

Guidelines on the General Administrative Act of 23 July 2019 regarding Contracts for Difference (CFD)

Reference no.: VBS 7-Wp 2000-2020/0026

- 1 The Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) has restricted the marketing, distribution and sale of contracts for difference (CFD) by issuing the General Administrative Act of 23 July 2019 pursuant to Article 42 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR).
- 2 The marketing, distribution and sale of CFD to retail investors in Germany is prohibited unless the following conditions are met:
 - Guaranteed initial margin protection (leverage limit)
 - Mandatory margin closeout protection
 - Mandatory negative balance protection (prohibition on any additional payments obligation)
 - Ban on offering monetary and non-monetary benefits in relation to the marketing, distribution and sale of CFD (prohibition on bonuses)
 - Direct and indirect communications relating to the marketing, distribution and sale of CFD to retail investors must include a standardised risk warning including a provider-specific loss percentage (“risk warning”).
- 3 BaFin monitors CFD offerings on the national market on an ongoing basis for compatibility with the provisions of the above-mentioned CFD General Administrative Act. The following guidelines are designed to provide indications of issues that in BaFin’s view must be taken into account when implementing the general administrative act:
 - a) Implementation of the CFD General Administrative Act in contractual arrangements
- 4 The requirements of the CFD General Administrative Act must be implemented in a legally unambiguous manner by CFD providers in their terms and conditions of business by including a contractual provision that, for example, prohibits any additional payment obligation and expressly provides for margin close-out protection.

5 The current terms and conditions of business governing CFD trading should be made available to retail investors on the CFD provider's web page.

6 Although it is not mandatory for the prohibition on offering monetary and non-monetary benefits and the obligation to provide a risk warning to be implemented in the terms and conditions of business, compliance with these requirements is mandatory for CFD providers.

b) Requirement for risk warnings

7 The CFD General Administrative Act requires all direct and indirect communications by CFD providers relating to the marketing, distribution and sale of CFD to contain a risk warning; however, it is not mandatory for the risk warning to also be included in the provider's terms and conditions of business.

8 The requirement ("no direct or indirect communications") includes the following in particular:

- Smartphone applications ("apps") and the descriptions of these apps in the app store
- Advertising videos, including those on video portals such as YouTube
- Podcasts (audio) and the descriptions of these podcasts
- Social media messages such as those on Twitter, Facebook, Instagram, etc.

c) Layout of risk warnings

9 It is mandatory for risk warnings to include a loss percentage and their layout must conform to the requirements of sections A to G of the Annex to the CFD General Administrative Act.

10 Under no. 4 of the risk warning conditions, providers can use a reduced-character risk warning as set out in section D of the Annex to the CFD General Administrative Act in those cases in which third-party marketing providers impose character limits. Examples are Google ads or Twitter messages. However, the reduced character risk warning does not apply to images and graphics embedded in messages. If such a message consists solely of an image, the latter must contain the warning set out in section B.

11 In the case of videos and similar media, the risk warning must be permanently displayed/shown both in the description of the video or similar medium and when this is played.

12 Moreover, the risk warnings may not refer to the temporary ESMA product intervention measure, which has expired, but must refer solely to BaFin's General Administrative Act regarding Contracts for Difference (CFD) of 23 July 2019. However, a cross-reference to the CFD General Administrative Act is not mandatory.

d) Prominence of risk warnings on web pages

13 Under no. 1 of the risk warning conditions, the risk warning for retail investors must always be presented in such a way that it is prominently displayed and recognisable to retail clients. In particular, the risk warning must be prominently displayed in the case of web-based

marketing. It must be displayed separately to the other published information and must be highlighted.

14 Providers can ensure this in the following ways, for example:

- A risk warning taking the form of permanent disclaimers at the bottom of the screen
- Highlighting the risk warning using bright colours or specific fonts

15 The visibility and recognisability of warnings for retail investors is restricted in the following cases, among others:

- Pop-up messages that obscure the risk warning when the web page is visited (e. g. data protection information)
- The possibility for investors to remove the risk warning in its entirety, e. g. by “clicking it off” or closing it
- The display of risk warnings in muted colours or distracting attention from them with other web page content
- Risk warnings embedded in narrative texts without highlighting them or separating them visually

e) Bonus offers

16 The CFD General Administrative Act forbids all forms of monetary and non-monetary benefits that could induce retail investors to trade in CFD at all, or to trade larger volumes of them. This prohibition covers direct and indirect offers of account opening bonuses, discounts on trading fees and volume-related discounts, rebates or benefits. “Recruit a friend” offers are also prohibited.

17 Benefits or offers that do not represent an incentive for retail investors to trade in CFD at all, or to trade larger volumes of them, and that are not linked to specific trading volumes, payment thresholds or the like, are still permitted. Examples include the provision of analysis tools or tutorials.

f) Affiliate and partner marketing as well as introducing brokers

18 In particular, CFD providers must ensure compliance with the mandatory risk warning where third parties perform advertising and marketing measures for them. This applies above all to so-called affiliate programmes or partner programmes and to introducing brokers. BaFin generally does not supervise these natural and legal persons. The advertisers or brokers (e. g. the operators of comparison websites) receive inflows of financial resources or commission from CFD providers for redirecting or brokering clients or for running advertisements.

19 Where such (outsourced) advertising or marketing does not display any risk warnings, these breaches of the requirements of the general administrative act are taken to have been committed by the CFD provider concerned if there is a direct or indirect – e. g. via an intermediary (affiliate network) – link or commissioning relationship between the CFD

provider and the advertiser and the institution has failed to take adequate organisational precautions to prevent illegal behaviour.

- 20 Consequently, CFD providers must ensure that the advertising partners or advertisers commissioned by them comply with the requirements to include a risk warning with a provider-specific loss percentage.
- 21 BaFin will monitor the provisions of the CFD General Administrative Act, including the guidelines as set out above, on an ongoing basis and where necessary will take administrative enforcement measures to ensure they are implemented.
- 22 Infringements of the CFD General Administrative Act of 23 July 2019 constitute an administrative offence under section 120 (9) no. 30 of the German Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*). They are punishable by a fine pursuant to section 120 (20) of the WpHG.

Please contact Division VBS 7 at ybs7@bafin.de if you have any questions regarding the implementation and scope of the CFD General Administrative Act.