

CSA Notice and Request for Comment

Proposed National Instrument 91-102 *Prohibition of Binary Options* and Related Proposed Companion Policy

April 26, 2017

Introduction

We, the securities regulatory authorities in all Canadian jurisdictions other than British Columbia (collectively, the **Participating Jurisdictions**), are publishing the following for public comment:

- Proposed National Instrument 91-102 *Prohibition of Binary Options* (the **Instrument**);
- Proposed Companion Policy 91-102 *Prohibition of Binary Options* (the **CP**).

In this Notice, the Instrument and the CP are referred to collectively as the **Proposed Instrument**.

We are issuing this Notice to solicit comments on the Proposed Instrument. We welcome all comments on the Proposed Instrument and have also included specific questions in the Comments section below.

While the British Columbia Securities Commission is not an authority publishing the Proposed Instrument under this Notice, it anticipates that, subject to receiving the necessary approvals, it will, in the near future, publish for comment a proposed instrument that will be consistent with the Proposed Instrument described in this Notice.

The public comment period expires

- May 29, 2017 in Alberta and Québec,
- June 28, 2017 in Manitoba and Saskatchewan, and
- July 28, 2017 in all other Participating Jurisdictions.

We encourage commenters in all Participating Jurisdictions, to the extent possible, to provide their comments by May 29, 2017.

Certain Participating Jurisdictions are considering implementing a final rule in advance of other Participating Jurisdictions. However, we anticipate that the instrument that will ultimately be

adopted in all CSA jurisdictions will be fully harmonized – e.g., through harmonizing amendments, where necessary.

Background

No individuals or firms are registered to sell binary options in Canada

By publishing the Proposed Instrument, we are not suggesting that current offerings of binary options in Canada are legal. Many of these products and the platforms selling them have been identified as vehicles to commit fraud. We emphasize that no offering of these products, including by a broker, dealer or platform, has been authorized in Canada. All current offerings in Canada are therefore illegal, with only limited and narrow exceptions for transactions with highly sophisticated investors. Nevertheless, some persons are using misleading information to promote these products as legal and legally offered.

It is our intention that the Proposed Instrument will make it explicitly clear that these products may not be advertised, offered, sold or otherwise traded to an individual in Canada.

AMF Proposal

On February 1, 2017, the Québec Autorité des marchés financiers (AMF) proposed an amendment¹ to the Québec *Derivatives Regulation* that was intended to prohibit the offering of a binary option with a maturity of less than 30 days to an individual (the [AMF Proposal](#)). The Participating Jurisdictions are proposing the Proposed Instrument as a means of implementing a prohibition in line with that set out in the AMF Proposal. The AMF is considering withdrawing the AMF Proposal and instead recommending the adoption of the Proposed Instrument.

Binary options fraud

We are concerned by the growing number of complaints received regarding the marketing of products commonly called “binary options” to individuals. Binary options are also called a variety of other names, including but not limited to “all-or-nothing options”, “asset-or-nothing options”, “bet options”, “cash-or-nothing options”, “digital options”, “fixed-return options” and “one-touch options”. All contracts or instruments, however named, marketed or sold that meet this definition will be prohibited under the Proposed Instrument.

A significant number of the complaints and inquiries received by CSA members concern online binary options platforms. These unregistered platforms, typically located off-shore, promise quick and high-yielding returns from trading binary options. On some platforms, trading may actually take place but it is typically extremely difficult and often impossible to win on the bet (because the platform controls the odds and often the reference value of the underlying interest). In some cases, even if an individual theoretically does win, the winnings may appear as a credit on a trading account on the platform but their money is not transferred or returned. In many other cases, no trading actually takes place and the operation is purely a fraud set up to take money from individuals, including through cash advances processed through the target’s credit card. Once a victim has lost their money, it is almost impossible to recuperate their losses.

¹ Draft Regulation to amend the Derivatives Regulation, February 1, 2017. The Notice, Draft Regulation and comments letters received in response to the Draft Regulation are available on the AMF website (www.lautorite.qc.ca).

Offering investment services or products to persons or companies in Canada, whether by telephone, online or in-person, is a regulated activity. It is illegal to offer investment services or products, including binary options not subject to the Proposed Instrument, in Canada without being registered as a dealer, with only limited and narrow exceptions for transactions with highly sophisticated investors.

Investing through unregistered offshore platforms or dealers can be risky and is a common red flag for investment fraud. Registration as a dealer is an important safeguard for investors, helping to ensure the suitability of the investment, and the character, proficiency and solvency of the dealer. The CSA encourage all investors to visit aretheyregistered.ca to check the registration of any person or company offering investment products, including binary options, to Canadians. Anyone who has invested with, or has concerns about, a binary options trading platform should contact their local securities regulator. We also encourage all investors to visit binaryoptionsfraud.ca.

Current regulation of binary options

We remind market participants that binary options, even binary options that are not subject to the Proposed Instrument, are derivatives and/or securities in each jurisdiction of Canada and that persons or companies advertising, offering, selling or otherwise trading such products to persons or companies in Canada are subject to securities legislation in Canada, including for example, anti-fraud provisions and requirements respecting registration, market conduct, and disclosure. Furthermore, in jurisdictions of Canada where binary options are regulated as securities, trading a binary option may be a distribution subject to the prospectus requirement.

In Québec, under the qualification regime, any person that wishes to create or market a derivative is required to apply to the AMF for qualification before the derivative is offered to the public. A qualified person may only market derivatives that have been duly authorized by the AMF as listed in its qualification decision or in a specific decision following an application by the qualified person. In addition, the qualified person must offer derivatives to the public through a registered dealer, or register with the AMF as a dealer.

The CSA consider a person or company to be trading in securities or derivatives in a local jurisdiction if that person or company offers or solicits trades of securities or derivatives to persons or companies in that local jurisdiction, including through a website or other electronic means.

Substance and Purpose of the Proposed Instrument

The purpose of the Proposed Instrument is to protect would-be investors from becoming victims of binary options fraud and from becoming victims of an illegal promotion of an extremely high risk product, by raising awareness among investors that these products are illegal and by disrupting the advertising and facilitation of these products. To this end, the Proposed Instrument will explicitly prohibit advertising, offering, selling or otherwise trading a binary option to an individual.

Summary of the Proposed Instrument

Prohibition

The Proposed Instrument prohibits advertising, offering, selling or otherwise trading a binary option with or to an individual. To prevent a party that offers a binary option from avoiding the prohibition by having their proposed client create a corporation or other type of entity to trade binary options, the Proposed Instrument also prohibits advertising, offering, selling or otherwise trading a binary option with or to or any other person or company that is created, or is primarily used, to trade a binary option.

The Proposed Instrument sets out a definition of “binary option” that is intended to capture a range of products that are, or are similar to, products that are commonly called binary options, regardless of how they are named.

Binary options

Binary options are based on the outcome of a yes/no proposition. If the outcome is yes, the buyer wins or is “in-the-money”. If the answer is no, the buyer loses or is “out-of-the-money” and loses all, or nearly all, of their investment. The yes/no proposition is structured on the performance of an underlying interest referenced in the contract – for example, a currency, commodity, stock index, or share – or the occurrence of a specified event referenced in the contract – for example, the outcome of an election or a change in a benchmark interest rate. The time or time period specified in the contract for determining whether the predetermined condition or conditions are met is often very short, sometimes hours or even minutes. The buyer either

- is entitled to receive a fixed amount if the predetermined condition is met, i.e., the buyer wins or is “in-the-money”, or
- loses all or nearly all of the amount paid if the predetermined condition is not met, i.e., the buyer loses or is “out-of-the-money”.

Anticipated Costs and Benefits

The Proposed Instrument is directed at prohibiting trading a binary option with an individual. Individuals are the primary targets of fraudulent binary options platforms, and non-fraudulent binary options also pose significant risks to individuals. The Proposed Instrument is intended to help protect would-be investors from binary options fraud, by prohibiting advertising, offering, selling and otherwise trading a binary option to an individual. It is also intended to reduce investor confusion about this form of product by making it clear that binary options are prohibited for individuals.

Potential offerors of binary options will be prohibited from offering these products to individuals if the time or time period specified for determining whether the predetermined condition or conditions are met is less than 30 days from the date the binary option is entered into. However, we do not believe that the prohibition will have a negative impact on investors’ access to necessary financial products.

We believe that the benefits to the market of reducing fraud and investor loss relating to binary options outweigh any costs of the Proposed Instrument.

Contents of Annexes

The following annexes form part of this CSA Notice:

- Annex A – Proposed National Instrument 91-102 *Prohibition of Binary Options*,
- Annex B – Proposed Companion Policy 91-102 *Prohibition of Binary Options*, and
- Annex C – Local Matters.

Comments

In addition to your comments on all aspects of the Proposed Instrument, we also seek specific feedback on the following questions:

1. Does the proposed definition of “binary option” capture contracts or instruments that should not be captured? If so, please specify the types of contracts or instruments that should not be captured and on what basis they would be captured.
2. The Proposed Instrument applies to binary options where the time period specified in the binary option for determining whether the predetermined condition or conditions are met is less than 30 days from the date the binary option is entered into. Is this time period appropriate? Please specify why or why not.
3. Staff considered a variety of options that would prevent circumvention of the binary options trading ban. These included provisions that would capture indirect trading by an individual through a company, trust or other entity. As currently drafted, the Proposed Instrument includes an anti-avoidance provision that would ban trading binary options with a person or company that is created, or primarily used, to trade binary options. We believe this approach captures our intent to prohibit attempted work-arounds of the binary options trading ban without increasing the complexity of the rule. Is the proposed provision unambiguous and clear, or should the scope of this provision be modified, for example, to more specifically extend to any person, company or other entity wholly-owned or controlled by an individual?
4. Do you believe the Proposed Instrument will accomplish the intended purpose of proposing it, as set out in this Notice?

Please provide your comments in writing by

- May 29, 2017 if responding to the Alberta Securities Commission or the Québec AMF,
- June 28, 2017 if responding to the Manitoba Securities Commission or the Financial and

Consumer Affairs Authority of Saskatchewan, and

- July 28, 2017 if responding to any other Participating Jurisdiction.

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. In addition, all comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.gov.on.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Thank you in advance for your comments.

Please address your comments to each of the following:

Alberta Securities Commission
 Autorité des marchés financiers
 Financial and Consumer Services Commission (New Brunswick)
 Financial and Consumer Affairs Authority of Saskatchewan
 Manitoba Securities Commission
 Nova Scotia Securities Commission
 Nunavut Securities Office
 Ontario Securities Commission
 Office of the Superintendent of Securities, Newfoundland and Labrador
 Office of the Superintendent of Securities, Northwest Territories
 Office of the Yukon Superintendent of Securities
 Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

If you are submitting your comments prior to May 29, 2017, please send your comments **only** to the following addresses. Your comments will be forwarded to the remaining jurisdictions:

M^e Anne-Marie Beaudoin
 Corporate Secretary
 Autorité des marchés financiers
 800, rue du Square-Victoria, 22^e étage
 C.P. 246, tour de la Bourse
 Montréal (Québec) H4Z 1G3
 Fax: 514-864-6381
consultation-en-cours@lautorite.qc.ca

Grace Knakowski
 Secretary
 Ontario Securities Commission
 20 Queen Street West
 22nd floor
 Toronto, Ontario M5H 3S8
 Fax: 416-593-2318
comments@osc.gov.on.ca

If you are submitting your comments after May 29, 2017 but prior to July 28, 2017, please send your comments **only** to the following address. Your comments will be forwarded to the remaining jurisdictions:

Grace Knakowski
 Secretary
 Ontario Securities Commission
 20 Queen Street West
 22nd floor
 Toronto, Ontario M5H 3S8
 Fax: 416-593-2318
comments@osc.gov.on.ca

Questions

Please refer your questions to any of:

Lise Estelle Brault
 Co-Chair, CSA Derivatives Committee
 Senior Director, Derivatives Oversight
 Autorité des marchés financiers
 514-395-0337, ext. 4481
lise-estelle.brault@lautorite.qc.ca

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ANNEX A

PROPOSED NATIONAL INSTRUMENT 91-102 *PROHIBITION OF BINARY OPTIONS*

Definition

1. In this Instrument, “binary option” means a contract or instrument that provides for only
 - (a) a fixed amount if the underlying interest referenced in the contract or instrument meets one or more predetermined conditions, and
 - (b) a lesser amount or zero if the underlying interest referenced in the contract or instrument does not meet one or more predetermined conditions.

Trading binary options with an individual prohibited

2. No person or company may advertise, offer, sell or otherwise trade a binary option with or to an individual.

Trading binary options with a person or company other than an individual prohibited

3. No person or company may advertise, offer, sell or otherwise trade a binary option with or to a person or company that is not an individual and that is created, or is primarily used, to trade a binary option.

Binary options of 30 days or longer

4. Sections 2 and 3 do not apply in respect of a binary option if the time specified in the binary option for determining whether one or more predetermined conditions is met is 30 days or more from the date the binary option is entered into.

Exemption – general

5. (1) Except in Québec, the regulator or the securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.
- (2) Despite subsection (1), in Ontario, only the regulator may grant an exemption.
- (3) Except in Alberta, Ontario and Saskatchewan, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction.

Effective date

6. This Instrument comes into force on [●].

ANNEX B

PROPOSED COMPANION POLICY 91-102 *PROHIBITION OF BINARY OPTIONS*

Introduction

The purpose of National Instrument 91-102 *Prohibition of Binary Options* (the **Instrument**) is to help protect would-be investors from binary options fraud.

The purpose of this Companion Policy is to state the view of the members of the Canadian Securities Administrators (the “CSA” or “we”) on various matters related to the Instrument.

We are concerned by complaints we have received regarding the marketing of products commonly called “binary options” to individuals. Many of these products and the platforms selling them have been identified as vehicles to commit fraud. Some persons have used misleading information to promote these products as legal and legally offered, despite not being authorized to offer these products to individuals in Canada. The Instrument explicitly prohibits advertising, offering, selling or otherwise trading a binary option (as defined in the Instrument) with or to an individual.

The CSA consider a person or company to be trading in securities or derivatives in a local jurisdiction if that person or company offers or solicits trades of securities or derivatives to persons or companies in that local jurisdiction, including through a website or other electronic means.

Definitions and interpretation

Unless defined in the Instrument or this Companion Policy, terms used in the Instrument and in this Companion Policy have the meaning given to them in securities legislation, including in National Instrument 14-101 *Definitions*. “Securities legislation” is defined in National Instrument 14-101 *Definitions*, and includes statutes and other instruments related to both securities and derivatives.

Interpretation of terms used or defined in the Instrument

Section 1 – Definition of “binary option”

The defined term “binary option” is intended to capture a range of products that are, or are similar to, products that are commonly called binary options, regardless of how they are named. Binary options are sometimes called a variety of other names, including but not limited to “all-or-nothing options”, “asset-or-nothing options”, “bet options”, “cash-or-nothing options”, “digital options”, “fixed-return options” and “one-touch options”.

Binary options are based on the outcome of a yes/no proposition, expressed as whether an underlying asset, event or value meets one or more predetermined conditions specified in the contract or instrument, at or during the time or time period specified in the contract or instrument. The specified time or time period for determining whether the predetermined condition or conditions are met is often very short, sometimes hours or even minutes.

Binary options typically exercise automatically; once the contract or instrument is entered into, there is no decision for either the buyer or the seller to make. The buyer either

- is entitled to receive a fixed amount if the predetermined condition is met, i.e., the buyer is “in-the-money”, or
- loses all or nearly all of the amount paid if the predetermined condition is not met, i.e., the buyer is “out-of-the-money”.

The yes/no proposition is structured on the performance of an underlying interest. For the purposes of the Instrument, we interpret “underlying interest” as the event or thing that the value or payment obligations of the binary option is based on, derived from or referenced to. The underlying interest of a binary option could be the

- occurrence of a specified event, e.g., the outcome of an election or a change in a benchmark interest rate, or
- performance or value of a security, index, currency, precious metal or any other commodity, price, rate, benchmark, variable or any other thing.

For example, a binary option may be based on a yes/no proposition such as whether:

- the value of the Canadian dollar will be above \$0.75 US on a particular day;
- the price of a share in ABC Company will be above \$14.37 at any time between two particular dates;
- the price of gold will be below \$1082 at 3:42 pm on a particular day;
- the price of oil will be in the range of \$48.00 – \$49.99 at any time on a particular day; or
- there will be more than one inch of rain reported at a specified location on a specific day.

A binary option typically does not grant the buyer or seller any right or obligation to buy, sell, receive or deliver an underlying interest referenced in the contract or instrument. For example, if the yes/no proposition of a binary option is based on the value of a share price, the binary option would provide for settlement in cash and would not provide for delivery of the underlying share. Similarly, if the yes/no proposition of a binary option is based on the movement in the price of gold, the binary option would provide for settlement in cash and would not provide for delivery of physical gold.

Typically, the only rights under a binary option for the buyer or seller are an entitlement to receive or an obligation to pay (a) a fixed amount if the predetermined condition or conditions are met, and (b) a lesser amount or zero if the predetermined condition or conditions are not met. The payout structure of a binary option is non-linear; that is, the payout possibilities are discrete amounts that are specified at the time the contract or instrument is entered into (although the actual value of the payout amount may not be determined at the time the contract or instrument is entered into).

However the product is named, the prohibition in the Instrument applies if the product meets the definition of “binary option” and the specified time for determining whether the predetermined condition is met is less than 30 days from the date the contract or instrument is entered into.

Section 2 – Trading binary options with an individual prohibited

Section 2 prohibits advertising, offering or selling a binary option to an individual. Advertising, offering and selling are elements of “trade” or “trading”. The phrase “or otherwise trade” includes soliciting and all other elements of “trade” or “trading”, including an act in furtherance of a trade.

Section 3 – Trading binary options with a person or company other than an individual prohibited

Section 3 prohibits advertising, offering or selling a binary option to a person or company, other than an individual, that is created, or is primarily used, to trade a binary option. Section 3 is designed to support the prohibition in section 2, by preventing a party that offers a binary option from avoiding the prohibition by having their proposed client create a corporation or other type of entity to trade binary options.

Section 4 – Binary options of 30 days or longer

Section 4 carves out from the prohibitions in sections 2 and 3 a binary option for which the specified time period for determining whether the predetermined condition or conditions are met is 30 days or more from the date the binary option is entered into.

We remind market participants that binary options that are not subject to the Instrument are derivatives and/or securities in each jurisdiction of Canada. Any person or company advertising, offering, selling or otherwise trading such products to persons or companies in Canada is subject to securities legislation in Canada including, for example, anti-fraud provisions and requirements respecting registration, market conduct and disclosure. Furthermore, in jurisdictions of Canada where binary options are regulated as securities, trading a binary option may be a distribution subject to the prospectus requirement.

In Québec, under the qualification regime, any person that wishes to create or market a derivative is required to apply to the Autorité des marchés financiers for qualification before the derivative is offered to the public. A qualified person may only market derivatives that have been

duly authorized by the Autorité des marchés financiers as listed in its qualification decision or in a specific decision following an application by the qualified person. In addition, the qualified person must offer derivatives to the public through a registered dealer, or register with the Autorité des marchés financiers as a dealer.

Offering investment services or products to persons or companies in Canada, whether by telephone, online or in-person, is a regulated activity. Investing through unregistered offshore platforms or dealers can be risky and is a common red flag for investment fraud. The CSA encourage all investors to visit aretheyregistered.ca to check the registration of any person or company offering investment products, including binary options, to Canadians. Anyone who has invested with, or has concerns about, a binary options trading platform should contact their local securities regulator. We also encourage all investors to visit binaryoptionsfraud.ca.

ANNEX C

LOCAL MATTERS

There are no local matters to consider at this time.