (a) is, or is likely to be, available for acquisition by issue, or for regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); and
 - (b) has resulted in, or will or is likely to result in, significant detriment to retail clients;ASIC may, by legislative instrument, order that a person must not engage in specified conduct in relation to the class of financial products, either entirely or except in accordance with conditions specified in the order.
3. A description of the significant detriment is set out in Attachment A, the Product Intervention Order Notice.
4. ASIC makes this instrument to reduce the risk of significant detriment to retail clients resulting from OTC binary options.
5. The orders in the instrument will remain in force for 18 months from the day the instrument commences, subject to the Court making an order staying or otherwise affecting the operation of the orders: see subsection 1023G(2) of the Act. The duration of the instrument may be extended beyond 18 months, but only in accordance with section 1023H of the Act (which requires a declaration, made by legislative instrument, in accordance with written approval from the Minister).

Assessment of human rights implications

6. The instrument does not engage any of the applicable rights or freedoms.

Conclusion

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7. ASIC Corporations (Product Intervention Order—Binary Options) Instrument 2021/240 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.