



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

Australian CFD Forum Limited & Ors

in respect of

best practice standards for Australian CFD Forum
members

Date: 2 April 2014

Authorisation numbers: A91403 – A91404

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Walker

Summary

The ACCC proposes to grant authorisation for 5 years to enable the Australian CFD Forum, CMC Markets Asia Pacific Pty Ltd, Global Markets UK Limited, IG Markets Limited and any future members of the CFD Forum, to make and give effect to the proposed best practice standards (the Standards) in the provision of contracts for difference (CFD).

Broadly, the Standards have been developed by the Australian CFD Forum to raise the level of compliance with existing regulatory guidance and in some cases to go above and beyond the regulatory benchmarks.

The ACCC considers that the proposed arrangements are likely to result in public benefit, including enhanced consumer protection and reduced information costs.

The ACCC received submissions from some interested parties who raised concerns about the Standards relating to the segregation and protection of client money and capital adequacy requirements. Interested parties expressed concern that the proposed Standards would affect CFD issuers differently, depending on the particular business model they applied.

However, the ACCC considers that the proposed arrangements are unlikely to result in significant public detriment, particularly as membership of the Australian CFD Forum is voluntary.

The ACCC is proposing to grant authorisation on the basis that the relevant statutory tests have been satisfied, that is, that the proposed arrangements are likely to result in a net public benefit. The ACCC's draft determination is not an endorsement of CFDs as an investment strategy or of a particular model for issuing CFDs. Further, the draft determination should not be seen as advocating any particular regulatory standard to apply to CFDs.

Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request that the ACCC hold a pre-decision conference to allow oral submissions on the draft determination

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Abbreviations

AFSL	Australian Financial Services Licence
APRA	Australian Prudential Regulatory Authority
ASIC	Australian Securities and Investment Commission
ASX	Australian Securities Exchange
CFD	Contract for difference
DMA	Direct market access
Forum	Australian CFD Forum Limited
MM	Market maker
Margin FX	Margin foreign exchange contracts
NTA	Net tangible assets
OTC	Over the counter
PDS	Product disclosure statement
Relevant Standards	The Standards that may, but for authorisation, be regarded as containing provisions which may contravene the Act.
Rules	Rules of Membership of the Australian CFD Forum Limited
Standards	Mandatory code of best practice standards proposed by the applicants
STP	Straight through processing – a term used interchangeably with DMA
The Act	<i>Competition and Consumer Act 2010</i>

The applications for authorisation

1. On 23 December 2013 the Australian CFD Forum Limited, CMC Markets Asia Pacific Pty Ltd, Global Markets UK Limited and IG Markets Limited (the applicants) lodged applications (A91403-A91404)¹ with the ACCC seeking authorisation to make and give effect to an arrangement to adhere to best practice standards in the provision of contracts for difference (CFD). Authorisation has been sought for a period of five years.
2. The Australian CFD Forum Limited (the CFD Forum) was created as an industry body specific to the CFD industry.² CFD Forum members sell contracts for difference or CFDs, which are a form of financial derivative product that may be traded through the ASX or, more commonly, over the counter (OTC). The proposed best practice standards are only relevant to OTC CFDs, not those traded through the ASX. OTC CFDs are typically marketed to retail investors.
3. The applicants have applied for authorisation to make and give effect to an arrangement whereby participants agree to adhere to best practice standards developed by the CFD Forum (Standards), to be administered in accordance with the CFD Forum's Constitution and Membership Rules which provide a regime for acceptance and termination of membership applications. The Standards are a mandatory requirement for membership of the CFD Forum. However, membership of the CFD Forum is not a requirement to trade in CFDs and therefore compliance with the Standards is not required more broadly.
4. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the CCA).³ The ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests⁴ contained in the CCA. While there is some variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition and weigh the two. In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the conduct would outweigh the likely detriment to the public.
5. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. Submissions received from the applicants and interested parties form part of the ACCC's considerations in assessing the applications for authorisation.⁵

¹ Applications A91403 and A91404 were lodged under section 88(1A)/88(1) of the *Competition and Consumer Act 2010*, Forms A and B respectively.

² The Australian Financial Markets Association (AFMA) is a broader industry forum. According to the applicants, the AFMA has a diverse membership with interest in a broad range of financial services and products.

³ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

⁴ Subsections 90(6), 90(7), 90(5A) and 90(5B), 90(8) of the CCA. The relevant tests are set out in Attachment A.

⁵ Copies of public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

Background

The applicants

6. The applications for authorisation were made on behalf of the CFD Forum's current membership and potential future members. There are approximately 40 CFD issuers currently operating in Australia. There are currently 3 members of the CFD Forum, two of which are the largest industry participants:
 - CMC Markets Asia Pacific Pty Ltd (CMC Markets) was founded in 2002, is Sydney based, but part of the broader CMC Market Group with offices globally. CMC Markets provides online stockbroking services including shares, options, managed funds warrants, interest rate securities and CFDs. The report by Investment Trends titled 'Investment Trends 2013 Australian CFD Report' found that CMC Markets was the main broker for 18% of survey respondents.
 - IG Markets Limited (IG Markets) is a subsidiary of the IG Group headquartered in London. It was the first to offer CFDs in Australia, in 2002. It specialises in financial derivatives including CFDs on shares and indices. IG Markets is a large CFD issuer within Australia - 43% of active CFD traders have an account with IG Markets according to Investment Trends, May 2012, while in 2013, Investment Trends reported that 38% of survey respondents used IG markets as their main broker.
 - Global Markets UK Ltd (GFT) is a subsidiary of GAIN Capital Holding Inc. and provides retail derivatives as well online currency trading. Its clientele includes institutions and retail investors.

Contracts for difference

7. CFDs are a highly leveraged derivative product marketed to and traded by retail investors. CFDs are essentially a leveraged bet on future changes in the market price of a share or commodity, or the value of an index or a currency exchange rate.⁶
8. Investors may only be required to put up as little as 1% of the total contract value. However, if the market moves unfavourably, they are also liable for the other 99% of the contract value. For example, if an investor purchased 10,000 shares at \$10 each, the initial outlay may be as little as \$1,000. However, the investor has \$100,000 of exposure in this example. CFD issuers profit from transaction fees, interest and other charges. In some instances, they may also retain market exposure on the other side to their clients' investments.
9. While a small number of CFDs are traded through the ASX, the vast majority of CFDs are traded 'over the counter' or OTC. OTC CFD issuers can be categorised as either following a market maker or direct market access (DMA) model.

⁶ CFDs are in many ways similar to margin foreign exchange contracts or 'margin FX' which are considered part of the same industry by ASIC. However, the ACCC understands that the data provided by the applicants does not generally include margin FX.

10. Market maker issuers offer the widest range of CFDs and set their own prices which may or may not diverge from the prices in the underlying market. Client orders create a corresponding position which the issuer may retain or hedge. As such, under the market maker model, it may be the case that the CFD issuer profits from its client's losses. The applicants predominantly operate with the market maker model, although IG Markets also operates a DMA model.
11. DMA issuers offer CFDs on a more limited range of underlying assets. Unlike the market maker model, DMA CFD prices correspond directly to the prices in the underlying market. DMA issuers automatically place each client order into the underlying markets (or hedge the position) and hence do not directly carry market risk from trading.⁷

Regulation of the CFD industry

12. CFDs are a form of derivative and are regulated as financial products. CFD issuers are required to comply with relevant financial services legislation including the *Corporations Act 2001*. They are required to hold an Australian Financial Services Licence (AFSL).
13. The Australian Securities and Investment Commission (ASIC) has issued Regulatory Guides on a range of topics relevant to CFD issuers. However the applicants submit that the Regulatory Guides are not in themselves legally enforceable, rather they are evidence of ASIC's view of appropriate practices and standards that should be followed by an AFSL holder to comply with their obligations under the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* and other Commonwealth, State and Territory legislation dealing with financial services.⁸
14. In addition to Regulatory Guides, ASIC has also issued a range of consultation papers and reports relevant to CFD issuers. The applicants advise they have drawn on these publications by ASIC in forming the Standards.

Relevant Standards

15. The applicants submit that the Standards are intended to provide protection for customers over and above the protection available under legislation. The Standards are based on regulatory guidance produced by ASIC but the applicants submit that they 'go above and beyond' in certain areas. In addition, there are instances where regulatory guidance by ASIC is not mandatory, but the Standards mandate a particular course of action or compliance with regulatory guidance.
16. Authorisation has been sought for 'Relevant Standards' only, being those Standards that may raise competition concerns:⁹
 - Relevant Standard 1 - compliance with the standards - this Standard is to mandate compliance with the Standards by CFD Forum members.

⁷ For further information, see ASIC's publication 'Thinking of trading contracts for difference (CFDs)?'.

⁸ For further information, see pages 8-11 of the Applicants' submission, 12 December 2013.

⁹ For further information, see pages 15-17 of the Applicants' submission, 12 December 2013.

- Relevant Standard 5 - advertising and promotional material - this Standard mandates ASIC's Regulatory Guides 227 and 234, requiring issuers to ensure promotional material is only published in financial markets based content and places parameters around the use of 'leverage' as a selling point. The objective is to ensure CFDs are only promoted to suitable customers.
- Relevant Standard 7 - segregation and protection of client money - this Standard requires members to implement a full client fund segregation model (over and above existing regulatory obligations including ASIC Regulatory Guide 227 Benchmark 5). Client money must be held by financial institutions that meet certain credit ratings. The objective of the standard is to reduce counter-party risk for customers.
- Relevant Standard 8 - this Standard requires members to adhere to certain arrangements to monitor customer credit risk including daily monitoring and assessment of appropriate customer limits. The Standard also requires members to liquidate customer accounts before they enter a negative equity position. The standard is intended to ensure customers are not exposed to excessive risk and loss.
- Relevant Standard 10 - suspended or halted underlying assets - this Standard is to prohibit new CFD positions when there is a trading halt, consistent with Benchmark 6 of ASIC Regulatory Guide 227. CFD issuers who are not members of the CFD Forum may continue to allow new positions when there is a trading halt, as long as they explain their approach to customers.
- Relevant Standard 12 – capital adequacy requirements - ASIC Consultation Paper 156 sets a minimum level of net tangible assets (NTA) at \$1m. The Standard requires members to have a minimum NTA of either \$2m or 10% of average revenue, whichever is greater. Further, members are required to refrain from entering into transactions if their NTA falls to 75% or less of the minimum amount. Members are required to comply with all cash requirements, other financial requirements and reporting obligations proposed by ASIC consultation paper 156. The Standard is intended to increase the protection of customers by ensuring members have a suitable margin or buffer.
- Relevant Standard 15 - dealing with intermediaries - This Standard requires members to conduct due diligence of intermediaries on a regular basis to verify certain aspects such as having an appropriate licence or authority and relevant insurance coverage. The Standard is intended to ensure intermediaries comply with the Corporations Act to the benefit of customers who deal with the intermediaries.

ACCC evaluation

17. As noted in paragraph 4, the ACCC's evaluation of the proposed arrangements is in accordance with the relevant net public benefit tests contained in the CCA. The ACCC's assessment concerns whether to grant an exemption from competition law to enable competitors to establish and agree to the proposed Standards. The

assessment is not an endorsement of one CFD model over another or an assessment of how CFDs should be regulated.

18. In assessing an application for authorisation the ACCC will undertake a number of preliminary steps, including:
- identifying the relevant areas of competition
 - identifying the likely future **with** the conduct for which authorisation is sought and the likely future **without** the conduct the subject of the authorisation. The ACCC will compare the public benefits and detriment likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
19. The ACCC considers that the area of competition affected by the proposed arrangements is the national supply of derivative products, including CFDs. While CFDs are primarily marketed and supplied to retail investors, the ACCC considers that the area of competition may include the supply of CFDs to any investors. However the ACCC considers that in this case a precise identification of the area of competition is not required to assess whether the proposed arrangements are likely to result in a net public benefit.
20. The applicants submit that in the absence of authorisation, they would not proceed to implement the Relevant Standards or Membership Rules because of competition law concerns. The applicants submit that they would not be able to achieve their objectives of ‘... enhancing the efficient operation, transparency and overall investor understanding and confidence in the Australian CFD industry.’¹⁰ The applicants submit that without authorisation of the Membership Rules that make the Standards mandatory for members, many prospective CFD Forum members would not comply with the standards because of the cost of compliance. In such circumstances the applicants submit that CFD issuers would achieve a lower standard of service delivery and regulatory compliance than would otherwise be the case.¹¹
21. The ACCC considers that without authorisation of the proposed arrangements, the applicants would be unlikely to agree to collectively implement and enforce the Membership Rules and Relevant Standards. It is possible that the applicants and other CFD issuers may implement the Standards or similar arrangements on an individual basis, particularly to the extent the Standards align with existing regulation including ASIC guidance. However, the ACCC considers that the Standards would not be met by as many CFD issuers without authorisation.

Public benefit

22. Having regard to the submissions of the applicants and interested parties the ACCC considers that the following public benefits are most relevant to its consideration of the proposed arrangements:
- Enhanced consumer protection for CFD investors
 - Reduced information costs for CFD investors

¹⁰ Australian CFD Forum Limited & Ors, submission, 12 December 2013, p.20.

¹¹ Australian CFD Forum Limited & Ors, submission, 12 December 2013, p.21.

23. The ACCC's assessment of the likely public benefits from the proposed arrangements follows.

Enhanced consumer protection

24. The applicants submit that the CFD industry is facing particular regulatory challenges including the marketing of products to retail investors and the handling and use of client money in light of the collapse of CFD issuer, MF Global in 2011.¹² The Australian Financial Markets Association (AFMA) submits that '... section 981D of the [Corporations] Act enables client money to be used by CFD providers for hedging purposes, although these provisions were not designed with the growing retail OTC derivatives market in mind' and further that the '... general nature of the provisions and the lack of clarity as to what constitutes client money has resulted in differing interpretations of the provisions within the CFD industry.'¹³
25. The CFD Forum was established with the stated objective of enhancing the efficient operation, transparency and overall investor understanding and confidence in the Australian CFD industry. The CFD Forum aims to achieve these objectives through the creation of the Standards and ensuring they are binding on members by way of the Membership Rules.¹⁴
26. The applicants submit that the Standards provide protections for customers that are over and above the protections under legislation. While the Standards are closely related to regulatory guides produced by ASIC, some of the parameters are aimed at a higher benchmark, or extend the requirements to intermediaries (for example standards 7 and 12 which are discussed further below).¹⁵
27. The applicants submit that membership of the CFD Forum will provide a point of competitive differentiation as a result of compulsory compliance with the Standards.
28. Interested parties have raised concerns with Relevant Standards 7 and 12.

Relevant standard 7

29. FP Markets submits that Relevant Standard 7 (which concerns the segregation and protection of client money) in particular is biased towards the business model adopted by the applicants and that the risks are different for CFD issuers that use the DMA model. FP Markets submits that under the DMA model, the CFD issuer passes on every client trade to a third party liquidity provider in contrast to the market maker business model where client orders may remain unhedged to profit from client losses. FP Markets submits that '... requiring firms to completely ban the use of client money for hedging in all circumstances will disproportionately impact [issuers that use] the DMA model because the DMA model has higher hedging requirements due to the fact that all client orders are hedged.'¹⁶

¹² Australian CFD Forum Limited & Ors, submission, 12 December 2013, p.6–7.

¹³ AFMA submission, 14 February 2014, p.2.

¹⁴ Australian CFD Forum Limited & Ors, submission, 12 December 2013, p.8 and p.20.

¹⁵ Australian CFD Forum Limited & Ors, submission, 12 December 2013, p.21–24.

¹⁶ FP Markets, submission, 18 February 2014, pp.2–4.

30. The ACCC considers that there are many risks for investors who elect to use CFDs as part of an investment strategy including client money risk, counterparty risk, liquidity, gapping and execution risks, external market forces, loss of margin, payment of losses and variation of margin and the CFD issuer's powers on default.¹⁷ Consistent with the range of risks that investors are exposed to, there are many factors that will influence the level of risk from one CFD provider to another.¹⁸
31. The ACCC considers that Relevant Standard 7 is likely to result in a higher degree of client money protection than the existing regulation including ASIC guidance, and this is likely to be of value to some investors. That is, the ACCC considers that if a CFD issuer were to adopt Relevant Standard 7, including implementing a full client fund segregation model rather than using client money for hedging activity, its customers would enjoy a higher level of client money protection than would otherwise be the case. In this regard, the ACCC considers that Relevant Standard 7 achieves a higher benchmark than current obligations on CFD issuers.

Relevant standard 12

32. FP Markets submits that smaller DMA businesses would be excluded from the CFD Forum even though their client positions may be very small and would require regulatory capital of less than Relevant Standard 12 (which concerns the capital adequacy requirements for CFD issuers).¹⁹ International Capital Markets (IC Markets) submits that it '... is misleading for the applicants to imply that [Relevant Standard 12] aims to reduce counterparty risk when in fact the counterparty risk or risk of insolvency is more closely linked to the trading model adopted by the provider [DMA or market maker] rather than the provider's financial resources.'²⁰
33. The ACCC considers that a greater level of capitalisation of a CFD issuer is likely to provide that issuer with a greater capacity to absorb losses from adverse events or market movements. This in turn, is likely to reduce the likelihood of losses to investors that could arise through the collapse of their CFD issuer.
34. The ACCC also notes that membership of the CFD Forum and hence any requirement to adhere to the proposed Standards is voluntary. The ACCC accepts that membership of the CFD Forum is likely to become a point of competitive differentiation rather than a prerequisite for participation in the industry.²¹ In this regard, the proposed arrangements may also lead to an increase in the level of compliance with existing regulatory guidance by CFD Forum members, but potentially also non-members should the proposed Standards become recognised and valued by investors.
35. In this case, non-members could join the CFD Forum and submit to the Standards or they could individually develop and meet their own high standards. The ACCC also notes that CFD issuers who do not agree with the proposed Standards would retain the option of forming their own association with a view to developing their own standards that they consider are relevant to their businesses and seek authorisation if necessary.

¹⁷ Australian CFD Forum Limited & Ors, submission, 12 December 2013, pp.5–6.

¹⁸ More detailed explanation of the risks can also be found in ASIC's guide 'Thinking of trading contracts for difference (CFDs)?' which is available free of charge on ASIC's website.

¹⁹ FP Markets, submission, 18 February 2014, p.3.

²⁰ IC Markets, submission, 14 February 2014, p.6.

²¹ Australian CFD Forum Limited & Ors, submission, 12 December 2013, p.2.

36. While there are many factors that will influence the risks of an investment with a particular CFD issuer, the ACCC considers that the proposed arrangements including Relevant Standards 7 and 12 are likely to result in public benefits for consumers by enhancing consumer protection.

Reduced information costs

37. The ACCC considers that the proposed arrangements are likely to result in public benefits by reducing information costs incurred by investors. Researching the standards of conduct of individual CFD providers is likely to take time and involve significant cost for prudent investors. Moreover, in the absence of the proposed arrangements, investors are unlikely to be able to monitor providers to ensure they continue to comply with particular standards. Yet this information can be highly relevant to investors in CFDs.

38. By setting minimum standards and monitoring compliance with those standards, the CFD Forum is likely to improve the information available to investors about its members and reduce the costs to investors in obtaining this information. The ACCC considers that the compliance obligations contained within the Membership Rules are likely to provide investors with a degree of assurance and facilitate a high level of compliance with the Standards by CFD Forum members.

Public detriment

39. Having regard to the submissions of the applicants and interested parties the ACCC considers that the following public detriments are most relevant to its consideration of the proposal:

- dampening competition from DMA and small CFD issuers
- potential for misrepresentations about risk by CFD issuers
- potential for authorisation by ACCC to inappropriately increase the CFD Forum's level of influence with policy makers.

40. The ACCC's assessment of the likely public detriments from the proposed arrangements follows.

Dampening competition from DMA and small CFD issuers

41. Some interested parties have expressed concern that the proposed arrangements are intended to benefit the incumbent CFD issuers who predominantly apply the market maker model, and to damage competitors that use the DMA model. For example, IC Markets submits.²²

Over the past three to four years all of the founding members of the Australian CFD Forum have suffered from stagnated and in some cases negative growth. These companies are predominantly losing market share to more transparent and fast growing Australian based firms operating a straight through processing (STP) or direct market access (DMA) business model.

²² IC Market submission, 14 February 2014, p.2.

...

It is apparent that the underlying agenda of this group is to stifle the growth of Australian based companies and their local service providers with the intent of severely depressing the local industry and consumer choice to gain a competitive advantage.

42. IC Markets also submits that the mandatory adoption of Relevant Standard 7 concerning the segregation of client money '... will lead to the decimation of the STP/DMA system in Australia, which is fast becoming the preferred trading system worldwide.'²³
43. FP Markets submits that the claim that Standards 7 and 12 'raise the bar' for the protection of client money is misleading because it is more important that CFD issuers have strong risk management models than follow those Standards. FP Markets further contends that the model proposed by the applicants is not relevant to DMA issuers in the same way it is to market maker issuers, and that if such standards were mandated it would compromise the viability of CFD issuers that use the DMA model.²⁴
44. FP Markets also submits that authorisation of the proposed arrangements may result in a reduction in the number of CFD issuers that use the DMA model which in turn is likely to remove the competitive discipline currently imposed on CFD issuers using the market maker model. Examples given by FP Markets include less attention being drawn to the differential between market prices and underlying markets, increased commission costs, the incidence of re-quoting of prices, execution speeds may slow down and price transparency may decrease.²⁵
45. However, for the reasons set out below, the ACCC considers that the proposed arrangements are unlikely to result in significant public detriments as a result of any dampening of competition in the supply of CFD products:
 - The Standards are voluntary because membership of the CFD Forum is not a pre-requisite to participation in the industry. The proposed Standards would only become mandatory for CFD Forum members. The ACCC considers that were CFD Forum members to reduce the level of service provided to customers, they would risk losing customers to other CFD issuers, whether operating with a market model or DMA model. The ACCC agrees with the submission of the applicants that it is likely a number of CFD issuers will not become members, but continue to participate in the industry.
 - Membership of the CFD Forum is open to all CFD issuers. The applicants submit that membership '...is assessed on the basis of open, objective, transparent criteria' (see section 3 of the Rules of Membership). The applicants also submit that 'an anti-competitive or unduly restrictive approach is not being adopted in relation to membership or the disciplinary provisions of the [CFD] Forum. Rather, the Membership Rules are the minimum necessary provisions to effectively enforce the Standards and ensure the [CFD] Forum's objectives are met.'

²³ IC Market submission, 14 February 2014, p.7.

²⁴ FP Markets submission, 18 February 2014, pp. 2–5.

²⁵ FP Markets submission, 18 February 2014, pp.4–5.

- The Membership Rules appear to provide for appropriate governance arrangements and compliance certification by a director of the member company. The ACCC considers that the review and certification requirements are likely to increase the level of compliance with the proposed Standards and mitigate the risk of consumers being misled by the membership status of CFD Forum members.

Potential for misrepresentations about risk by CFD issuers

46. FP Market submits that authorisation of the proposed arrangements will enable CFD Forum members to represent themselves as an industry body, yet they predominantly use the market maker model. FP Markets submits that this would be detrimental to the CFD industry as clients would no longer be presented with balanced information regarding the different CFD models that exist.²⁶ FP Markets also submits that CFD Forum members may make a marketing pitch such as 'We're a member of the Australian CFD Forum so your funds are safer'.²⁷
47. The ACCC notes that existing laws protect customers from businesses that seek to mislead or deceive customers and authorisation of the proposed arrangements would not affect this protection.²⁸ Further, it is not clear to the ACCC that granting authorisation would increase the incidence of misrepresentations by CFD issuers.
48. On this basis, the ACCC considers that the proposed arrangements are unlikely to result in significant public detriment from a potential increase in misrepresentations about the risks of investing in CFDs. Nonetheless, CFD issuers must ensure that they do not make misleading or deceptive representations with respect to the model they use or their products in general.

Potential for authorisation by ACCC to inappropriately increase the CFD Forum's level of influence with policy makers

49. Some interested parties have expressed concern that the CFD Forum does not represent all CFD issuers. For example, FP Markets submits that the 'many benefits of DMA ... are not represented by the Australian CFD Forum'.²⁹
50. In addition, the AFMA submits that while 'industry self-regulatory initiatives have an important role to play in promoting good practice and, thus, supplementing formal regulation, the policy issues in relation to client money are a matter that should be the subject of law reform'.³⁰ Similarly, IC Markets submits that:³¹

Treasury and ASIC may want to introduce proposals that restrict the use of client money and impose higher financial standards and they, as the appropriate regulatory authorities, will do so, if it is necessary to protect consumer interests.

²⁶ FP Markets, submission, 18 February 2014, p.4.

²⁷ FP Markets, submission, 18 February 2014, p.3.

²⁸ For example see section 18 of the Australian Consumer Law and section 12 of the Australian Securities and Investments Commission Act 2001.

²⁹ FP Markets submission, 18 February 2014, p.5.

³⁰ AFMA submission, 14 February 2014, p.2.

³¹ IC Markets submission, 14 February 2014, p.5.

51. Interested parties are concerned that authorisation of the proposed arrangements by the ACCC could give the CFD Forum a greater level of influence with Treasury and/or ASIC. In turn, this influence could be used to shape of future regulatory reform in a way that suits the applicants above CFD issuers that currently use the DMA model.
52. The ACCC notes that its role in assessing these applications for authorisation is to assess whether to grant an exemption from competition law by applying the relevant public benefit tests, not to advocate a particular model of CFD or the appropriate regulatory framework. The CFD Forum, and any other industry bodies or participants are equally able to discuss regulatory issues with Treasury and/or ASIC. The ACCC's draft determination is not an endorsement of a particular model for issuing CFDs and should not be seen as advocating any particular regulatory standard to apply to CFDs.

Balance of public benefit and detriment

53. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
54. The ACCC considers that the proposed arrangements are likely to result in public benefits arising from enhanced consumer protection and reduced information costs for investors. The ACCC also considers that the proposed arrangements are unlikely to result in significant public detriments. The voluntary nature of the proposed arrangements is likely to mitigate potential detriments that may otherwise arise.
55. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
56. Accordingly, the ACCC proposes to grant authorisation to the applicants to make and give effect to an arrangement to adhere to best practice standards in the provision of CFDs.

Length of authorisation

57. The Act allows the ACCC to grant authorisation for a limited period of time.³² This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
58. In this instance, the applicants seek authorisation for a period of five years. The applicants submit that this is the minimum term necessary to support growth in the membership of the Forum, the application of the Standards by its membership and to build public recognition of the Forum and the Standards.

³² Subsection 91(1).

59. The ACCC considers that an initial period of authorisation of five years is appropriate and will provide the CFD Forum with a reasonable length of time to grow its membership.

Draft determination

The application

60. On 23 December 2013 the Australian CFD Forum Limited, CMC Markets Asia Pacific Pty Ltd, Global Markets UK Limited and IG Markets Limited lodged applications A91403 and A91404 with the ACCC. Application A91403 was made using Form A, Schedule 1, of the Competition and Consumer Regulations 2010. Application A91404 was made using Form B, Schedule 1, of the Competition and Consumer Regulations 2010. The applications were made under subsections 88 (1 and 1A) of the Act to:

- Make and give effect to an agreement to adhere to standards of best practice in the provision of CFDs, administered in accordance with the CFD Forum's Constitution and Membership Rules which provide a regime for membership and sanction (including termination).

61. The applicants seek authorisation of these arrangements as they may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act. The arrangements may also contain an exclusionary provision (within the meaning of section 45 of the Act) that may also be a cartel provision.

62. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

63. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed arrangement for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct. In addition the ACCC is satisfied that the proposed arrangements for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.

Conduct for which the ACCC proposes to grant authorisation

64. The ACCC proposes to grant authorisation to Australian CFD Forum Limited, CMC Markets Asia Pacific Pty Ltd, Global Markets UK Limited, IG Markets Limited and future members of the Australian CFD Forum to make and give effect to an agreement to adhere to standards of best practice in the provision of CFDs,

administered in accordance with the CFD Forum's Constitution and Membership Rules, for five years.

65. Further, the proposed authorisation is in respect of the Relevant Standards, Membership Rules and Constitution as they stand at the time authorisation is granted. Any changes to the Relevant Standards, Membership Rules and Constitution during the term of the proposed authorisation would not be covered by the proposed authorisation.

66. This draft determination is made on 2 April 2014.

Further submissions

67. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- make a determination granting:
 - i. an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - ii. an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - iii. an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.