



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Product Intervention Order Extension - Contracts for Difference) Instrument 2022/259

This is the Explanatory Statement for ASIC Corporations (Product Intervention Order Extension - Contracts for Difference) Instrument 2022/259 (the *instrument*).

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

Summary

1. The instrument is a declaration that [ASIC Corporations \(Product Intervention Order– Contracts for Difference\) Instrument 2020/986](#) (the *Principal Instrument*), a product intervention order made under subsection 1023D(3) of the *Corporations Act 2001* (the *Act*), remains in force for the period ending at the end of 23 May 2027 unless it is revoked earlier. The Principal Instrument commenced on 23 November 2020 and without this declaration would cease on 23 May 2022, having remained in force for 18 months.
2. The Principal Instrument imposes certain conditions on specified dealing in over-the-counter (*OTC*) contracts for difference (*CFDs*) in relation to retail clients and prohibits giving or offering specified benefits to retail clients or prospective retail clients in specified circumstances.
3. Before ASIC made the instrument, ASIC provided a report to the Minister under s1023H(3) of the Act on whether the instrument should be made. The Minister gave his written approval under subsection 1023H(4) of the Act for ASIC to make the instrument.

Purpose of the instrument

4. The purpose of this instrument is to declare under subsection 1023H(1)(b) of the Act that the Principal Instrument remains in force for the period ending at the end of 23 May 2027, unless it is revoked earlier. By doing so, the Principal Instrument can continue to reduce the risk of significant detriment to retail clients resulting from CFDs as follows:
 - (a) the leverage ratio limits set out in subsection 7(2) of the Principal Instrument reduce the size and speed of retail clients' CFD losses by reducing CFD exposure and the sensitivity of CFDs to market volatility;
 - (b) the margin close out protection set out in subsection 7(3) of the Principal Instrument standardises a common risk management feature that acts as a circuit breaker to close out one or more of the open CFDs connected to a retail client's CFD trading account in circumstances where the retail client has lost a substantial proportion of the funds in that trading account;

- (c) the negative balance protection set out in subsection 7(5) of the Principal Instrument standardises a risk management feature that protects retail clients by limiting their losses on CFD positions to the funds in their CFD trading account; and
- (d) section 6 of the Principal Instrument prohibits offering or giving specified inducements to retail clients and prospective retail clients that encourage higher trading volumes and can distract them from the risks of trading CFDs, while not barring discounts of fees and costs that are offered to all retail clients and prospective retail clients.

Consultation

5. On 18 October 2021, ASIC issued Consultation Paper 348 *Extension of the CFD Product Intervention Order (CP 348)*. In CP 348, ASIC set out its analysis of the impact of the Principal Instrument and proposed to extend the Principal Instrument until it is revoked or sunsets on 1 April 2031 (*CP 348 Extension Proposal*). CP 348 showed our analysis of significant improvements in a number of key metrics and indicators of retail client detriment from CFD trading following the implementation of the CFD Order.
6. Among other things, ASIC sought feedback on:
 - (a) the proposal to extend the Principal Instrument;
 - (b) the effectiveness of the Principal Instrument in reducing significant detriment to retail clients;
 - (c) the impact of the Principal Instrument on retail clients;
 - (d) the impact of the Principal Instrument on the business of CFD issuers;
 - (e) the effects of the Principal Instrument on competition in the financial system; and
 - (f) the period of the proposed extension of the Principal Instrument.
7. ASIC received 49 submissions relating to the CP 348 Extension Proposal, including submissions from 9 CFD issuers, 32 CFD investors, an industry body representing some CFD issuers, a consumer advocate, a stockbroker and 5 confidential submissions.
8. Most respondents did not support our proposal to extend the Principal Instrument, mainly opposing the leverage ratio limits in the Principal Instrument. Many suggested that the leverage ratio limits be removed, increased or that experienced retail investors be permitted to trade at higher leverage ratio limits. However, most respondents were supportive of the other measures in the Principal Instrument.
9. Three CFD issuers supported extending the CFD Order, indicating it would provide regulatory certainty for the industry and clients. One CFD issuer noted that they have conducted an analysis demonstrating that higher leverage was not good for retail clients.
10. A consumer advocate, CHOICE, strongly supported the CFD Order being extended. CHOICE and a stockbroker further recommend that the sale of CFDs to retail clients be banned. Three of the five confidential submissions supported extending the CFD Order.

11. The submissions to CP 348 are publicly available on ASIC's website, excluding confidential submissions.
12. The feedback to CP 348 was taken into account when making the instrument. Having considered the consultation feedback and having analysed data from more than 60 CFD issuers to assess the impact of Principal Instrument, ASIC is satisfied that the Principal Instrument is operating efficiently and effectively and that it is appropriate to declare under subsection 1023H(1) that the Principal Instrument remains in force for the period ending at the end of 23 May 2027, unless it is revoked earlier. Further details of ASIC's analysis and its response to the submissions are published in Report 724: *Response to submissions on CP 348 Extension of the CFD product intervention order*.

Estimate of regulatory compliance burden

13. ASIC has reviewed and assessed the performance of the Principal Instrument and found that it is achieving its objectives effectively and efficiently and that therefore a Regulatory Impact Statement is not required for this instrument to be extended (OBPR22-01709).

Legislative authority

14. The instrument is made under subsection 1023H(1) of the Act.
15. ASIC may, at any time before a product intervention order ceases to be in force, give the Minister a report on whether the declaration should be made. After considering the report, the Minister may give an approval in writing for the purposes of subsection 1023H(1) of the Act.
16. Before ASIC made the instrument, ASIC provided a report to the Minister under s1023H(3) of the Act on whether the instrument should be made. The Minister gave his written approval under subsection 1023H(4) of the Act for ASIC to make the instrument.
17. Under subsection 1023H(1) of the Act, ASIC may, in accordance with an approval under subsection (4), by legislative instrument, declare that a product intervention order that is in force:
 - (a) remains in force until it is revoked; or
 - (b) remains in force for a specified period, unless it is revoked earlier.
18. A declaration under this subsection has the effect of overriding any provisions in a product intervention order about the duration of the order: see subsection 1023G(3).
19. The instrument is a disallowable legislative instrument.

Operation of the instrument

Name

20. Section 1 of the instrument provides that the instrument is the *ASIC Corporations (Product Intervention Order Extension - Contracts for Difference) Instrument 2022/259*.

Commencement

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

Authority

22. Section 3 of the instrument provides that the instrument is made under subsection 1023H(1) of the Act.

Terms of declaration

23. Section 4 of the instrument provides that the Principal Instrument remains in force for the period ending at the end of 23 May 2027, unless it is revoked earlier.

Considerations relating to delegated and primary legislation

24. The effect of the instrument is to extend the operation of the Principal Instrument until the period ending at the end of 23 May 2027, unless it is revoked earlier. Although the instrument does not itself modify or exempt persons or entities from the operation of primary law, ASIC has assessed in consultation with Treasury:

- (a) whether and why the extension of the measures in the Principal Instrument should be implemented by legislative instrument made under subsection 1023H(1) of the Act as opposed to amendment to primary legislation,
- (b) the appropriate duration of the extension of the Principal Instrument; and
- (c) whether any amendments to primary legislation may be pursued in future.

25. ASIC considers that the measures in the Principal Instrument should be extended by the instrument because:

- (a) the instrument (and the Principal Instrument) utilises specific powers given to ASIC by Parliament that are intended to be used proactively to reduce the risk of significant detriment to retail clients resulting from financial products. Commencing in April 2019, Part 7.9A of the Act sets out a framework and the procedural requirements for ASIC to make, amend, extend, remake and revoke product intervention orders;
- (b) the instrument is a timely way of extending the Principal Instrument before it expires on 23 May 2022. A product intervention order may remain in force for up to 18 months and may be extended by ASIC with the Minister's written approval, following a report to the Minister from ASIC on whether the extension should be made;

- (c) the measures in the Principal Instrument are technical in nature, apply to a single product class (CFDs) and affect the issue of CFDs by approximately 60 Australian financial services licences only;
 - (d) the product intervention powers in Part 7.9A of the Act allow ASIC to amend a product intervention order, should the need arise, to respond in a flexible and timely way to changes to product features, issuance and sales practices, consumer harm and international regulatory standards. Currently, the measures in the Principal Instrument are consistent with regulatory measures in force in major CFD markets.
26. Following public consultation and having assessed that the Principal Instrument is operating efficiently and effectively, ASIC considers it is appropriate for the instrument to declare that the Principal Instrument remain in force for the period ending at the end of 23 May 2027, unless it is revoked earlier. This period is appropriate because it:
- (a) allows the Principal Instrument to continue to operate to reduce the risk of significant detriment to retail clients resulting from CFDs;
 - (b) provides regulatory certainty for CFD issuers and retail clients;
 - (c) provides an adequate timeframe for consideration as to whether the protections should be extended further prior to the expiry of the Principal Instrument and
 - (d) balances the additional regulatory burden associated with more frequent data gathering and consultation on further extensions.
27. The Minister has considered and approved the duration of the extension provided for in the instrument, to the end of 23 May 2027 unless revoked earlier.
28. It will be a matter for the Government and for Parliament as to whether any amendments to the Act may be made in future to include the measures in the Principal Instrument. ASIC notes the Government's commitment to consider the merits of making future amendments to the relevant enabling Acts and regulations as part of its review process for any delegated legislation within the Treasury portfolio prior to its sunset.

Statement of Compatibility with Human Rights

29. 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 A](#).

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 Extension – Contracts for Difference) Instrument 2022/259.

Overview

1. This instrument is a declaration made under subsection 1023H(1) of the Corporations Act 2001 (the *Act*) to extend a product intervention order so that it remains in force for the period ending at the end of 23 May 2027, unless it is revoked earlier. This instrument extends *ASIC Corporations (Product Intervention Order–Contracts for Difference) Instrument 2020/986 (Principal Instrument)* which imposes certain conditions in relation to specified dealings in over-the-counter (**OTC**) contracts for difference (**CFDs**) (a class of financial product) in relation to retail clients and prohibits giving or offering certain benefits to retail clients or prospective retail clients in specified circumstances.
2. Before ASIC made the instrument, ASIC provided a report to the Minister under subsection 1023H(3) of the Act on whether the instrument should be made. The Minister gave his written approval under subsection 1023H(4) of the Act for ASIC to make the instrument.
3. By declaring that the Principal Instrument remains in force for the period ending at the end of 23 May 2027, unless it is revoked earlier, the Principal Instrument can continue to reduce the risk of significant detriment to retail clients resulting from OTC CFDs.

Assessment of human rights implications

4. This instrument does not engage any of the applicable rights or freedoms.

Conclusion

5. This instrument 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*.