



13 February 2023

Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Senate Standing Committees on Economics,

**Re: Australian Securities and Investments Commission investigation and enforcement inquiry**

CISA consulting Pty Ltd ("CISA" "we" "us" "our") welcomes the opportunity to provide input to the Senate Standing Committee's inquiry on the capacity and capability of the Australian Securities and Investments Commission to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct ("**Senate Inquiry**").

CISA is a consultancy firm that provides regulatory advice for complex and innovative financial products. Our team has extensive experience in the contracts-for-difference ("**CFD**"), margin foreign exchange ("**FX**"), and stockbroking industries, working with both industry participants and financial services regulators. We are committed to delivering high-quality, informed guidance to our clients in order to meet their regulatory compliance requirements.

We acknowledge that ASIC has a challenging role in that it must balance two key priorities, improving the performance of the financial systems and its entities for the benefit of the economy and commercial certainty, while at the same promoting informed and confident participation of investors and consumers in the financial system.

It is clearly an issue when economic gain is prioritized over protecting consumers or ensuring transparency. However, it can also be a problem when efforts to promote investor confidence leads to restrictions on informed choice. This can occur when regulators unilaterally make decisions about what they believe is best for investors, even if investors do not want the intervention. We have concerns that this has been occurring in relation to the CFD and FX industry ("**CFD industry**"), with ASIC's use of the product intervention powers.

**Executive summary**

The CFD industry experience provides a useful example of significant regulator intervention, and we would like to provide our view of factors that should have been considered and may have led to a different, more constructive, effective outcome for both CFD investors and CFD industry participants:

1. **Focus on bad actors and poor conduct:**
  - ASIC should prioritise targeting bad actors specifically rather than impacting an entire industry or product offering where possible – this can be more beneficial in cases where a product can easily change;
2. **Focus on what investors are asking for:**
  - Regulators should avoid restricting investor freedom of choice if investors are not asking for change and the investors are not vulnerable in nature.



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- Market forces will often determine the success or failure of a business idea or product offering. If a product has existed for a long time and is in constant demand, there is a reason. This should be taken into account in assessing the manner in which a regulator engages with an industry or product offering, particularly in relation to any restrictions to be placed on a particular offering;
  - Being a retail investor does not automatically mean that an investor is vulnerable and should not prevent them from making a higher risk decision as long as it is an informed one;
- 3. Improve prioritisation of resources and action**
- Given the limited resources ASIC has, it is important to focus those resources where the impact will be the greatest and is the most needed;
- 4. Improve understanding and appreciation of the business impact of regulatory change**
- There should be adequate oversight to ensure ASIC maintains an adequate balance between protecting investors and supporting business and competition; and
- 5. Be mindful of the potential for regulatory fatigue**
- Repeated focus on an industry without adequate justification can have negative impacts on business sentiment which may lead to mistrust and lack of engagement between industry participants and regulators.

### **Background - Product Intervention Order**

In October 2020, ASIC utilised its newly granted product intervention powers to restrict the way that CFD Products are traded in Australia (**CFD Order**).<sup>1</sup> On 6 April 2022, the CFD Order was further extended for another 5 years.<sup>2</sup>

It is important to note that CFDs are not novel and had been successfully traded in their original form for decades prior to the CFD Order.

The CFD Order had a significant impact on CFD industry businesses in Australia. ASIC stated that in the three months post implementation there had been a 29% decrease in active retail accounts from the prior quarter.<sup>3</sup> Anecdotally we are aware this reduction in retail clients continued after this original assessment.

However, there is no clear evidence to suggest that these retail clients simply stopped trading CFDs.

Industry participants did see an increase in experienced investors requesting wholesale client status following the announcement of the CFD Order. This change in client demographic from retail to wholesale was also observed by ASIC.<sup>4</sup>

Members of the Australian CFD and FX Association, an industry association alliance of domestic CFD Issuers, also observed a large proportion of clients choosing offshore trading venues to be able to continue to trade the products the way they want to.

It appears that much of the reduction in clients were the more experienced investors. Informing our view is information from the Australian CFD and FX Association that stated since Australia introduced leverage restrictions members had seen:

- a nearly 50% reduction in the average number of trades on a retail trading account;

<sup>1</sup> ASIC Corporations (Product Intervention Order—Contracts for Difference) Instrument 2020/986 (**"CFD Order"**).

<sup>2</sup> ASIC Corporations (Product Intervention Order Extension—Contracts for Difference) Instrument 2022/259.

<sup>3</sup> ASIC Consultation Paper 348 *Extension of the CFD Product Intervention Order* (**"CP 348"**), para 11.

<sup>4</sup> CP348, para 61.





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- a 75% reduction in Electronic Adviser ("EA" or automated trading) users;
- a 75% reduction in accounts undertaking over 10 trades a week; and
- an 85% reduction in accounts undertaking over 50 trades a week.

We believe the leverage restrictions implemented by the CFD Order increased the cost of trading and changed the risk/reward balance of CFD Products so fundamentally that they became no longer fit for purpose for experienced retail clients, particularly the high-volume, speculative day traders that they had been most suitable for. This would not appear to be an ideal outcome for investors in Australia.

Given this concern, we wanted to highlight some aspects of ASIC's actions around the implementation of the CFD Order and other action taken against the CFD Industry that we think would benefit the Senate Inquiry, with particular reference to the following items in the terms of reference:

*The capacity and capability of the Australian Securities and Investments Commission to undertake proportionate investigation and enforcement action arising from reports of alleged misconduct, with particular reference to:*

- b. the balance in policy settings that deliver an efficient market but also effectively deter poor behaviour;*
- c. whether ASIC is meeting the expectations of government, business and the community with respect to regulatory action and enforcement;*
- d. the range and use of various regulatory tools and their effectiveness in contributing to good market outcomes;*

## **1. Focus on bad actors and poor conduct**

*Initial regulator concerns about our industry appeared to be more about non-compliant and unregulated brokers, not the local, regulated, compliant population.*

Even after the CFD Order was enacted, these scammers and fraudsters continue to evade regulatory oversight by operating unlicensed and targeting vulnerable clients. To avoid detection, some have even shifted their focus to products like cryptocurrency, but they continue to employ the same harmful business practices, such as cold call centres, boiler rooms, hidden identities, and pressure selling. These practices, rather than the specific product being advertised, are the primary source of harm that should be the focus of regulators.

International statements about the harm caused by over the counter ("OTC") derivative products (which is the broader term that encompasses CFDs) focussed on unregulated entities and binary options providers (which is a non-leveraged product that operates differently to CFDs and were not the subject of ASICs CFD Order):

- *"Approximately one-half of reporting jurisdictions – the majority of EU respondents as well as Australia and the United States (CFTC and the National Futures Association or NFA) – indicate that promotional techniques and messages may be aggressive and/or misleading; in some of these jurisdictions, such behavior is prevalent primarily with unregulated firms".<sup>5</sup>*
- *"Although unregulated firms based outside the European Union have a relatively small market share, they are very numerous (326 in October 2015) and represent the majority of customer complaints received by the French AMF."<sup>6</sup>*
- *"An AMF study on the clients of the main providers authorised by serious regulators...clients recorded EUR175 million in losses versus EUR13 million in gains over four years... Moreover, according to the Paris public prosecutor's office, estimated losses on illegal Forex/binary option*

<sup>5</sup> Report on the IOSCO Survey on Retail OTC Leveraged Products, December 2016 page 4.

<sup>6</sup> Report on the IOSCO Survey on Retail OTC Leveraged Products, December 2016 page 18.







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*websites and scams (emphasis added) through false transfer orders amounted to EUR4.5 billion in France over six years.”<sup>7</sup>*

ASIC also acknowledged the threat posed by unlicensed, fraudulent activity in several of its key regulatory actions at the time:

- 17-257MR ASIC targets unlicensed binary option mobile apps – “The review highlighted over 330 apps which were offered to Australians by entities and individuals that appeared to be unlicensed.”
- 16-246MR ASIC warns investors about Titantrade.com – “ASIC is concerned that the promoters and/or operators of the Website are offering unlicensed financial services in Australia”.
- 16-218MR ASIC crackdown on unlicensed retail OTC derivative providers – “ASIC has warned of a dramatic increase in the extent of unlicensed conduct by retail OTC derivative providers seeking to expand their market with new customers for their complex and risky products such as binary options.”
- 16-189MR ASIC warns investors about dealing with GOptions, Porterfinance, Boss Capital, MaxOptions, Bloomberg Options, Citrades, RBOptions and OptionsXO - All of these entities operate websites that offer binary option trading services but none of them are appropriately licensed or authorised to provide these types of services in Australia.

Even the primary court actions that ASIC used to justify its intervention on the CFD industry demonstrate a similar pattern of there being overseas control (which was often difficult to ascertain), unlicensed conduct and a serious disregard of Australian regulatory requirements. Some examples are as follows:

AGM Markets and their authorised representatives OT Market and Ozifin were fined \$75 million <sup>8</sup>	<ul style="list-style-type: none"> <li>• The entities were all entirely controlled by offshore interests who were already the subject of multiple enforcement actions by other jurisdictions;</li> <li>• the entities provided personal advice to vulnerable people (even though they were not licensed to do so);</li> <li>• the entities had major sale call centres who sole purpose was to encourage people to repeatedly fund their accounts; and</li> <li>• there was acknowledgement that in this matter there were thousands of individual instances of conduct that contravened the relevant statutory provisions.</li> </ul>
Forex Capital Trading was the subject of freezing orders from ASIC and was sued for unconscionable conduct <sup>9</sup>	<ul style="list-style-type: none"> <li>• this entity was controlled and owned by offshore interests. The company is a subsidiary of a Vanuatu company;</li> <li>• the entity provided personal advice (even though it was not licensed to do so);</li> <li>• the entity operated in a way that was in breach of multiple Australian requirements including its conflicted remuneration requirements; and</li> <li>• the entity again used a high pressure call centre strategy which was designed to encourage clients, particularly vulnerable clients, to fund and lose this money.</li> </ul>
Union Standard International Group was the subject of freezing orders	<ul style="list-style-type: none"> <li>• the entity was entirely controlled and operated by overseas interests;</li> <li>• the Australian licensee had no access to their website, the trading servers or any of the client records;</li> </ul>

<sup>7</sup> AMF news release Forex, binary options and online financial scams: the AMF, the Paris public prosecutor, consumer affairs watchdog DGCCRF, and prudential authority ACPR joined forces to eradicate the problem April 1 2016 [https://www.amf-france.org/en\\_US/Actualites/Communiqués-depresse/AMF/annee-2016.html?docId=workspace%3A%2F%2FSpacesStore%2Fb6848912-6303-4a84-bab2-a5f0f118fabf](https://www.amf-france.org/en_US/Actualites/Communiqués-depresse/AMF/annee-2016.html?docId=workspace%3A%2F%2FSpacesStore%2Fb6848912-6303-4a84-bab2-a5f0f118fabf).

<sup>8</sup> 20-246MR Federal Court imposes \$75 million penalty on OTC derivative issuer AGM Markets and former authorised representatives OT Markets and Ozifin.

<sup>9</sup> 20-161MR ASIC sues Forex Capital Trading Pty Ltd for unconscionable conduct and conflicted remuneration.





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from ASIC and eventually went into liquidation <sup>10</sup>	<ul style="list-style-type: none"> <li>the holding entity not only operated in a way that was in breach of Australian requirements but refused to cooperate with Australian court decisions; and</li> <li>despite the actions taken by ASIC, clients and money were moved offshore to a Vanuatu entity completely outside of Australian jurisdictional reach.</li> </ul>
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These practices of high-pressure sales and non-compliant behaviour are not representative of the entire CFD industry. Many industry participants were supportive of the enforcement actions taken by ASIC and provided valuable market intelligence to aid in identifying illegal or poor conduct.

However, in addition to their enforcement action, ASIC went on to implement the CFD Order that affected the entire regulated population, including Australian-owned and operated CFD issuers, and changed product features that appear to have no direct relevance to the bad behaviour. One of the most significant changes was the restriction on leverage, which does not address the issue of unlicensed conduct and has no relation to high-pressure sales tactics. Additionally, the original product intervention consultation conflated the harms associated with binary options with those of CFDs, despite the fact they are distinct products and binary options are not leveraged.<sup>11</sup>

It is important to note that ASIC had already chosen to use this path before they were granted the authority to do so.

On 14 May 2018 (nearly a year before the product intervention power was assented to), an ASIC Commission Action item noted the following:

#### **Retail OTC Derivatives**

##### **Commission:**

- NOTED ASIC's new approach to the retail OTC derivatives sector, which involves disrupting unlicensed access to clients and their money, a wide-reaching consumer education campaign, and traditional regulatory and enforcement action; and*
- REQUESTED that the team prepare for ASIC receiving the product intervention powers so that work can commence as soon as these powers are received.<sup>12</sup>*

The purely online/off exchange nature of our businesses makes it easier for fraudsters to pose as legitimate entities and exploit investors. While the CFD Order may have limited the ability for fraudsters to promote scams in Australia using CFDs, the reputational damage caused by ASIC's use of this power and their consistent negative public statements has had a significant negative impact on the entire industry including those that are operating a legitimate business.

#### **Recommendations for improvement**

Regulators should target bad actors and not use the actions of these operators to impact a broader industry which operates legitimate, compliant business models.

Focusing on poor conduct rather than the product is beneficial as products are often easily alterable in the context of a fraudulent scheme.

<sup>10</sup> 20-319MR ASIC takes action against Union Standard International Group and its former corporate authorised representatives.

<sup>11</sup> ASIC CP 322 Product intervention: OTC binary options and CFDs ("CP 322").

<sup>12</sup> Freedom of information FOI 046-2020 request document email, subject heading "Commission meeting 729 – Item 13 – Monday 30 April 2018 – Action Item".







## 2. Focus on what investors are asking for

*When it came to restricting CFD products, were investors asking for this change?*

ASIC's original product intervention consultation focused on an increase in complaints as a key indicator of harm occurring to retail CFD investors:

*The number of complaints about binary options and CFDs has accelerated since 2017. We have identified just under 4,000 complaints reported to either ASIC or the Australian Financial Complaints Authority (AFCA) in the first seven months of 2019.<sup>13</sup>*

However, as highlighted above, many of the complaints received by ASIC were related to binary options and unlicensed entities, which were not impacted by the restrictions in the CFD Order. Furthermore, AFCA reported a 42% increase in overall complaints during the first four months of its operation in 2019.<sup>14</sup> The entire investments and advice sector accounted for only 5% of complaints received by AFCA, and only 1.2% were related to retail OTC derivative issuers (which includes binary option providers). Notably, more than half of those complaints were directed at a single financial firm that had already had its Australian Financial Services License suspended by ASIC.<sup>15</sup>

ASIC also reported around 1 million active clients in 2019 trading OTC derivatives<sup>16</sup> - even if all 4,000 complaints were related to CFD products provided by licensed entities, this constitutes a relatively small percentage (0.4%) of consumers.

Against this backdrop, it is reasonable to conclude that the majority of consumers understood the risks of CFD products and were happy with the financial service they were provided. CFDs have been traded using the same terms for decades and have steadily increased in popularity due to the availability of low-cost, or no cost, real-time market information and retail trading execution times matching wholesale venues. This allows for trading that is more speculative in nature. It would be unlikely that a harmful product could sustain success for such a prolonged period, as market forces would eventually lead to its decline.

The fact that a large number of submissions were made to the original product intervention consultation, with many individuals requesting that ASIC reconsider its action to restrict leverage, is also noteworthy.

Specifically, over 400 submissions were received, with 300 of them being from individuals.<sup>17</sup> Compare this to other typical ASIC consultations:

- CP 313 Product intervention power, which outlined guidance on ASIC's approach to exercising the product intervention power - one confidential and 27 non-confidential responses. None appear to be from individuals;
- CP 296 Funds management, which sought feedback on proposed guidance in relation to managed investment schemes, corporate collective investment vehicles (CCIVs) and passport funds – 9 submissions, none appear to be from individuals.
- CP 316 Using the product intervention power: Short term credit, which was the first use of the power – 20 submissions. 4 of those appear to be from individuals but unlike with the CFD intervention, these individuals supported the intervention.

<sup>13</sup> CP 322, para 65.

<sup>14</sup> AFCA News, Edition 1 - 21 March 2019.

<sup>15</sup> AFCA Six month report, 21 March 2019.

<sup>16</sup> ASIC report 626 Consumer harm from OTC binary options and CFDs.

<sup>17</sup> See submissions at <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-322-product-intervention-otc-binary-options-and-cfd/>





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### Recommendations for improvement

ASIC should avoid restricting investor freedom of choice in circumstances where there is no clear evidence of investor demand for change.

As long as financial services are offered in a compliant manner, market forces will determine the success or failure of a financial product or business.

Just because a person is a retail investor, it does not make them vulnerable and it does not mean they cannot choose to make a higher risk decision as long as it is an informed one.

### 3. Improve prioritisation of resources and action

*Was legitimate CFD trading a critical issue for retail investors that needed to be solved as a priority?*

One reason provided in the media release announcing the original CFD Order was client trading losses during COVID-19:

*"Heavy losses sustained by retail clients trading in highly leveraged CFDs and ongoing market volatility during the COVID-19 pandemic highlight the need for stronger CFD protections in the product intervention order."<sup>18</sup>*

However, ASIC commissioned independent research to examine the impact of COVID on investment behaviour suggests that retail investors are not heavily invested in CFDs and Margin FX.<sup>19</sup> REP 735 found:

- the most common product type held by investors was Australian shares (73% owned at least one of this product type, with a median of three different Australian shares held). The next most common were cryptocurrencies (44% owned at least one of this product type, with a median of three different cryptocurrencies held) and international shares (31% owned at least one of this product type);<sup>20</sup>
- less than 7% of those surveyed held either CFDs or margin FX and of those that did:
  - 97% said CFDs made up less than 20% of their overall portfolio;
  - 94% said margin FX made up less than 20% of their overall portfolio;<sup>21</sup>
- 0% of moderately experienced investors and only 1% of recent investors claimed to have purchased CFDs or Margin FX when they started investing; and<sup>22</sup>
- only 31% experienced realised losses in CFDs and 42% on margin foreign exchange. At the same time 52% lost on market linked notes, 47% on hybrid securities and 45% on Exchange Traded Options (ETOs).<sup>23</sup>

The findings of the research align with CFD industry observations, which indicate that CFD traders are typically experienced and aware of the high-risk nature of these instruments. Therefore, they tend to only allocate a small portion of their investment portfolio to CFDs. Additionally, CFDs are not widely traded among retail investors. The general public are not typically accessing these types of products except via fraudulent schemes, which can be a problem for any financial product.

<sup>18</sup> 20-254MR ASIC product intervention order strengthens CFD protections.

<sup>19</sup> ASIC REP 735 *Retail investor research* 11 August 2022 ("REP 735").

<sup>20</sup> REP 735 page 1.

<sup>21</sup> REP 735 Figure 6.

<sup>22</sup> REP 735 Figure 14.

<sup>23</sup> REP 735 page 6.





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CFD investors were not entirely without regulatory protection prior to the CFD Order being implemented. The CFD industry had already experienced a series of targeted reforms, that had strengthened retail investor understanding and protection beyond that required in many other financial industries, including:

- enhancing protections for client money;<sup>24</sup>
- ensuring adequate financial resources;<sup>25</sup>
- improved disclosure, which included requiring the industry to implement a client qualification policy as part of their onboarding process.<sup>26</sup>

The onboarding process for CFD products alone can protect vulnerable investors from accessing these types of products. CFD industry observations suggest on average less than 20% of investors that begin the onboarding process end up trading CFDs.

In addition, broader financial industry reforms that were implemented soon after the introduction of the CFD Order appear to address much of the bad conduct that ASIC had observed in the CFD industry, such as:

- the design and distribution obligations,<sup>27</sup> which mandate product issuers to distribute their products only to those investors that are likely to be suitable for the product; and
- stronger anti-hawking restrictions,<sup>28</sup> which helps prohibit unsolicited sales and in turn helps prevent vulnerable or inappropriate investors from engaging with products that are not suitable for them.

Despite all of this, ASIC has invested significant resources on compulsory information gathering exercises, public reports and statements, as part of a desire to implement product restrictions on our industry.

It is unclear why a decades old product, with limited investor interest compared to other financial products, where most investors are aware of its high-risk nature, and where investors only use a fraction of their overall investment portfolio, needed to be a top priority for ASIC intervention in the form of the CFD Order.

#### Recommendations for improvement

Beyond standard surveillance and enforcement actions, given the limited resources available to ASIC, it seems appropriate to focus resources where the impact will be the greatest and is most needed.

#### 4. Improve understanding and appreciation of the business impact of regulatory change

*There has been an observable material impact on the CFD industry since the CFD Order was enacted. This impact has arisen from the broad powers that ASIC has been granted.*

At the time of the CFD Order consultation, international interventions in the regulation of CFDs in other jurisdictions had already demonstrated there would be a decline in retail clients and a significant decrease in trading volume if the reforms were implemented. Many of international investors were

<sup>24</sup> Treasury Laws Amendment (2016 Measures No. 1) Bill 2016 and the Corporations Amendment (Client Money) Regulations 2017.

<sup>25</sup> ASIC Corporations (Financial Requirements for Issuers of Retail OTC Derivatives) Instrument 2022/705, which was previously Class Order 12/752.

<sup>26</sup> Regulatory Guide 227 Over-the-counter contracts for difference: Improving disclosure for retail investors.

<sup>27</sup> Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019.

<sup>28</sup> Financial Sector Reform (Hayne Royal Commission Response) Act 2020.







observed to be shifting to firms operating outside of the regulated jurisdiction where the reforms took place. See below the comments from the Polish regulator:

*"In respect of the lower margin requirements, the KNF observed (i) a decrease in the number of active accounts of retail clients; (ii) a significant decrease in the trading volume by retail clients; and (iii) a decrease in the number of transactions carried out by retail clients. Surveys conducted by the KNF and by a Polish association of investment firms indicate that many Polish clients opened an account with a broker registered outside of the Union and that this was driven by the ability to access higher leverage."<sup>29</sup>*

ASIC even acknowledged that the 121% growth in investors in CFDs from 2017 to 2019 could be attributed to overseas clients moving away from more restrictive jurisdictions.<sup>30</sup> In this context, it is difficult to see how ASIC could not have been aware that implementing stricter leverage regulations would result in foreign investors moving to other markets, and also negatively impact Australian-based investors who desired the features provided by traditional CFDs.

It is important to note that it was not illegal for Australian entities to offer products to foreign investors from many countries that had restrictions, as long as they did not directly target them. The fact that those investors actively chose to seek out products with more flexibility and were willing to trade in jurisdictions outside of their local protections highlights the demand for CFDs and similar products, even in the face of stricter regulations in some countries.

The ASX also attempted to offer a similar limited leverage ASX listed CFD product to retail investors in Australia in 2013,<sup>31</sup> but the product was short lived as there was little interest and it could not compete with the products, conditions and pricing offered by Australian over-the-counter CFD Issuers. ASIC would have been aware of this outcome yet chose to continue with the restrictions.

#### **Recommendations for improvement**

There is room for an improved understanding and recognition of the impact ASIC's broad powers can have on industries. ASIC has obligations to support business and competition. We support the independent oversight and assessment of ASIC in its roles and responsibilities to ensure it maintains the right balance.

### **5. Be mindful of the potential for regulatory fatigue**

*ASIC continues to focus material resources on the industry even after product intervention.*

Since 2019, ASIC has issued numerous significant and time-consuming compulsory information demands to the CFD Industry. The CFD Order implementation and product intervention consultation participation have also been resource intensive. These demands added to the CFD industry's burden of implementing broader financial services reforms, including new Internal Dispute Resolution ("IDR") requirements,<sup>32</sup> breach reporting obligations,<sup>33</sup> design and distribution obligations,<sup>34</sup> and anti-hawking obligations.<sup>35</sup>

<sup>29</sup> OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY of 30 July 2019 on the product intervention measures relating to contracts for differences proposed by the Komisja Nadzoru Finansowego of Poland Para 11.

<sup>30</sup> CP322, para 137.

<sup>31</sup> ASX 'Module 2: How do ASX Listed CFDs work?', Version 1 August 2013

[https://www.asx.com.au/documents/resources/module\\_2\\_How\\_do\\_ASX\\_Listed\\_CFDs\\_work.pdf?cfid\\_course\\_02\\_text](https://www.asx.com.au/documents/resources/module_2_How_do_ASX_Listed_CFDs_work.pdf?cfid_course_02_text)

<sup>32</sup> ASIC Corporations, Credit and Superannuation (Internal Dispute Resolution) Instrument 2020/98.

<sup>33</sup> Financial Sector Reform (Hayne Royal Commission Response) Act 2020 schedule 11.

<sup>34</sup> Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019.

<sup>35</sup> Financial Sector Reform (Hayne Royal Commission Response) Act 2020 schedule 5.





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At the end of 2022, ASIC began another intensive targeted surveillance of the CFD industry, focusing on the recently implemented design and distribution obligations. This review began just 8 months after ASIC had decided to extend the CFD Order which had the effect of maintaining significant restrictions mandating how CFD products can be distributed to retail investors in Australia and despite an independent report highlighting the insignificant impact that CFDs had on current retail investment patterns.

Given the limited resources that ASIC has available, it is unclear why it has chosen to target the CFD industry for this additional scrutiny, given that it has already undergone significant changes to its distribution practices, rather than focusing on other financial services industries that may pose a greater risk to investors. Objectively it appears to be more beneficial to examine other sectors and better protect a larger proportion of investors.

We are not aware of any additional evidence suggesting there is a remaining distribution problem with CFD products. If anything, complaints across the industry have reduced. Client numbers have also significantly reduced to the point that many in the sector have significantly downsized their Australian operations and some are considering closing Australian operations entirely.

It is possible that ASIC may find some instances of non-compliance in the sector due to the intricate technicalities of the design and distribution obligations, possibly caused by regulatory fatigue among industry participants.

Repeated focus on an industry without adequate justification can have negative impacts on business sentiment. It can lead to industries becoming less willing to engage with regulators or share valuable market information, for fear of reprisal. This can make it more difficult for regulators to identify and address potential risks or compliance issues, and can create a climate of mistrust and hostility between industry participants and regulators. Additionally, it can also make it difficult for businesses to operate and plan for the future, if they are uncertain about the regulatory environment they operate in.

#### **Recommendations for improvement**

It is important for ASIC to prioritize the use of its resources in the most efficient and effective way in order to better protect investors and ensure compliance with regulations.

There is benefit in open dialogue between regulator and the regulated population. Repeated focus on an industry without adequate justification can seriously impact what should be a cordial relationship.

We hope the above information has provided some useful input in the Senate Inquiry. We are happy to provide additional information if it assists the process.

Yours Sincerely,

Peta Stead  
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**CISA Consulting**



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