

1 June 2022

Quality of Advice Review Secretariat
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: AdviceReview@treasury.gov.au

Dear Quality of Advice Review Secretariat,

Re: Quality of Advice Review Issues Paper (“Quality of Advice Review”)

The Australian CFD and FX Association (“**Association**” “**we**” “**us**” “**our**”) is an alliance of domestic retail over-the-counter (“**OTC**”) derivative providers, established to promote consumer protection and healthy industry competition and standards. Our members are margin foreign exchange and contracts for difference (“**CFD Product**”) issuers which offer their products to retail and wholesale clients in Australia.

Thank you for providing us with the opportunity to comment on the Government’s Quality of Advice Review.

While our members are product issuers and not providers of personal advice, we believe we can provide some useful insights to help with your considerations of consent arrangements for the wholesale client and sophisticated investor classification.¹

In October 2020, ASIC utilised its newly granted product intervention powers to restrict the way that CFD Products) are traded in Australia.² On 6 April 2022, the CFD Order was further extended for another 5 years.³

It is important to note that CFD Products are not novel and had been successfully traded in their original form for decades prior to the CFD Order. Our industry never historically focused on wholesale classification of clients at onboarding, with most automatically classified as retail unless otherwise requested.

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. We saw a dramatic increase in our experienced investors requesting wholesale client status following the announcement of the

¹ Quality of Advice Review s4.7.

² ASIC Corporations (Product Intervention Order—Contracts for Difference) Instrument 2020/986 (“**CFD Order**”).

³ ASIC Corporations (Product Intervention Order Extension—Contracts for Difference) Instrument 2022/259.

CFD Order. This change in client demographic from retail to wholesale was also observed by ASIC.⁴

Informing our view that it was experienced investors requesting wholesale status was the fact that our members estimate since Australia introduced leverage restrictions there has been:

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

Members also observed a large proportion of clients heading to offshore trading venues to be able to continue to trade the products the way they want to.

The observations above match similar experience in other overseas jurisdictions where tight restrictions on CFD Products have been implemented:

“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.”⁵

As part of the consideration of whether to extend the CFD Order, we recommended that ASIC create a class of experienced retail clients within the CFD Order that could access higher leverage levels, allowing those investors to retain their retail protection status while still being able to access the products they were looking for. ASIC rejected this option noting:

“there is an existing product-agnostic regulatory framework in the Corporations Act for clients who have more experience. Provided such clients meet the relevant tests to be classified as wholesale clients (including as sophisticated investors under s761GA) under the existing laws, they will not be affected by the proposal.”⁶

We therefore raise these concerns with Treasury, because any change to the consent arrangements for the professional or sophisticated client definitions will directly impact CFD issuers given the limitations the CFD Order has now implemented. Should product restrictions become overly burdensome or costly on clients, it will simply drive more clients to access products offshore in unrestricted and unregulated jurisdictions.

More generally, we are seeing Australian regulation becoming less principles- based and more prescriptive. With the advent of additional powers such as the product intervention power where there is an ability to significantly restrict the features of established products, it is important to give experienced retail clients, who understand the risks, an avenue to make the investment choices that they want to. In our view, highly prescriptive retail client regulation would not allow for this.

⁴ Extension of the CFD product intervention order CP348 para 61.

⁵ 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.

⁶ ASIC Report 724 Response to submissions on CP 348 Extension of the CFD product intervention order p25.

Having said that, we do think there is scope for s761GA of the Corporations Act 2001 (“s761GA”) to be improved to provide better client protection.

Should there be a requirement for a client to agree with the adviser in writing to being classified as a wholesale client?

We believe that consent or acknowledgement by the client is important and should apply to the professional investor definition in the same way it applies to the sophisticated investor definition.

Are any changes necessary to the regulatory framework to ensure consumers understand the consequences of being a sophisticated investor or wholesale client?

1. Client acknowledgement

Any change from retail to wholesale status under s761GA should be driven by the client and not the financial service provider.

The clear client written acknowledgement in s761GA(f) assists with this aspect. However, requiring the client to acknowledge they have not been given a product disclosure statement (“PDS”) does not take into account the fact that outside of the personal advice space, many PDS’s and other retail client documents are made available online and are often included in a standard online onboarding process.

We recommend that this part of the acknowledgement is changed to simply say that the client acknowledges the PDS and any other retail disclosure document will no longer apply to them.

2. Make the choice reversible

The following recommendation is not about understanding the consequences but does allow for a retail client to change their mind.

We believe that s761GA should state that the client has the ability, at their discretion, to reverse the choice of being classified as a sophisticated client by providing written notice to a financial services licensee.

Should there be a requirement for a client to be informed by the adviser if they are being classified as a wholesale client and be given an explanation that this means the protections for retail clients will not apply?

We believe that this disclosure is very important.

Immediately after the CFD Order restrictions were announced, we experienced numerous clients requesting wholesale recognition to access product features that would soon no longer be available to them in Australia. Our members understood the scrutiny that would be applied by ASIC to this process, as many had already seen similar heightened regulatory surveillance in overseas jurisdictions. We also wanted to make sure our clients understood the consequences of the decision they were making.

Our members found it useful to ensure that clients provided clear consent before the consideration process for the purposes of s761GA even started, in addition to providing clear disclosure of the protections that would no longer be available to the relevant clients should they eventually qualify as wholesale.

Thank you once again for the opportunity to comment and please let us know if we can provide any additional information on the matters we have raised in this submission.

Yours respectfully,



Peta Stead
Director
Australian CFD and FX Association