



**ASIC**  
Australian Securities &  
Investments Commission

## Explanatory Statement

### *ASIC Corporations (Product Intervention Order Extension–Binary Options) Instrument 2022/779*

This is the Explanatory Statement for *ASIC Corporations (Product Intervention Order Extension–Binary Options) Instrument 2022/779* (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 \(Product Intervention Order–Binary Options\) Instrument 2021/240\*](#) (the **Principal Instrument**), a product intervention order made under subsection 1023D(3) of the *Corporations Act 2001* (the **Act**), remains in force until it is revoked. The Principal Instrument commenced on 7 April 2021 and without this declaration would cease on 7 October 2022, having remained in force for 18 months.
2. The Principal Instrument prohibits the issue and distribution of over-the-counter (**OTC**) binary options to retail clients.
3. 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.

### Purpose of the instrument

4. The purpose of this instrument is to declare under subsection 1023H(1)(a) of the Act that the Principal Instrument remains in force until it is revoked. By doing so, the Principal Instrument can continue to reduce the risk of significant detriment to retail clients resulting from binary options by prohibiting the issue and distribution of binary options to retail clients.

### Consultation

5. On 26 May 2022, ASIC issued [\*Consultation Paper 362 Extension of the Binary Options Product Intervention Order \(CP 362\)\*](#). In CP 362, 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 October 2031 (**CP 362 Extension Proposal**). CP 362 showed our analysis of significant improvements in a number of key metrics and indicators of

retail client detriment from binary options trading following the implementation of the Principal Instrument.

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 the risk of 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 binary options 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 3 submissions to CP 362, from IG Australia Pty Ltd (a contracts-for-difference (CFD) issuer, securities dealer and former binary options issuer), consumer advocate CHOICE and the Law Council of Australia. We did not receive any submissions from retail clients.
8. All respondents agreed about the effectiveness of the Principal Instrument and supported our proposal to extend it so that it would remain in force until is revoked or sunsets on 1 October 2031.
9. The submissions to CP 362 are publicly available on ASIC's website.
10. The feedback to CP 362 was taken into account when making the instrument. Having considered the consultation feedback and having analysed data from binary options issuers before and after the implementation of the Principal Instrument to assess its impact, 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 until it is revoked. If the Principal Instrument is not revoked, then under the *Legislation Act 2003*, it will sunset on 1 October 2031. Further details of ASIC's analysis and its response to the submissions are published in Report 736: *Response to submissions on CP 362 Extension of the binary options product intervention order*.

### ***Estimate of regulatory compliance burden***

11. 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 (OBPR22-02690).

### **Legislative authority**

12. The instrument is made under subsection 1023H(1) of the Act.

13. 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.
14. 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.
15. 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.
16. 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).
17. The instrument is a disallowable legislative instrument.

## **Operation of the instrument**

### ***Name***

18. Section 1 of the instrument provides that the instrument is the *ASIC Corporations (Product Intervention Order Extension – Binary Options ) Instrument 2022/779*.

### ***Commencement***

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

### ***Authority***

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

### ***Terms of declaration***

21. Section 4 of the instrument provides that the Principal Instrument remains in force until it is revoked.

## **Considerations relating to delegated and primary legislation**

22. The effect of the instrument is to extend the operation of the Principal Instrument until the period ending at the end of 1 October 2031, 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.
23. 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. Part 7.9A of the Act commenced in April 2019, and 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 7 October 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; and
  - (c) 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 many major binary option markets.
24. 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 until it is revoked (unless revoked prior, it will sunset on 1 October 2031). 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 binary options;
  - (b) provides regulatory certainty for binary option 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.
25. The Minister has considered and approved the duration of the extension provided for in this instrument.
26. 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 sunseting.

### **Statement of Compatibility with Human Rights**

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–Binary Options) Instrument 2022/779.***

#### 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 until it is revoked. This instrument extends [ASIC Corporations \(Product Intervention Order–Binary Options\) Instrument 2021/240 \(Principal Instrument\)](#) which prohibits the issue and distribution of over-the-counter (*OTC*) binary options (a class of financial product) to retail clients. If it is not revoked, it will sunset on 1 October 2031.
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 until it is revoked, the Principal Instrument can continue to reduce the risk of significant detriment to retail clients resulting from OTC binary options.

#### 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*.