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OTC Intermediary Compliance
Market Supervision
Australian Securities and Investments Commission
Level 7, 120 Collins Street
Melbourne, VIC 3000

By email: Market.Supervision.OTC@asic.gov.au

Dear OTC Intermediary Compliance Team,

Re: ASIC Consultation Paper 322 *Product Intervention: OTC binary options and CFDs*

The Australian CFD and FX Association ("**Association**") is an alliance of domestic retail OTC derivative providers, established to promote investor protection and healthy industry competition and standards.

Combined, the current members of the Association contribute to the Australian economy by:

- operating Australian businesses that conduct a $11.5 trillion p.a. in turnover;
- supporting over 260,000 active investors;
- paying approximately $184 million in tax; and
- employing over 350 people in Australia.

The Association supports improving standards in Australia. Each member has agreed to contribute to the design of an Industry Code, a broader industry initiative which aligns with the measures outlined in IOSCO's regulatory toolkit in the *Report on Retail OTC Leveraged Products* from September 2018.[1]

We are happy to meet with ASIC to provide additional information on the Industry Code and work with ASIC to discuss the best way to implement industry reforms in Australia, which protects investors without restricting them to the point that they are encouraged to look for opportunities outside of the Australian regulatory environment.

We do not agree that the product intervention power is suitable as an implementation process for the various policy measures set out in the IOSCO regulatory toolbox. Before we cover the specific

[1] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD613.pdf.

questions in Consultation Paper 322 ("**CP 322**"), the Association wishes to outline several fundamental concerns that it has with ASIC using the product intervention power on CFD and FX issuers in the way it has detailed in CP 322.

1. Significant consumer detriment has not been established

Demonstrating significant consumer detriment is, and should be, a high bar. The harm ASIC has detailed in the paper is:

- attributed to binary options which are a fundamentally different products to CFDs and FX derivatives and are not offered by the vast majority of licensed CFD and FX issuers in Australia;
- predominantly caused by unlicensed, unregulated and fraudulent entities;
- based on an incomplete picture of the complaints made about our industry; and
- based on a misunderstanding of how clients typically trade our products.

<u>Combining information with binary options information</u>

The clear majority of the harms discussed in CP 322 are associated with binary option products. The Association is concerned that this provides a false narrative to the assessment of harm caused by CFDs and margin FX products.

Binary options are distinctly separate products from CFDs and FX derivatives and involve a fundamentally different trading experience. Binary options can be described as akin to gambling. As an all-or-nothing bet, if an investor's prediction is wrong, they will lose all of their money, if their prediction is right, they will get their money back with an additional payment. Binary options are typically offered with set timeframes that are so short that no fundamental analysis will allow an investor to be able to accurately predict the movement. More often than not the payout and pricing structures are also opaque, particularly around the strike-price of the binary option, which is controlled by the issuer and small delays can more easily change whether someone wins or loses. An investor trading binary options will only make money in the long run if they win the majority of the bets that they make.

There is only one AFS licensee that solely provides binary options. This makes pricing and quality comparisons between licensed Australian providers impossible.

In contrast, CFDs and FX derivatives allow investors to set their own profit targets and stop loss orders, allowing them to make a profit even if they do not win the majority of their trades. Pricing of CFDs and FX derivatives is also directly tied to the underlying assets and investors themselves determine when to be in and out of the market based on the prices they see.

Unlike binary options issuers, it is simply not possible for a CFD and FX issuer to have bad or opaque pricing in Australia, as investors would simply move to a competitor. The retail CFD trading community in Australia is very vocal online about their trading experiences with issuers and it is common for investors to 'switch' between issuers if they are not receiving the level of service that they expect.

For the reasons set out above, we do not consider it appropriate for ASIC to reference information and actions it has taken in regard to binary options and binary option providers when discussing the impact CFD and margin FX issuers have on investors in Australia.

For completeness, the Association is fully supportive of a ban on binary options.

<u>Harm from unlicensed and unregulated providers</u>

We are concerned that CP 322 does not appear to address the actions of unregulated entities and individuals and fraudulent entities (as distinct from compliant, licensed entities) in causing harm to retail clients. This is despite a number of international regulators confirming that they are a material cause of loss for retail clients in the retail OTC derivative industry:

- *"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".*[2]
- *"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."*[3]
- *"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 websites and scams (emphasis added) through false transfer orders amounted to EUR4.5 billion in France over six years."*[4]

ASIC itself appears to have acknowledged the threat posed by unlicensed, fraudulent activity in a number of its key regulatory actions:

- 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."

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[2] Report on the IOSCO Survey on Retail OTC Leveraged Products, December 2016 page 4.
[3] Report on the IOSCO Survey on Retail OTC Leveraged Products, December 2016 page 18.
[4] 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/Communiques-de-presse/AMF/annee-2016.html?docId=workspace%3A%2F%2FSpacesStore%2Fb6848912-6303-4a84-bab2-a5f0f118fafb.

- 16-189MR *ASIC warns investors about dealing with GOptions, Porterfinance, Boss Capital, MaxOptions, Bloombex 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.
- 16-142MR *ASIC warns investors about services advertised by Top Ten Binary Brokers also known as Top 10 Binary brokers.com (Top Ten Binary Brokers)* – "ASIC is concerned that Top Ten Binary Brokers is offering unlicensed financial services in Australia"
- 16-066MR ASIC warns investors about dealing with Market City International and Brokers500 – "The website contains statements to the effect that Market City International holds an Australian financial services licence (License No. V0046651). These statements are false and are likely to mislead the public. "Market City" is a registered business name of the Perth Market Authority, an agency of Western Australia. The number V0046651 corresponds to that business name. The Perth Market Authority has no connection with Market City International."

The primary actions ASIC has taken against licensed issuers also considers unlicensed conduct:

- *18-340MR ASIC cancels AGM Markets licence for unconscionable conduct and unmanaged conflicts of interest* – "the AFS licence was cancelled after ASIC found AGM: provided financial product advice about securities and superannuation interests when it did not hold a licence to do so";
- *18-315MR ASIC cancels AFS licence of retail OTC derivative issuer Direct FX Trading Pty Ltd* for serious compliance failures* – "ASIC found that Direct FX: continued to carry on a financial services business while suspended"
- *18-034MR Operators of 'binary options trading boiler room' banned following conviction* – "Ms Jaros and Mr Cooper were convicted and sentenced for operating a financial services business without a licence and lodging false documents to ASIC containing false or misleading material"

Unlicensed providers are already prohibited from providing financial services in Australia and there are severe penalties associated with doing so (including criminal and civil penalties).

Any product intervention will only impact licensed entities so it is not clear how actions taken as described in CP 322 will address the material source of harm coming from unlicensed providers. The proposed restrictions may actually result in retail traders moving to these unlicensed brokers as traders seek more flexibility/leverage, causing more consumer harm which is precisely what ASIC are trying to address. The most effective means of addressing consumer harm would be to focus on addressing/penalising the unlicensed issuers in Australia rather than imposing restrictive regulation across the entire licensed industry.

<u>Industry complaints</u>

CP 322 discusses the increase in complaints received by ASIC and AFCA in relation to binary options and CFDs. We are concerned that the statistics referenced by ASIC do not correctly reflect the number or nature of the complaints directed at the industry.

Many of the complaints received by ASIC will be in relation to binary options and/or unlicensed entities, neither of which are impacted by the restrictions proposed in CP 322. The Association believes that this unrelated information should not be considered in ASIC's decision-making regarding actions that will impact licensed FX and CFD providers.

It is also not clear how many of the complaints received by ASIC were considered legitimate enough to lead to a surveillance, investigation or resulted in any actual action being taken against a licensed entity. It is equally unclear whether the complaints reported to AFCA are the same as the complaints reported to ASIC, which may mean that complaints have been double-counted.

Association members are witnessing a disturbing trend involving websites and online forums run by overseas individuals and entities that instruct complainants about how to gain money from issuers, typically by making specific claims and threatening to go to the regulator or ombudsman. It is now commonly known amongst the trading community that handling AFCA complaints is a very expensive and time-consuming process for licensed issuers (costing around $7,000 even if the matter is found in the issuer's favour). These websites and forums are leveraging this to their advantage, coaching complainants to demand financial settlements from issuers under threat of AFCA escalation, often for malicious or vexatious complaints that have no grounds. The forum or website facilitator then gets a cut of the settlement money paid to the complainant. The Association believes that any assessment by ASIC of the number and level of complaints made against industry participants should also take into account this increasingly popular and concerning practice.

AFCA has said that the level of overall complaints it received had risen 42% in the first four months of its operation.[5] It appears the increase in complaints is not only impacting the retail OTC derivatives industry.

In its first report AFCA mentioned the investments and advice sector made up only 5% of overall complaints. Of this, 24% were in relation to retail OTC derivative issuers, but more than half of that number were complaints against one financial firm which had its AFS Licence suspended by ASIC.[6] AFCA has not provided any information as to the proportion of the remaining complaints it received (about other OTC derivatives issuers) that were actually found in the complainant's favour. This data is important in gaining an accurate picture of the complaints directed at industry, particularly in the context of the rising number of organised vexatious complaints activity referred to above, as well as certain market events which are outside of issuers' control and responsibility.

One such event in this time period was the major unexpected market gapping event as a consequence of the Japanese yen flash crash, which led to a number of investor losses that became the subject of

[5] AFCA News, Edition 1 - 21 March 2019.
[6] AFCA Six month report, 21 March 2019.

multiple complaints. While the outcome of these events is unfortunate, the losses are caused by a series of market factors, not by the direct action of retail OTC derivative issuers.[7]

Going forward, this type of issue would be addressed by negative balance protection, further reducing complaints, which is supported by the Association.

If the figure of 4,000 complaints is taken as being entirely associated with justified complaints against licensed entities (which is not the case for the reasons set out above), and each complaint is taken as separate and distinct (and not the same complaint being made to both AFCA and ASIC or the same complaint being made multiple times), then based on the figure of 1 million active investors, only 0.4% of investors have made a complaint about a licensed OTC derivatives issuer. While every licensee should aim for no complaints, it is difficult to see how less than one half of a percent of active investors complaining about a product demonstrates a significant detriment to all investors.

For these reasons, we caution ASIC against relying on the statistics in CP 322 as definitive evidence of significant harm to investors.

Trading example in CP 322

In CP 322, ASIC used examples of an investor called 'Tim' who deposited $10,000 with a retail OTC derivatives issuer and then invested all $10,000 in a S&P/ASX200 CFD at a leverage rate of 200:1, enabling a $2 million exposure.

This example does not correctly reflect the way that investors trade with the industry, because:

- it would be highly unlikely (and commercially extremely foolhardy) for any issuer to take responsibility for such a high level of exposure from a single client unless they had extremely large amounts of capital – bearing in mind that the issuer is on the other side of that trade and many issuers would have to enter into an identical trade with their liquidity providers or prime brokers;
- the trade would be closed-out almost instantaneously as a consequence of market movement and there being no further funds to support the trade through those movements; and
- the product value test means that Tim would be considered a wholesale investor, as distinct from a retail investor, under the *Corporations Act 2001*.[8]

A typical retail investor is more likely to trade in 1 lots or micro-lots (0.01 - 0.1 lot) rather than the large amounts invested by Tim in ASIC's example. Investors are also more likely to enter into and close out multiple trades in a day and not be subject to the overnight costs referenced in CP 322. In fact, most issuer disclosure explicitly discourages investors from holding positions if they are unable to monitor them.

[7] Box B The Recent Japanese Yen Flash Event, Statement on Monetary Policy – February 2019, Reserve bank of Australia https://www.rba.gov.au/publications/smp/2019/feb/box-b-the-recent-japanese-yen-flash-event.html
[8] *See s761G(7)(a) Corporations Act*.

Our other concern is that ASIC's comparison of CFDs and margin FX products to a vanilla ETF is not comparing like for like. Investors typically trade CFDs and margin FX products as part of short-term holding strategies. The products are not designed for long-term holding strategies and this is not how investors use them, with the majority of trades being closed in a single day. The rewards are also not the same - CFDs and margin FX will greatly outperform any ASX listed ETF when it comes to short-term gains. A more accurate ETF comparison for ASIC to make would be to reference some inverse, leverage ETFs listed in the US that are readily available to Australian retail investors.

Other risks with ETFs that have not been considered in ASIC's example is where retail investors are gaining exposure to them via margin loan facilities.

Regardless, we remind ASIC that, "The power is also not designed or intended to prevent all monetary losses or eliminate all risk from the financial markets (e.g. market risk)".[9]

In addition, CP 322 does not appear to contemplate or take into consideration the impact on two of the most common investors of CFD and margin FX trading:

- scalpers; and
- Expert Advisor (**EA**) users.

The purpose of scalping is to make a profit by buying or selling financial products and holding the positions for a very short time and closing it for a small profit. Many trades are placed throughout the trading day using a system that is usually based on a set of signals derived from technical analysis charting tools. The charting is made up of a multitude of signals that create a buy or sell decision when they point in the same direction. This type of trader will make a large number of trades for a small profit each time. The recommendations in CP 322, including the leverage requirements and margin close out requirements, will make this form of trading impossible as the amount of capital required for trading certainty will be beyond most retail investors.

In any given day, anywhere from 20 – 50% of the trades through most issuer systems will be from EAs. This is becoming more and more popular as the technology and accessibility of these types of systems improves. For a number of these systems it is critical that there is available capital to facilitate maximum flexibility in volatile market conditions. The type of changes CP 322 is recommending will impact these systems in a significant way. Not only will many EAs become useless (as a number of strategies require no leverage restrictions), investors that want to continue to trade in Australia will have to go to the time and expense of reprogramming the EAs to operate under a completely different trading environment.

2. The product intervention power was not meant for established products

As mentioned in CP313 paragraph 27, ASIC sees the product intervention power on a market-wide basis as a way to:

(a) address market-wide problems causing significant consumer detriment more quickly than law reform; and

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[9] ASIC Consultation Paper 313 *Product Intervention Power* (CP 313) paragraph 15.

(b) deal with 'first-mover' issues that may inhibit industry-led responses to products that are causing significant consumer detriment.[10]

The Association considers that the age of a product should therefore be taken into consideration in the assessment. It would seem inconsistent to use the product intervention power, which is designed to facilitate swift remedies, on a product that has been offered in the same way for a long period of time. CFDs and margin FX have been offered under the same conditions for over 17 years. It is not clear from a policy perspective how ASIC can justify the need for a quick resolution if the issues it is trying to resolve have been present for such a long period of time, this also supports the justification of an extended period of time to comply with ASIC's proposals.

Formal law reform is the most appropriate way to address any shortcomings with a product that has been operational in a standard way for a long time period.

Likewise, it would also be difficult to claim investors have had no chance of understanding a product that has managed to be successfully offered to the same type of investors for this length of time. The only way a product continues to be available is where there is investor demand for that product. The current investor demand for CFDs and margin FX products would not exist if no one understood the product and/or all investors suffered significant detriment.

We are concerned about the precedent that would be set should the CP 322 requirements be implemented using product intervention. It could cause serious uncertainty for all financial services industry participants, which would no longer be able to rely on the history or the popularity of a product as a safe indicator that they can continue to provide those products into the future, even if the products are part of their core business.

With long term established products, the impact on industry systems, processes, staff and investors are far greater. This is why the Association considers that formal reform, with proper consideration and consultation as well as reasonable transition periods, is more appropriate to avoid material, if not fatal, impacts on financial service providers.

The Association fully supports further reform and we are confident a cohesive industry/regulator approach would enable faster and more effective action.

The Association notes that the design and distribution obligations (which were implemented at the same time as the product intervention power) appear to be more applicable to established products and more appropriate for the matters ASIC has raised in CP 322. The design and distribution obligations:

> *"…[were] designed to assist investors to obtain appropriate financial products by requiring issuers and distributors to have a customer-centric approach to designing, marketing and distributing financial products."*[11]

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[10] ASIC Consultation Paper 313 *Product Intervention Power* (CP 313) paragraph 27.
[11] Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 Explanatory Memorandum

3. CP 322 is not changing one aspect of a product, it is changing all aspects

ASIC has stated that it is basing its changes on the regulatory toolkit outlined by IOSCO. As a consequence, it is implementing eight separate material legislative reforms requiring multiple changes to the products offered by the industry in a single action with little to no transition time.

ASIC has not provided evidence of why it is necessary to make multiple material changes to the offering of an established product at the same time in order to address the significant harms outlined in CP 322. Even one of the proposed changes (for example negative balance protection) may have a significant impact on how the product, and the industry, operates in practice. Requiring the industry to implement so many changes at once is extremely burdensome for industry and, more importantly, it increases the risk of unforeseen negative consequences for investors.

For example, requiring additional capital from investors upfront in a leverage change, combined with changing the margin close-out barrier to 50% (which would also require far more capital from investors) could in itself lead to far more investor positions being mandatorily closed out and ultimately lead to investors incurring additional losses.

It is also important to note that the IOSCO measures are part of a regulatory toolkit – a series of policy tools for regulators to consider. The measures are not mandated IOSCO requirements and they are not even IOSCO guidelines:

> *"The first toolkit describes a range of policy measures that* ***may*** [author emphasis added] *be adopted by IOSCO members to address the specific risks arising from the offer and sale of the relevant products by intermediaries"*[12]

A number of IOSCO members have chosen not to implement any of the measures. Some larger regulators, for example the US regulators, have chosen not to implement many of the measures outlined in the toolkit.

The measures are also high-level policy suggestions. The Association notes that no other international regulator has implemented all the measures in one action. Even with individual reforms, other regulators have entered into detailed discussions with industry and provided long transition periods. In contrast, ASIC appears to have selected requirements implemented by various international regimes and adopted the most restrictive stance possible by proposing to implement multiple, detailed requirements that can fit under each broad measure.

Formal law reform is more suitable due to the sheer number of proposed changes. We would also encourage ASIC to take a step by step approach rather than implementing multiple changes at once, in line with the approaches taken by its IOSCO peers.

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[12] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD613.pdf.

4. The recommended changes will not address the harm and may make it worse

As outlined above, fraudulent issuers who are primarily unlicensed and unregulated are the key cause of harm to investors in the OTC derivative industry.

The product intervention power only impacts licensed entities, so as a consequence of its use, these unregulated, fraudulent entities will have a competitive advantage over legitimate businesses that are trying to provide transparent, honest and efficient services to clients under an increased regulatory burden.

It is also important to consider both regulator sentiment for a product and investor sentiment. Even where a regulator has a negative view of a particular product, investor views of the product should also be taken into consideration. If there is no clear evidence of investors asking for a product or a certain aspect of a product to be banned and there is also evidence of strong investor demand for the product, then there is a risk that a ban will merely encourage those investors to satisfy their demand elsewhere, in a way that potentially exposes them to more harm.

This is particularly relevant to CFDs and margin FX - where a number of international regulators are already backing away from increased product restrictions, in recognition that such measures are simply driving investors outside of the regulatory environment to continue to access the products they want.

For example, the Polish regulator conducted two surveys of investors after the European Securities and Markets Association ("**ESMA**") product intervention on retail OTC derivatives. One of which was conducted by the Polish Chamber of Brokerage Houses ("**PCBH**") and the other by the supervisory authority ("**PFSA**") as part of its activities. The Polish regulator covered the outcome of those surveys in its response to ESMA (the following is the translation from the original response):[13]

> *"According to PCBH's survey of 459 independent investors, 50% of respondents declared that they had transferred their account to a broker registered outside the European Union as a result of the introduction of product intervention by ESMA, of which 99.6% of investors in the above group declared that the main reason for the transfer was the possibility of using higher leverage.*
>
> *Similar results were obtained in a survey conducted by the supervisory authority (PFSA) among retail investors of the Forex/CFD market. 54% of respondents declared that they had opened an account with a broker registered outside the European Union as a result of the introduction of ESMA product intervention, of which 95% of investors from the above group indicated that the above decision was influenced by the possibility of using higher leverage. Among the remaining respondents, 56% indicated that they were considering taking such action.*
>
> *For over 86% of clients, leverage is a very important element taken into account when choosing a broker. The same percentage of respondents indicated that they prefer a leverage level of at least 100:1."*

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[13] See DECYZJA NR DAS.456.2.2019 KOMISJI NADZORU FINANSOWEGO, w sprawie ustanowienia ograniczeń w zakresie wprowadzania do obrotu, dystrybucji oraz sprzedaży klientom detalicznym kontraktów na różnicę (CFD) https://dziennikurzedowy.knf.gov.pl/DU_KNF/2019/27/akt.pdf

The recent ESMA product intervention also appears to have done nothing to discourage investors from wanting to invest in similar high-risk products. The Cyprus Securities Exchange Commission ("**CySEC**") recently acknowledged this in a press release accompanying further consultation on the ESMA measures:

> *"the consumer demand for high risk, speculative trading products shows no sign of decreasing in Europe"*[14]

The Autorité des marchés financiers ("**AMF**") was so concerned about investors accessing the products outside of its regulatory remit that it found it necessary to publish additional messaging to investors reiterating the purpose of the ESMA measures:

> *"the purpose of these measures is to achieve the legitimate objective of investor protection and encourages investors to resist certain online trading platforms' efforts to circumvent and remove the protections put in place by the regulators."*[15]

Since ASIC's announcement about the proposed use of product intervention powers on the industry here in Australia, issuers have received multiple complaints from clients on a daily basis who have specifically stated they will be moving to offshore providers if the reforms are implemented. It is difficult to reconcile how forcing retail investors to have to look outside of a formal regulatory environment to access the products they want will be of benefit to them and not expose them to additional harm.

5. A number of factors listed in CP 322 are not an accurate representation of the product

<u>Loss rates</u>

We are concerned that the loss levels quoted in CP 322 are not an accurate representation of CFDs and margin FX products – in that they may be more attributable to market factors rather than any particular aspect of the product or issuer conduct.

ESMA appears to have confirmed this, stating that profitability has gone down after the implementation of its requirements:

> *"The share of profitable retail client accounts decreased slightly, but this appears to be mainly arising from the soaring prices of cryptocurrencies in August 2017. Comparing client outcomes over time is not only impacted by the product intervention measures, but also for example by market conditions. Market conditions in August 2017 were bullish in comparison to August 2018."*[16]

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[14] Cyprus Securities and Exchange Commission, Press Release - *CySEC Consults to Impose National Measures to Restrict the Marketing, Distribution and Sale of Contracts for Differences*, 30 May 2019.
[15] Autorité des marchés financiers, *CFDs and binary options: the AMF reminds investors that the purpose of the restriction measures agreed on by ESMA is to protect them*, News release, 11 September 2018.
[16] EUROPEAN SECURITIES AND MARKETS AUTHORITY DECISION (EU) 2018/1636 of 23 October 2018 renewing and amending the temporary restriction in Decision (EU) 2018/796 on the marketing,

The FCA also recently stated:

> *"We recognise that the percentage of lossmaking retail client accounts may not improve and that profitable trades may be less profitable when trading at lower leverage."*[17]

A review of many issuer websites does appear to confirm that loss rates have not changed in a significant way since ESMA's restrictions were introduced.

Simply put, leverage gives investors the ability to get more buying power with less upfront costs. Losses occur because of the trading decisions made by investors, regardless of the leverage used. There is no clear evidence that leverage is tied directly to losses. Even in ASIC's own statistics, the products with the highest levels of leverage had the lowest loss rates. Loss rates in the retail OTC derivative industry are instead more likely to be higher because investors are able to make more, shorter term trades. In addition, as investors do have the ability to gain larger exposure, they can be more vulnerable to market movement but this also means they have the ability to make larger gains in the short term.

In our view, loss rates for CFDs and other OTC derivatives should not be compared to the loss rates of other longer-term investment products and strategies, which may be safer but do not provide similar return on investment opportunities. The profitability numbers in the retail OTC derivative industry are more appropriately compared to similar short-term investments such as unleveraged stock trading, futures and options trading. For example, they appear to be similar to that of day traders operating in a listed market:

- *"[t]he most experienced day traders lose money and nearly 3/4ths of day trading can be traced to traders with a history of losses".*[18]

In other words, the losses experienced by investors are not because the investors are vulnerable, but because they are making the decision to take on higher levels of risk in order to be able to make more significant short-term gains.

Investors are more likely to be vulnerable (and suffer more uninformed detriment) in scenarios where the issuer of the product is also the one considering their personal circumstances and encouraging them to invest. This position is supported by the fact that the most significant investor losses considered by the Parliamentary Joint Committee on Corporations and Financial Services in 2009,[19] and then by the Financial System Inquiry in 2014,[20] (which ultimately led to the recommendation of the product intervention power) were in scenarios where the product issuer was also providing personal advice to retail investors - as was the case with Storm Financial, Opes Prime, and Westpoint.

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distribution or sale of contracts for differences to retail clients.

[17] FCA Policy Statement PS19/18 *Restricting contract for difference products sold to retail clients* p 19.

[18]https://faculty.haas.berkeley.edu/odean/papers/Day%20Traders/Day%20Trading%20and%20Learning%20110217.pdf

[19] Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into financial products and services in Australia*, November 2019.

[20] Treasury, *Financial Systems Enquiry – Final Report*, November 2014.

By contrast, CFD and margin FX issuers do not provide personal advice and do not set the prices for their products, with many relying on unrelated, third party liquidity providers for pricing. As a consequence, issuers are not directly responsible for the decisions made by clients which may lead to any loss or profit.

Much of the misconduct that ASIC has dealt with in the licensed retail OTC derivative space in recent times is from issuers who were providing personal advice to investors outside of their licence authorisations. The Association encourages ASIC to continue to take action against such clear breaches of Australian requirements.

Low income investors

We are concerned that ASIC's figures regarding low income investors are not accurate, because the majority of issuers do not collect this information and/or do not independently verify the information they do collect on this particular point. Many investors will provide artificially low income information as they do not want to inform the issuer of their actual earnings until they have had a chance to review and trial issuer's platform.

ASIC's information does not take into consideration, for example, a self-employed business owner who may not pay themselves a large salary but who has access to material liquid assets.

The Association notes that the new distribution obligations, which have already been introduced into Australian legislation, will significantly mitigate the harm caused by the distribution of products to unsuitable investors.

Investors not understanding the product

ASIC's commentary does not appear to take into consideration the comprehensive onboarding process that most investors have to undertake prior to being able to trade OTC derivatives (under disclosure obligations that only apply to retail OTC derivative issuers), including the various detailed risk statements on issuer websites. Most issuers also have demo accounts available for investors to trial trading prior to live trading.

These types of warnings and processes are not required of offerors of many other financial products and services, for example, where a retail client decides to invest in an inverse, leveraged ETF on an overseas exchange via an Australian broker or when they want to invest in a listed hybrid product.

Again, the distribution obligations should mitigate this type of harm without the need for additional regulatory burden on the industry.

The claim that current disclosure is deficient

In relation to the various claims that issuers are not clearly disclosing the risks or material aspects of the financial products that they offer, the Association wishes to highlight that we are not aware of a single case where ASIC has put a stop order on any retail OTC derivative product disclosure statement in the 17 years that the products have been available to retail investors.

6. Investor choice is not being considered

At the end of the day, it is the investor that should have the right to choose the products that they want to invest in.

CP 322 does not seem to recognise that there are a significant number of retail investors who do fully understand the risks of CFDs and margin FX products but want to invest in them because of the potential short-term gains that are not present in most other products.

Any assumption that a retail investor cannot understand the risks of complex products (i.e. products that are not simple investments) is unfounded. ASIC and international regulators have provided numerous public statements about the loss rates and other risks associated with these products. Any investor that goes through an onboarding process with an issuer of CFDs and margin FX products is served with multiple prominent risk warnings but they are still deciding to trade. In fact, ASIC's own statistics show that the popularity of these products has doubled in the last two years.

At a minimum ASIC should consider allowing the possibility for an experienced investor who understands and agrees to the risks to access the types of products they want. We have outlined this in more detail below in response to question F1Q1.

7. Unintended economic and job consequences in the FinTech industry

We encourage ASIC to also consider some other unintended consequences of the changes it is recommending. CFD and margin FX businesses are FinTech businesses, which operate completely online. The industry also supports other FinTech innovation from individuals and entities who provide third party software solutions for the industry and investors, including various risk management, trading and account management solutions.

In this global online world, investors have the ability to move very quickly and we expect business models to adjust equally as fast.

If investors move offshore, so will business models, which will not only lead to a large loss in jobs and tax revenues but also in a large migration of FinTech business, knowledge and expertise to jurisdictions outside of Australia. As the Association makes up half of the $22 trillion turnover stated in ASIC's report,[21] doubling those figures would suggest this could impact around 1,000 jobs and A$400m annually in tax revenue.

Given the Australian government's current support for FinTech in Australia,[22] we believe it is important that ASIC also consider this impact when reviewing the cost and business impact of its proposals.

Questions from CP 322

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[21] ASIC Report 626 *Consumer harm from OTC binary options and CFDs* snapshot gross annual turnover figure and based on the consolidated figures of the Association members as calculated by Deloitte Access Economics.
[22] See the scope of the matters being considered by the Select Committee on Financial Technology and Regulatory Technology at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Financial_Technology_and_Regulatory_Technology/FinancialRegulatoryTech.

In relation to specific questions in the paper, please review our responses below.

E1 proposals

The Association members are supportive of a binary options ban and have no further comments to make on the specific questions asked under this section.

F1Q1 Do you agree with our proposal to make a market-wide product intervention order which imposes Conditions 1–8 (set out in Table 5) on the issue and distribution of CFDs to retail clients? If not, why not? If you disagree that CFDs 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.

We do not agree with ASIC's proposals to make a market-wide product intervention order on the basis of the evidence provided above. We do not believe ASIC has proven significant consumer detriment. We also consider that ASIC has not provided adequate evidence to suggest all of the proposed measures are required to reduce the potential harm to investors.

We believe a number of the restrictions proposed by ASIC achieve the same outcome or may in fact work against each other - causing more harm to retail investors. For example, leverage caps combined with margin close out requirements and negative balance protection.

We reiterate that formal law reform appears to be a more appropriate means of restricting products that have been provided in the same way for 17 years, rather than using a product intervention power designed for swift remedies.

We also believe that it is inaccurate to compare the Australian product intervention power with overseas product intervention powers to illustrate the suitability of the power's use on the OTC derivatives industry. For example, the UK Financial Conduct Authority is a prudential regulator and its power is a general rule making power. By contrast, the Australian product intervention power is more restricted and is designed to pause significant consumer detriment in a timely fashion only in situations where traditional law reform cannot be enacted quickly enough. The obligation for decisions of ultimate reform still remain with the Australian Government, namely the Minister as their representative.

Finally, we consider that the new product distribution obligations are better suited for reducing the harm that ASIC is seeking to address, in that they will deal with many if not most of the matters raised by ASIC in CP 322. These reforms have already been implemented in law and the impacts of those reforms have been costed by industry participants.

In terms of the specific conditions set out in CP 322, while most of the proposals can be implemented by issuers, we ask that ASIC review the suggested time frames. In addition, we raise the following concerns.

<u>Leverage Caps</u>

Our predominant concern is with ASIC's recommended leverage caps. These caps are far too strict and would make it impossible for many retail investors to trade effectively, especially scalper traders and EA users. If these caps are introduced in their current form, investors will look outside of the protection of Australian regulatory environment to access the products that they want to trade.

We believe that ASIC should consider a tiered approach, which is being considered by a number of other international regulators.[23] Under this approach, experienced investors who understand the risks are able to trade at higher leverage levels, while new investors are more restricted.

Our recommendation is that **experienced investors**:

- earn an annual income of at least $85,000 or who have over $200,000 in liquid assets; and
- are investors that have:
  - traded CFDs and margin FX for at least 12 months, placing a minimum of 50 trades in the previous two years; and
  - signed an acknowledgement form stating they have previous experience in acquiring or disposing of financial products that allows them to assess:
    - the merits of trading CFDs and margin FX; and
    - the value of CFDs and margin FX; and
    - the risks associated with holding CFDs and Margin FX; and
    - the client's own information needs; and
    - the adequacy of the information given by the licensee and the product issuer.[24]

  In the case where an investor is unable to provide independent evidence that they have the trading experience or is unable to meet the income and asset test, the acknowledgement form would need to be additionally certified by an independent licensed financial advisor, lawyer or certified accountant. [25]

We also believe this class of investor is already contemplated by the *Corporations Act 2001* in the "Sophisticated Investor" definition which allows for a retail investor to be treated as a wholesale investor, where there is a statement from an Australian Financial Services Licensee that the investor has sufficient experience to assess features of the offer, and where they have satisfied other administrative requirements.

Rather than relying on that section, which means that investors have to forgo the protections of being a retail investor, we are of the view it would be better if an "experienced investor" status was established formally as part of any recommended reforms.

All other investors will be classified as inexperienced and will have stricter restrictions.

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[23] See https://www.cysec.gov.cy/CMSPages/GetFile.aspx?guid=efb41dd3-9c23-42fc-b057-c5edcd389226 and https://dziennikurzedowy.knf.gov.pl/DU_KNF/2019/27/akt.pdf.
[24] These align with requirements already available to investors under s761GA *Corporations Act.*
[25] This form is similar to the Investor Certificate requirement under the *Financial Markets Conduct Act 2013* (NZ).

Our recommended leverage levels are based on overseas experiences and an understanding that any reduction in those levels is likely to lead to investors seeking products overseas, potentially exposing them to greater harm.

We recommend the following:

Inexperienced investors should have the following leverage restrictions:[26]

- Major currency pairs* - 30:1
- Non-major currency pairs, gold and equity indices - 20:1
- Commodities other than gold - 10:1
- Individual equities and other reference values - 5:1
- Cryptocurrency assets - 2:1

These levels align directly with the current ESMA restrictions.

Experienced investors should have the following leverage restrictions:

- Major currency pairs* - 100:1
- Non-major currency pairs, gold and equity indices - 50:1
- Commodities other than gold - 30:1
- Individual equities and other reference values - 20:1
- Cryptocurrency assets - 5:1

*Major currency pairs are any products whose base and quoted currency are made of the following currencies: AUD, USD, EUR, JPY, GBP, CAD or CHF.

We also highlight that the above proposed leverage caps will be implemented in addition to negative balance protection which will assist in preventing investor losses.

We have reviewed ASIC's analysis on setting leverage ratio limits in Appendix 2 of CP 322. We note that conducting a review of equities only severely limits the analysis. ASIC Report 579 stated that CFDs (which does not just include equity CFDs but also index, commodity, cryptocurrency and even some FX based CFDs) make up only 18% of transactions and 21% of turnover in the Australian market. These CFDs also already have some of the lowest levels of leverage. Margin FX is clearly the largest traded product in Australia.[27]

<u>Margin Close out</u>

We are concerned about implementing such a restricted close out value, especially given ASIC's intention to cap leverage. Issuers receive many complaints about mandatory closeouts. Given the volatility of the markets and the additional capital that investors will already be required to deposit under ASIC's proposed leverage caps (which impacts both an investor's initial margin and ongoing margining requirements), it is highly likely that the average retail investor will find themselves closed

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[26] These would align to the ESMA measures.
[27] ASIC Report 579 *Improving practices in the retail OTC derivatives sector*, June 2018.

out of positions far more frequently, leading to additional losses as they are unable to ride out the market movements.

We do not believe a mandated margin close out is necessary because ASIC is already suggesting a negative balance protection requirement. In our view, notification is more critical. We recommend that the requirement be amended to simply state that an issuer must clearly notify an investor that the accumulated value of margin required for open positions is provided at 50% of the equity in their trading account. This will allow the investor to make the decision about their open positions, rather than having the decision forced on them.

The prohibition on inducements

While the Association agrees that investors should not be inappropriately encouraged to trade products that are not suitable for them, we note that many other industries offer similar inducements and it seems anticompetitive and unfair to single out one industry.

For example, investors can earn frequent flyer points when trading shares with E*Trade.[28]

We also note that most share trading platforms will tier their fees based on the size of the trade or the trade value.[29]

This is no different to CFD providers offering trading rebates for high volume traders.

We therefore recommend carving out trading rebates from prohibited inducements as we do not believe this is encouraging trading. On the contrary, it is common practice for many financial service providers who discount fees for those who are more frequently purchasing their products or who are purchasing more high value products.

The requirement for specific disclosure on trading platforms

It is important for ASIC to note that a number of licensees utilise third party trading platforms. The type of disclosure required is not easy to implement and may be out of the issuer's control. This should be taken into consideration in regard to this type of disclosure.

Real-time disclosure of total position size and overnight funding costs

The Association is concerned that some of the proposals are in fact anti-competitive in nature, because the requirements are not in place in any other jurisdiction or for any other product offered in Australia. Please refer to our response to F1Q6 which provides more information about the anti-competitive aspects of the proposals outlined in CP 322.

We note that requiring an annualised overnight funding cost is not possible for swap charges as these charges will consistently change. A swap charge for a particular position is heavily influenced by the underlying interest rate corresponding to each of the two currencies involved. The swap charge is applied when an investor holds the position at the daily rollover point, which is 00:00 server time and known in FX trading as 'tomorrow next' or 'tom next.' Swap charges are driven by interest

[28] See https://www.qantas.com/fflyer/dyn/partners/financialServices/onlineTrading
[29] See discussion at https://www.canstar.com.au/online-trading/brokerage-fees/

rate differentials. Interest rate differentials are another way of thinking about the difference in interest rates between the base and quote currencies. Naturally, there can be differences in the two interest rates, so some issuers will net these off and assess the differential, investors are then charged — or could even receive — a daily amount of interest. Factors that affect this amount include lot size, the current market price, and the extent of the differential between the two interest rates at that time.

F1Q2 Condition 2 would require the terms of a CFD to provide that a CFD issuer must close out one or more of a retail client's open CFD positions, if the retail client's funds in their CFD trading account fall to less than 50% of their total initial margin required for all of their open CFD positions on that account. Do you agree with this condition or would it be better for clients (and operationally easier) if the CFD issuer is required to close all of the retail client's open CFD positions?

We do not recommend implementing a requirement to close out all positions in this situation. Even closing out some positions when an investor still has enough money to support their positions is going to severely impact the investor, especially when combined with the requirements for additional capital as a consequence of the recommended leverage caps.

This is a particular risk to investors relying on EA systems.

F1Q3 Condition 5 would require a CFD issuer to provide a prominent risk warning on account opening forms, trading platforms maintained by the CFD issuer, websites and the front page of PDSs. Do you agree with this condition? Do you think a risk warning should also be required on all advertising and marketing material?

The Association is not concerned about the requirement for risk warnings in principle, but we do wish to highlight the practical difficulties with displaying warnings on third party trading platforms. There are also difficulties in displaying comprehensive warnings on certain social media sites and on banner advertisements.

On the basis of the above, we recommend that the requirement for risk warnings be limited to an issuer's onboarding process, the front page of the PDS and website. The current risk warnings (such as those stating that trading in the products is high risk) should be retained for all other marketing materials.

For completeness, we also reiterate that the type of comprehensive risk disclosure being recommended by ASIC is not currently required for any other type of financial product of service being offered in Australia, even for those products that may have similar loss rates.

F1Q4 Do you agree with our proposal that the order would remain in force for a period of 18 months? If not, why not?

We reiterate that making material changes to a product that has been offered in a consistent way for 17 years is likely to have a severe cost and impact on industry if implemented for any time period.

However, should ASIC insist on using the product intervention power for this purpose, we recommend a shorter time period of three months followed by a review of the impact of the changes.

F1Q5 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?

In our view, the proposed timeframes for implementation are far too restrictive given the multiple, material changes being considered. Some of the requirements, such as negative balance protection, have no transition period at all.

Regulators in other jurisdictions have entered into far more detailed discussions with industry over multiple years and then provided transition periods of between 6 months to 2 years to implement just some of the measures being considered by ASIC. No other global regulator has implemented the number of changes that ASIC is proposing.

For example, the Monetary Authority of Singapore ("**MAS**") consulted in 28 May 2012 on higher margins and additional disclosure only. They considered the consultation and put out a feedback statement in 14 March 2014 which included draft regulations that had a transition period of 6 months after the regulations entered into law.[30]

MAS then conducted an additional consultation on capital requirements, additional leverage caps and client money segregation on 14 March 2014, which they provided feedback to on 26 May 2017 and published regulations which had a 1 year transition period.[31]

The Financial Services Agency in Japan made an announcement about leverage caps in May 2009, providing a transition period for an initial leverage cap in August 2010 of more than 1 year and then another 1 year transition period to reduce the cap further.[32]

The National Futures Association in the US provided a 9 month transition period for each of their various amendments.[33]

It is important to note that both the US and Japan implemented stepped-changes to their leverage cap transitions in an effort to reduce the impact on investors.

We also note some of the ESMA regulated jurisdictions are yet to permanently implement the changes recommended by ESMA.

We believe that a transition period of at least 12 months prior to the obligations coming into force will be required, having regard to the number of changes ASIC is proposing to make under the product intervention order and the requirement for both issuers and investors to have to change their systems and processes.

The reason for this transition time is:

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[30] See https://www.mas.gov.sg/publications/consultations/2012/consultation-paper-on-review-of-regulatory-framework-for-unlisted-margined-derivatives-offered-to-retail-investors
[31] See https://www.mas.gov.sg/publications/consultations/2014/consultation-paper-on-draft-regulations-to-enhance-the-regulatory-framework-for-unlisted-margined-derivatives-offered-to-retail-investors
[32] See https://www.reuters.com/article/markets-forex-margin/japan-to-impose-cap-on-forex-margin-trade-leverage-idUST36139520090731.
[33] See https://www.nfa.futures.org/rulebook/rules.aspx?Section=9&RuleID=9053.

- many issuers now use multiple trading platforms (for example, MT4/MT5 and cTrader). The changes will have to be made to all of those systems, which they do not directly own or control;
- unlike other jurisdictions, ASIC is proposing implementing multiple material changes at the same time;
- EAs are more popular than ever and investors will need time to reprogram, research new EAs, purchase new EAs and test them for a period of time in different market conditions prior to implementation to reduce material impact on trading outcomes;
- ASIC is proposing the changes at a time when there are multiple other regulatory changes occurring such as the monitoring of recently implemented life cycle reporting, potential IDR reforms which includes a detailed implementation of a record data set and additional reporting obligations to ASIC, and product distributions reforms;
- the new proposals require multiple changes to all disclosure documents, websites and marketing material. This requires each issuer to undertake a comprehensive audit of current disclosure. Much of the marketing material is also professionally designed static or moving images that are uploaded to online providers, such as Google, and this requires time and cost to redesign and distribute;
- the proposed changes to leverage are so severe and so different to the current requirements that detailed investor education will need to be provided as trading strategies will need to be completely changed and new trading strategies will need to be tested on demo systems; and
- the cost of implementing so many changes will already be material. Requiring them to be implemented in a short time frame dramatically increases the cost, which in turn increases the risk of a financial stress situation on issuers who rely on large capital reserves to provide a safer trading environment to investors.

Question F1Q6 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?

We disagree with ASIC's statement in CP 322 that the requirements are not anti-competitive because they apply to the entire industry – in our view this is far too simplified a view of competition.

The importance of competition as a consideration for the use of the product intervention power is demonstrated by the *Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018*, which implemented a regulatory requirement on ASIC to consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system.[34] This piece of legislation in turn came from recommendations from the 2014 Financial System Inquiry ("the **Murray Inquiry**"), which raised the importance of reporting of how regulators balance competition against their core objectives as well as reporting on how they identify barriers to cross-

[34] *Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018* s1.

border provision of financial services.[35] Competition considerations was also highlighted as important for financial stability in the June 2018 Productivity Commission report.[36]

Firstly, OTC derivative products are available online and are accessible globally. The proposed requirements only apply in Australia. ASIC has recommended implementing a combination of the strictest measures from a number of overseas jurisdictions and is requiring additional obligations that go beyond anything required by international regulations or by the IOSCO measures. This clearly puts Australian financial services licensees at a serious disadvantage and impacts Australian investors far more than investors and issuers under any other regime.

In addition, the international OTC derivative industry is known to have multiple overseas issuers operating unhindered in unregulated environments. These unregulated issuers will not have to comply with any of the obligations that ASIC is proposing.

The proposed requirements are also anti-competitive in Australia because it means retail OTC derivative issuers will be required to comply with multiple additional regulatory obligations and restrictions under Australian law that are not required of any other financial services provider operating here. No other licensee is required to publicly state loss rates or provide negative balance protection, for example:

- Australian brokers can offer investment in inverse, leveraged ETFs on overseas exchanges with none of these restrictions; and
- a wholesale intermediary will be able to offer access to high-leveraged products without any of the restrictions applying.

ASIC's proposals will not apply to unlicensed brokers and while they still exist, this regulation competitively advantages those issuers creating the most harm.

Matters such as leverage, fees and suitability of being loaned money to investment can be equally relevant to other Australian financial offerings, such as margin lending facilities in order to increase investment in shares or managed funds.

Finally, and most critically, the significant impact of the proposed changes will lead to the collapse or closing down of multiple licensees, particularly smaller licensees because:

- licensees are being required to make multiple changes at one time;
- the changes are all material;
- they are costly (not just in the cost to implement but in revenue and income. For example, CMC Markets UK PLC announced a 30% drop in operating income for its year end results for 31 March 2019); [37]
- they impact multiple established systems and processes;
- they are required to be implemented in tight time frames;

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[35] Murray et all, Financial System Inquiry — Final report, November 2014 Recommendation 30.
[36] Productivity Commission Inquiry Report, Competition in the Australian Financial System, No 89, 29 June 2018.
[37] CMC media statement - Final results for the year ended 31 March 2019 https://www.cmcmarkets.com/group/news/cmc-markets-announces-fy19-full-year-results

- they are being implemented at a time when issuers are required to implement multiple other regulatory changes (such as changes to internal dispute requirements, the implementation of the new distribution obligations, the monitoring of the new life cycle trade reporting requirements); and
- they are being implemented at a time when ASIC has already burdened the industry with multiple requests for detailed information and requests, requiring them to pay large legal and advisor costs.

Conclusion

We are concerned that ASIC may be taking incorrect assumptions into consideration in its decision to use product intervention on the CFD and margin FX issuers and does not appear to be adequately considering the unintended consequences of the recommended reforms. Overall, we do not believe the harm and the benefits that are outlined in CP 322 are an accurate representation of the industry, investor behaviour or consumer outcomes.

The changes recommended by ASIC are not minor and technical and will have material impact on both licensees and investors.

The Association members alone anticipate the costs to their entities to be around $16 million in a one-off set up cost and $2.9 million in ongoing costs at least for the first year. This is the cost of implementation only and does not include revenue losses from investors moving offshore. This also does not take into consideration the cost on the Australian economy as a consequence of lost tax revenue, the loss of income being brought into Australia from overseas investors and the loss of local jobs. It also does not take into consideration the costs on investors themselves who will need to pay for changing EA and other trading strategies.

We urge ASIC to reconsider its position on these matters and take time to discuss the issues with industry in a constructive way.

Please let us know if we can provide any additional information on the matters we have raised in this submission.

Yours respectfully,

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