HOLLEY NETHERCOTE LAWYERS

Our Ref: MM:GP:241

16 November 2026

ASIC
Level 5
100 Market Street
Sydney NSW 2000

Via email: Market.Intermediaries@asic.gov.au

Dear Sir/Madam,

RE: CS 64 Protecting retail investors: Proposed extension and amendments to the CFD product intervention order

Thank you for the opportunity to provide feedback on ASIC's proposed extension and amendments to *ASIC Corporations (Product Intervention Order—Contracts for Difference) Instrument 2020/986* (**CFD PIO**).

ABOUT US

Holley Nethercote Lawyers is one of Australia's leading financial services regulatory firms. We are experts in digital asset technology, financial services and consumer credit regulation, financial crime and commercial law. Employing over 37 staff across Melbourne, Sydney and Adelaide, our firm acts for many Australian CFD issuers.

We have extensive experience advising CFD issuers on the regulatory framework applying to their Australian businesses, including the CFD PIO, Australian financial services licensing, client money and design and distribution obligations, financial services disclosure requirements and the application of the *Corporations Act 2001* to digital assets and derivatives.

We run a Derivatives Forum quarterly, which is attended by the majority of Australian CFD issuers. We also have deep involvement in the development of Australia's digital asset regulatory framework.

SUMMARY OF OUR VIEW

Our submission focuses on a number of practical issues arising from ASIC's proposals including in relation to digital assets, the prohibited benefits provisions and options CFDs.

The proposed amendments give rise to several issues that ASIC should, in our view, address before finalising the CFD PIO.

In particular:

1. replacing "cryptoasset" with the broader concept of "digital asset" in relation to initial margin requirements may cause conventional financial products to attract a 50% initial margin requirement merely because they are tokenised;

2. the amended definition of "contract for difference" contains a change to the valuation limb that is not explained in CS 64;

3. the proposed amendments to the exception for information services, educational tools and research tools require further clarification and appropriate transitional arrangements; and

4. the CFD PIO should explicitly recognise digital assets as part of net equity in order to calculate margin close out and negative balance protections that apply to those CFDs. Otherwise, the amended CFD PIO risks recognising the digital asset component of the product for settlement purposes while continuing to calculate net equity, margin close out and negative balance protection by reference to concepts that do not expressly accommodate digital assets (but for the reference to *derivative retail client property*, which does not include any additional guidance).

Given the nature and extent of these issues, we do not consider that ASIC should proceed directly from the current draft to a final instrument. Industry participants should have an opportunity to consider the revised drafting as a whole and assess how the provisions operate together before the amended CFD PIO is finalised.

Form of the amended CFD PIO

The proposed amendments make a number of substantive changes to the CFD PIO, including to the definition of "contract for difference", the initial margin requirements and the prohibited benefit provisions.

The CFD PIO is already a detailed instrument that CFD issuers must translate into operational requirements across their trading systems, disclosures and compliance arrangements.

Following the proposed amendments, users will need to read the existing CFD PIO together with the amending instrument to determine the requirements that apply.

ASIC has not proposed providing accompanying regulatory guidance explaining the operation of the amended CFD PIO. In those circumstances, we consider that the final instrument should be presented in a form that allows industry participants to readily identify and apply the operative requirements as a whole.

We prepared a consolidated version of the CFD PIO for the purposes of reviewing the proposed amendments because of the difficulty of assessing their operation against the existing instrument. We expect industry participants will face the same difficulty when implementing the amendments.

Our recommendation

ASIC should consider presenting the amendments to the CFD PIO in a single consolidated instrument showing the proposed changes in mark-up, rather than requiring industry participants to navigate the existing CFD PIO together with a detailed, separate amending instrument.

A consolidated instrument would materially improve the accessibility of the requirements and reduce the risk of inconsistent interpretation or implementation.

Classification of digital assets for initial margin purposes

The existing CFD PIO includes a 50% initial margin requirement, permitting maximum leverage of 2:1 for cryptoassets.

ASIC proposes to repeal the existing definition of "cryptoasset", insert a new definition of "digital asset" and amend paragraph 7(2)(d) so that the 50% initial margin requirement applies where the underlying for a CFD is a digital asset, instead of just a cryptoasset.

The proposed definition of digital asset is broader than the existing definition of cryptoasset. It extends beyond native cryptoassets such as Bitcoin to conventional financial assets represented using DLT or other cryptographically verifiable technology.

Shares, bonds, interests in funds and other conventional financial products are increasingly falling within the proposed definition of "digital asset" even though, absent this structure, they have a different initial margin requirement under paragraph 7(2), including under the residual category in paragraph 7(2)(e).

Tokenisation can change the manner in which rights in an asset are recorded or transferred without changing the legal or economic characteristics of the underlying asset. The leverage limits in the CFD PIO reflect, among other things, differences in the volatility and risk characteristics of different underlyings. Those characteristics do not necessarily change merely because an asset is represented or transferred using digital asset technology.

Tokenisation may introduce different operational, custody or settlement risks. Those risks may need to be addressed through other regulatory or risk management requirements, but they do not justify applying the 50% initial margin requirement applicable to cryptoassets to all tokenised but otherwise conventional financial products.

The applicable initial margin requirement should therefore continue to reflect the characteristics of the underlying asset, rather than the technology used to record or transfer it.

The issue is likely to become more significant as tokenisation becomes more widely adopted. Existing financial products could move between margin categories merely because the technology changes.

Our recommendation

ASIC should retain the existing concept of "cryptoasset" solely for the purpose of the initial margin requirement in paragraph 7(2)(d).

This would allow ASIC to use the broader concept of "digital asset" for the amended CFD definition and settlement provisions without inadvertently changing the regulatory treatment of tokenised but otherwise conventional financial products.

Net equity, margin close out and negative balance protection

ASIC proposes to modernise the CFD definition to accommodate derivatives settled by transfer of digital assets. However, the proposed amendments do not address how digital assets are treated in calculating net equity, where net equity determines the operation of margin close-out and negative balance protection. No changes have been made to the definition of net equity that are required to reflect the way in which margin may take the form of digital assets.

Digital assets should explicitly form part of derivative retail client property and therefore net equity where they are attributable to the relevant CFD trading account. Otherwise, the net equity calculation will understate the collateral available to support the client's CFD obligations and result in margin close-out or negative balance protection being triggered unnecessarily.

We note that the definition of initial margin has not been changed. Although implicit, given the other corresponding changes being made to the CFD PIO, it would be helpful for ASIC to confirm within the CFD PIO that initial margin may be provided in the form of digital assets.

Definition of contract for difference

Limb (a) of the definition of "contract for difference" has been changed to read (our emphasis to show the changes):

(a) the value of the derivative, or the amount of consideration ***that must, or may be required to,*** *be provided under the derivative, is ultimately determined, derived from or varies by reference to (wholly or in part) the change, between the acquisition and termination of the derivative…*

CS 64 describes the proposed amendments to the definition as accommodating settlement by transfer of digital assets. However, the proposed instrument also amends paragraph (a) of the definition by replacing the existing reference to consideration "to be provided" with consideration that "must, or may be required to, be provided".

This appears capable of changing the substantive scope of the CFD definition independently of the amendments relating to digital asset settlement.

Our recommendation

If ASIC does not intend to change the existing perimeter of the definition through paragraph (a), it should retain the existing formulation. If a broader perimeter is intended, ASIC should identify the products or arrangements that the additional words are intended to capture and explain the policy basis for the change.

Definition of "underlying"

The proposed definition of "underlying" retains "an asset" as an example of a thing that may constitute an underlying. A digital asset would ordinarily be capable of being an asset. It is therefore unclear whether ASIC intends the introduction of the separate defined term "digital asset" to alter the scope of "asset" elsewhere in the CFD PIO.

ASIC should confirm that the introduction of the definition of "digital asset" does not narrow or otherwise affect the existing reference to an "asset", which should continue to include a digital asset where applicable.

Discounts

The proposed exception for discounts in paragraph 6(3)(b) introduces requirements that the discount be offered unconditionally, except for conditions reasonably necessary to give effect to a volume based discount, and that it be offered to all retail clients and prospective retail clients on "substantially the same terms and conditions".

The intended operation of these requirements is unclear. In particular, it is not clear what conditions will be regarded as "reasonably necessary" to give effect to a volume based discount or when discounts will be regarded as offered on "substantially the same terms and conditions".

This uncertainty is also reflected in the proposed record-keeping requirements, which require issuers to maintain records demonstrating compliance with these requirements. Issuers need sufficient certainty about the substantive requirements to determine what evidence they must retain to demonstrate compliance.

Our recommendation

ASIC should clarify the meaning of "reasonably necessary to give effect to a volume based discount" and "substantially the same terms and conditions", including by providing examples of discounts that fall within and outside the exception. The associated record-keeping requirements should be aligned with that clarification.

Required transitional arrangements for prohibited benefits

Linked to the above point on discounts, ASIC proposes to narrow the existing exception for information services, educational tools and research tools so that the exception applies only where the relevant service or tool is made available to all retail clients and is not provided as an inducement to engage in the conduct identified in paragraphs 6(2)(b) to (d).

Many CFD issuers currently provide information services, educational tools and research tools in reliance on the existing exception. The proposed amendment may therefore require issuers to review existing client offerings, withdraw or modify particular services, amend eligibility or access arrangements and, in some cases, make associated contractual changes.

Information services, educational tools, research tools and trading tools also involve development, licensing, data and support costs. Requiring an issuer to make a service or tool available to all retail clients in order to rely on the exception may therefore materially increase the cost of providing it, particularly where the issuer currently offers a more sophisticated tool only to clients for whom it is relevant. If extending access becomes uneconomic, issuers may withdraw or scale back the service or tool rather than provide it to every retail client. The proposed amendment could therefore have the unintended consequence of depriving existing clients of access to higher-quality tools that support informed trading and risk management.

ASIC does not presently propose a transitional period for these arrangements. This contrasts with the existing CFD PIO, which included transitional treatment for certain gifts, discounts,

rebates, trading credits and rewards where the relevant conduct occurred before 29 March 2021.

Our recommendation

ASIC should provide a three month transitional period before the amended exception takes effect. This would give issuers a reasonable opportunity to identify existing information services, educational tools and research tools that no longer fall within the exception, assess whether they could constitute a prohibited benefit, and modify or withdraw those arrangements and make any necessary contractual changes.

Where relevant conduct occurred before the date of the introduction of the revised CFD PIO this should also be given transitional relief. The amended provisions should also make clear that conduct lawfully undertaken in reliance on the existing exception before commencement does not become prohibited merely because the amended exception subsequently takes effect.

Other matters

We understand that there are only a small number of CFD issuers offering options CFDs, accordingly, we have kept our comments on the proposals relating to options CFDs brief. We draw a small number of matters to ASIC's attention for further consideration:

As drafted, the amendments to paragraph 7 make existing paragraph 7(2)(e) difficult to read together with proposed paragraphs 7(2)(f) and (g), particularly given that paragraph 7(2)(g) itself requires the initial margin to be determined by applying paragraphs 7(2)(a) to (e) by reference to the underlying of the option.

The proposed amendments should also remove the unnecessary "; and" appearing at the end of paragraphs 7(2)(d) and 7(2)(f).

Drafting and consequential amendments

In addition, there are a few other amendments required.

The reference to "the conditional prohibition" in subsection 6(1) should be corrected to "the conditional prohibitions".

We welcome the opportunity to discuss this submission with ASIC.

Yours sincerely,

Holley Nethercote Lawyers