Digital Economy Council of Australia

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Submission to Australian Securities and Investments Commission

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Response to Consultation Paper 381 Updates to INFO 225: Digital Assets: Financial Products and Services

Digital Economy Council of Australia

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About DECA

The Digital Economy Council of Australia (DECA) is the peak industry body representing Australian businesses and professionals in blockchain, digital assets, decentralised finance (DeFi) tokenisation and Web3 technologies.

DECA advocates for responsible adoption and regulation of these technologies working closely with government, regulators and industry stakeholders to ensure Australia remains a globally competitive digital asset market.

DECA acknowledges the contributions of its members across the digital asset sector to this response.

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Purpose of This Submission

This submission responds to ASIC's Consultation Paper 381 (CP381) and the updated INFO225 guidance which introduce significant regulatory changes affecting financial product classifications licensing and compliance obligations for digital asset businesses.

DECA welcomes ASIC's efforts to provide regulatory clarity for digital assets and supports a framework that promotes innovation while ensuring consumer protection. However several critical aspects of the proposed INFO225 require refinement to ensure that ASIC provides clarity to the industry, and that its views align with case law, industry realities, international best practices and Treasury's ongoing reforms.

ASIC's proposals expand financial product classifications and impose wide licensing and compliance obligations that may be impractical or misaligned with how digital assets operate. If implemented without modification these rules risk:

- Expanding financial product classifications beyond established case law
- Creating disproportionate compliance burdens that will force many Australian businesses offshore

- Restricting consumer access to widely used digital assets
- Creating inconsistencies between ASIC and Treasury's digital asset reforms
- Applying financial product laws to decentralised assets and tokenised real-world assets inappropriately

DECA's submission provides practical recommendations aimed at:

- Ensuring proportionate regulation that distinguishes between investment products and other digital asset use cases
- Clarifying financial product classifications to avoid unnecessary regulatory capture
- Aligning ASIC's framework with international best practices

ASIC's consultation presents a critical opportunity to refine Australia's approach to digital asset regulation. Without modifications ASIC's proposals could hinder investment and place Australia at a competitive disadvantage globally.

The Need for a Balanced and Pragmatic Regulatory Approach

Australia is at a pivotal moment in shaping its digital asset regulatory framework. A well-designed regulatory model can protect consumers, support innovation and ensure Australia's leadership in blockchain and digital finance. However without adjustments ASIC's current proposals risk:

- Imposing regulatory barriers that may deter investment and business growth
- Restricting consumer access to regulated digital asset services
- Creating regulatory fragmentation if ASIC's approach diverges from Treasury's ongoing digital asset reforms

Australia's legal framework should support Australia's long-term competitiveness by ensuring that regulations are risk-based and innovation-friendly. Leading jurisdictions such

as the UK[1], the EU[2] and Singapore[3] have accelerated adoption of proportionate regulatory approaches to digital assets balancing market integrity with industry development.

Whilst ASIC's role is that of regulator, not policy-maker, it can:

- choose to interpret and provide guidance on the law in a manner that acknowledges the nuance of the digital asset sector and its underlying protocols
- provide relief where the Government seeks to create fit-for-purpose reforms
- limit the use of its regulatory powers where businesses seek to meet shifting and untested interpretations of the law in good faith

Industry Concerns & Regulatory Uncertainty

DECA members operate real businesses contributing to the Australian economy and employment in a global market. However, ASIC's proposed regulatory framework introduces uncertainty by expanding or reversing long-established interpretations of financial product laws without clear legal justification.

These proposals are being introduced while the industry is already navigating concurrent regulatory reforms including:

- Payments licensing reforms[4]
- Digital asset regulatory reform proposals[5]
- AML/CTF reforms[6]

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[1] UK Government, *Financial Services and Markets Act 2023*, available at: https://www.legislation.gov.uk/ukpga/2023/29/contents.
[2] European Commission, *Markets in Crypto-Assets (MiCA) Regulation* (Regulation (EU) 2023/1114), available at: https://www.cssf.lu/en/markets-in-crypto-assets-mica-micar/#:~:text=With%20MiCAR%20
[3] Monetary Authority of Singapore (MAS), *Payment Services Act 2019 (Revised 2024)*, available at: https://www.mas.gov.sg/regulation/acts/payment-services-act
[4] Australian Treasury, *Payments System Modernisation (Regulation of Payment Service Providers): Consultation Paper* (December 2023), available at: https://treasury.gov.au/consultation/c2023-469663.
[5] Australian Treasury, *Regulating Digital Asset Platforms: Proposal Paper* (October 2023), available at: https://treasury.gov.au/sites/default/files/2023-10/c2023-427004-proposal-paper-final.pdf.
[6] Attorney-General's Department, *Overview of the Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2024*, available at: https://www.ag.gov.au/crime/anti-money-laundering-and-counter-terrorism-financing/anti-money-laundering-and-counter-terrorism-financing-amendment-act/overview-amlctf-amendment-act.

- The introduction of a scams code framework[7]

No other sector is managing this level of overlapping regulatory transformation while simultaneously facing new legal interpretations that depart from historical norms.

We are informed that ASIC's updated INFO225 guidance and consultation process is the most expansive of its kind and has raised concerns within legal and business communities about whether the existing law is appropriate for digital assets.

There are also concerns about whether ASIC has the resources required to manage the licensing and enforcement changes it is proposing given industry feedback regarding current licensing wait times.

Industry Engagement & Confidentiality Considerations

This submission reflects the collective voice of Australia's digital asset industry drawing input from a broad range of market participants including leading Australian businesses.

However many industry participants have expressed concerns about public engagement in the regulatory process due to the potential to amplify enforcement risks or create commercial pressures with banking relationship providers.

Industry participants are hesitant to engage openly due to regulatory uncertainty. A regulatory framework that discourages open dialogue weakens market integrity and policy outcomes.

To ensure critical industry perspectives are represented without exposing businesses to risk this submission is provided without attributing views to specific companies.

ASIC's Regulatory Shift & its Impact on Industry

ASIC's recent interpretation of financial product classifications marks a departure from prior public positions. In 2014, ASIC said most digital assets were not financial products.[8] Even as

[7] Australian Competition and Consumer Commission (ACCC), *ACCC welcomes passage of world-first scams prevention laws* (February 2025), available at: https://www.accc.gov.au/media-release/accc-welcomes-passage-of-world-first-scams-prevention-laws.
[8] Australian Securities and Investments Commission (ASIC), *Senate inquiry into digital currency: Submission by ASIC* (December 2014)

recently as 2021 ASIC leadership publicly indicated that digital asset investors were "on their own" due to the absence of regulatory coverage.[9]

ASIC has a statutory obligation to promote commercial certainty, reduce business costs and improve the efficiency of the financial system. By modifying its interpretation of digital assets without legislative reform ASIC risks overstepping its role as a regulator and moving into policymaking.

Scope of This Submission

This submission highlights the most pressing regulatory concerns raised by DECA members. While not exhaustive it reflects the primary industry position on ASIC's proposed changes.

DECA urges ASIC to consider both the substance of this submission and what the need for anonymity among industry participants indicates about the current state of regulation in Australia.

Acknowledgments

This submission is the result of extensive industry consultation and collaboration across multiple forums.

It reflects insights gathered from roundtable discussions, working groups, legal forums and leadership dialogues within the digital asset sector. Over the past several months, hundreds of industry participants have contributed through direct conversations, structured feedback sessions and survey responses, ensuring that this submission captures a broad and representative industry perspective.

DECA acknowledges the invaluable contributions of its members and stakeholders, whose engagement has been instrumental in shaping this response.

We also recognise the expertise of leading legal and regulatory specialists, including Hamilton Locke, Holley Nethercote, and Hall & Wilcox, whose insights have helped refine critical aspects of this submission.

[9] ASIC, *Submission 61*, p. 19.

A special acknowledgment is extended to the DECA working group sponsors and leadership teams, whose expertise and guidance have shaped the key positions outlined in this response.

This response represents not just the views of individual firms but a collective position for an industry that is deeply committed to regulatory clarity, consumer protection and the responsible development of Australia's digital asset ecosystem.

Headline Issues

BITCOIN AND SIMILAR DIGITAL ASSETS ARE NOT FINANCIAL PRODUCTS

Key Point

Bitcoin and digital assets with similar characteristics are not financial products.

Response

In December 2014, ASIC said in its submission to the Senate inquiry into digital currency:[10]

> *"ASIC has considered whether digital currencies, such as bitcoin, are financial products… ASIC's view is that digital currencies themselves do not fall within the current legal definition of a financial product. ASIC has communicated this view to industry participants."*

ASIC then explained, in paragraph 45-53, why bitcoin and similarly characterised "digital currencies" are not financial products.[11]

Neither the relevant sections of the Corporations Act 2001 (the Act), the associated regulations, the Bitcoin protocol, or case law, has changed since ASIC's submission in 2014.

However, in a round table with ASIC after the release of CP381, ASIC was asked if Bitcoin was a financial product based on its proposed revised interpretation. ASIC

[10] Australian Securities and Investments Commission (ASIC), Submission to the Senate Inquiry into Digital Currency (December 2014), p. 12

[11] Australian Securities and Investments Commission (ASIC), Submission to the Senate Inquiry into Digital Currency (December 2014), paragraphs 45–53

said “we don’t know.” This creates an unacceptable and unworkable level of uncertainty in Australia, particularly considering BTC represents more than half of the total market capitalisation.

ASIC should clarify in INFO225 that its 2014 interpretation of traditional digital assets, such as BTC, ETH and digital assets with similar characteristics, remains unchanged. If it wishes to change its view, it is essentially taking the role of government as policy maker. This would provide significant clarity, given that BTC and ETH together represent the majority of global market capitalisation.

Commentary

Despite the passage of time, issues the digital asset industry views as first principles questions remain ambiguous, unclear or unaddressed. The unequivocal non-financial product characterisation of bitcoin is a clear example of this.

Concerns surrounding regulatory overreach are rooted in ASIC’s very broad definition and categorisation of financial products in this sector.

NO-ACTION RELIEF IS INADEQUATE

Key Point

The scope of the proposed no-action relief framework creates uncertainty and creates an uneven playing field for businesses, depending on when they apply for a licence or a licence variation.

Response

Under the current proposal, the eligibility criteria, timeframes and relief mechanisms are unclear and inconsistent. This resultant uncertainty undermines business confidence.

We propose removing ASIC's phrase 'commenced operations as at December 2024' as a trigger for relief eligibility. Instead, relief should apply to all businesses for a minimum period of 24 months and include clearly defined exit pathways.

The current language fails to offer relief for businesses that have already invested significant time and financial resources in anticipation of launching in Australia, for those restructuring with new entities after December 2024 or for businesses planning to launch in 2025.

The guidance has the potential to stifle innovation by requiring that all new business ventures within the regulatory scope of INFO225 obtain licenses before implementation. We note as an example, some market making AFSL applications take up to 2 years to be granted.[12]

Businesses that seek an Australian Financial Services Licence (AFSL) early may reasonably be concerned that they risk rejection or overly onerous conditions if and likely when ASIC's expectations evolve during the process. Companies that delay applying for licenses may ultimately benefit from improved and developed guidance. This inconsistency will likely leave early applicants at a disadvantage.

Relief should not automatically expire upon licensing. Businesses may rely on service providers and counterparties who continue under no-action relief and a hard expiry could lead to market disruption and unintended compliance gaps. ASIC should

[12] Holly Nethercote Law, Fact sheet: The AFSL Application Process (2024), available at: https://www.hnlaw.com.au/fact-sheet-the-afsl-application-process/

provide clear and structured pathways for businesses to exit no-action relief so that they are not left uncertain about when and how relief will be withdrawn.

For businesses requiring an Australian Markets Licence (AML) and/or a Clearing and Settlement Facility licence (CSF), the current relief timeline does not provide sufficient opportunity for ASIC (or Treasury) to fully develop a fit-for-purpose AML Tier 3 (or AML-style DAF) framework. Although the process may begin, it cannot reasonably be completed within the current timeframe and would likely require a great deal of further consultation with industry. Discussions regarding the appropriateness, detail and criteria of an AML remain in their early stages. Consequently, the no-action relief should be extended.

ASIC should provide regulatory certainty for firms acting in good faith by ensuring that new licensing obligations do not cause unfair enforcement actions. Businesses that have operated legally under existing frameworks should not face penalties due to evolving regulatory classifications. A formal prohibition on enforcement against conduct now brought within the AFSL perimeter is critical to ensuring industry confidence.

Commentary

ASIC has not clarified how it will process and approve licensing applications for hundreds of digital asset businesses within a six-month timeframe. Without a structured approach to application prioritisation and review, regulatory bottlenecks will almost certainly delay approvals and create unnecessary compliance risks for businesses attempting to transition into the new regime.

The uncertainty outlined above is compounded by the expectation that Treasury Digital Asset Platform Reforms are expected in the second quarter of 2025.[13] *Businesses are being asked to proceed with license applications and conditions that may be significantly affected by*

[13] Australian Treasury, *Regulating Digital Asset Platforms: Proposal Paper* (October 2023), available at: https://treasury.gov.au/sites/default/files/2023-10/c2023-427004-proposal-paper-final.pdf.

frameworks that have not yet been tabled but are reasonably anticipated to impact the sector.

This creates unreasonable commercial and operational uncertainty, so wide relief is warranted.

RESPONSIBLE MANAGERS: UNREALISTIC TALENT POOL AND STRUCTURAL GAPS

Key Point

The requirements for Responsible Managers for AFSLs must be pragmatic, acknowledging that domain experience in the digital asset sector has been developed as this nascent industry has operationalised.

Response

ASIC’s requirement that Responsible Managers (RMs) have regulated experience is impractical and unworkable when applied to the digital asset industry.

Given that digital asset businesses have largely operated outside the traditional regulated financial services framework, the current standard does not reflect the sector's reality and creates an unnecessary barrier.

In an industry that has evolved without tailored regulation, the most relevant expertise has been gained in non-traditional settings. Excluding professionals from Responsible Manager roles solely because their experience did not occur within an ASIC-licensed firm overlooks the industry's evolution and risks sidelining those best equipped to manage risk and compliance.

This issue is acute in areas such as custody, cyber resilience, exchange and digital asset infrastructure, where specialised expertise is essential for managing complex risks. ASIC's proposed framework makes it exceptionally difficult to find Responsible Managers who meet both the traditional experience requirements and possess the necessary technical knowledge of digital assets. For example, very few Responsible Managers have experience "making a market" in "non-cash payment" facilities. Consequently, many individuals with deep expertise in digital asset custody, cyber resilience, trading, staking and infrastructure are excluded, even though their knowledge exceeds that of traditional finance professionals with little direct exposure to digital assets.

Mandating that digital asset firms appoint Responsible Managers from traditional financial services, who may not understand the unique operational, technological and security risks of digital assets, is counterproductive. While compliance experience is important, managers must also grasp their firm's specific risks and controls. Without this balance, governance will be formally compliant but practically deficient, leaving consumers at greater risk.

Potential solutions to address this issue include:

Recognition of Prior Industry Experience

- Follow ASIC's approach in other transitioning sectors by formally recognising prior experience in digital asset businesses as meeting Responsible Manager competency requirements.
- Enable firms to comply with licensing obligations without needing to appoint individuals who lack sector-specific expertise.

- Apply the precedent set in sectors such as claims handling services[14], limited Australian Financial Services Licences for accountants[15], and the experienced provider pathway for financial advisers.[16]

Structured Training Programs

- Accept tailored compliance and regulatory training for Responsible Managers from the digital asset industry in lieu of traditional regulatory experience. For example, apply the precedent set in assessing overseas RM applicants, where a half-day course on Australian licensing requirements was considered sufficient when deep industry expertise is present.
- Provide a pathway for these individuals to meet ASIC's expectations without excluding them from leadership roles.

Without these solutions, ASIC's proposed INFO225 will force businesses to search for Responsible Managers that are simply not available. This shortage will delay licensing outcomes and heighten systemic non-compliance risks.

Commentary

The industry has long been misunderstood and maligned, creating a perception of reputational risk and potential negative professional outcomes. This intangible impact is well known within the sector but underappreciated externally, and it must be acknowledged before effective rules and guidelines for Responsible Managers can be developed.

[14] Australian Securities and Investments Commission (ASIC), *Claims Handling and Settling: How to Comply with Your AFS Licence Obligations*
[15] Australian Securities and Investments Commission (ASIC), *AFS Licensing Requirements for Accountants Who Provide SMSF Services*
[16] ASIC, *Financial Adviser Standards: Experienced Provider Pathway*

FINANCIAL PRODUCT CLASSIFICATIONS: OVERREACH AND LACK OF CASE LAW ALIGNMENT

Key Point

Despite longstanding opportunities to provide clear guidance, ASIC's approach to defining financial products in the digital asset sector remains overly broad and subjective. The absence of clear legal criteria creates legal uncertainty, regulatory overreach, misclassification of digital assets and ultimately deters innovation.

Response

ASIC's proposed approach to defining financial products within the digital asset sector is overly broad, subjective, and inconsistent with established case law. While appropriate regulation of financial products is critical to protect consumers and ensure market integrity, it must be applied in a way that is predictable, transparent and aligned with clear legal principles.

The proposed guidance takes broad and subjective interpretations of statutory phrases without benchmarking them against available case law. For example, ASIC relies heavily on the concept of "bundled rights and expectations" as a basis for classifying digital assets as financial products.[17] This approach introduces subjectivity into the regulatory framework, effectively leaving businesses and consumers without a clear or workable test for determining whether a particular asset is a financial product.

[17] Australian Securities and Investments Commission (ASIC), *Consultation Paper 381: Updates to INFO 225—Digital assets: Financial products and services* (December 2024), p. 7

The suggestion that an asset could be deemed a financial product simply because market participants perceive multiple aspects of the service as being bundled together, should be more precise. In the recent Qoin Case, Justice Downes said:

> *"that a financial product's functionality requires integration with another product, facility or thing does not necessarily mean that the other product, facility or thing forms part of the financial product.*
>
> *In this case, each Qoin Wallet is built on top of the Qoin Blockchain, of which there is only one and which exists separately to each Qoin Wallet. …it does not follow that the Qoin Blockchain is itself a financial product, or that it forms part of a financial product."*[18]

Justice Downes also did not find that the Qoin token was a financial product.[19]

Also, ASIC's proposed methodology classifies financial products by examining market behaviour, such as price appreciation and secondary market trading, rather than their underlying legal structure and function. Many commodities and assets (including gold, real estate and collectables) experience price appreciation and trade on secondary markets without being automatically classified as financial products.

Courts and regulatory frameworks have consistently emphasised that an asset's classification as a financial product must depend on tangible factors including its legal structure, contractual obligations, published product descriptions and enforceable rights between parties.

Applying a different standard to digital assets would create an inconsistent and unfair regulatory environment that leads to uncertainty and imposes unnecessary regulatory obligations on businesses.

As noted above, ASIC's approach does not reference established case law, including the Qoin decision - which explains situations where elements of a service should *not*

[18] *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2024] FCA 457, [108]
[19] *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2024] FCA 457

be bundled together as one financial product. In that case, the court made clear that not all components of a digital asset service are financial products, even when they can be used for transactions or held in expectation of value appreciation. The Qoin case reinforced that whether an asset is a financial product depends on its legal structure and the obligations between parties, not on market perceptions or secondary market activity.[20]

To address these concerns, ASIC should:

- Provide a structured, objective framework for determining when a digital asset is a financial product, based on clear legal characteristics and obligations rather than on market behaviour or investor expectations.
- Include step-by-step criteria that businesses can use to assess their compliance obligations.
- Benchmark its views against established case law.
- Clarify that, in some situations, different aspects of a service should not necessarily be bundled together as part of the same facility, and cite examples to illustrate this.
- Ensure full alignment with existing case law, including the decisions in Qoin, Block Earner[21] and Finder,[22] which provide judicial guidance on digital asset assessment under Australian law.
- Avoid introducing policy positions that contradict or undermine these legal precedents.
- Commit to formal industry consultation to refine its approach to digital asset classification.
- Work collaboratively with industry participants to ensure that the guidance is practical, enforceable and reflective of real-world use cases

[20] *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2024] FCA 457, available at: https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0457.
[21] *Australian Securities and Investments Commission v Block Earner Pty Ltd* [2024] FCA 78
[22] *Australian Securities and Investments Commission v Finder Wallet Pty Ltd* [2024] FCA 69

Commentary

Consecutive governments and a series of regulatory consultations, including Treasury Token mapping exercise have failed to resolve these issues. This has resulted in extreme and problematic uncertainty.

Rather than providing certainty, this information sheet risks creating additional confusion.

ASIC's approach does not merely clarify existing laws, it expands interpretations in ways that effectively create new regulatory obligations. This is a function of Parliament and the courts, not regulatory discretion

A continued direct and transparent dialogue is needed if we are to move forward. The industry remains ready to engage in this conversation, as it has for many years, rather than testing the regulatory perimeter when a clear alternative is available.

STABLECOIN REGULATION: MISALIGNMENT WITH TREASURY AND UNWORKABLE CLASSIFICATION

Key Point

ASIC's classification of stablecoins as financial products creates unnecessary regulatory complexity and directly conflicts with Treasury's proposed framework, which takes a more structured and internationally aligned approach.

Response

INFO225's approach to stablecoin classification risks creating regulatory overlap and fragmentation with Treasury's Payment System Modernisation reforms. Treasury's functional approach proposes to regulate payment functions (like issuing a payment

stablecoin) rather than the underlying payment stablecoin token, aligning with global regulatory trends.

Industry feedback suggests ASIC should adopt a more precise differentiation between payment stablecoins and investment focused stablecoins to ensure that regulation targets risk appropriately rather than imposing broad financial product classifications.

ASIC proposes to classify stablecoins themselves as financial products, rather than regulating the functions performed by issuers and service providers. This approach fails to account for the fact that stablecoins serve multiple purposes and exist in different structural forms, making a blanket classification inappropriate.

Stablecoins can have multiple and differing characteristics including:

- The maintenance of a stable value with reference to a fiat currency (referred to as Payment Stablecoins by Treasury);
- Collateralisation with fiat, digital assets or other assets;
- A peg maintained through algorithmic mechanisms;
- A yield bearing feature that provides returns to holders and may exhibit characteristics of financial products.

ASIC's approach, if implemented, will cause significant regulatory uncertainty for both issuers and users and stands in stark contrast to approaches in other major jurisdictions. In jurisdictions such as Singapore,[23] the UK[24] and the EU[25] regulation focuses on the stablecoin issuer. These jurisdictions require issuers to maintain proper reserves, adhere to robust governance frameworks and ensure operational

[23] Monetary Authority of Singapore (MAS), *Regulations for Stablecoin Issuers under the Payment Services Act*, available at: https://www.mas.gov.sg/news/media-releases/2023/mas-finalises-stablecoin-regulatory-framework.
[24] UK Government, *Financial Services and Markets Act 2023 (Stablecoin Regulation Amendments)*, available at: https://www.legislation.gov.uk/ukpga/2023/29/contents.
[25] European Commission, *Markets in Crypto-Assets (MiCA) Regulation* (Regulation (EU) 2023/1114), available at: https://eur-lex.europa.eu/eli/reg/2023/1114/oj/eng

transparency rather than automatically classifying stablecoins as securities or derivatives.

Stablecoin issuers in Australia could face dual compliance obligations under both financial product regulations and payment system laws. This creates unnecessary duplication and cost and will discourage the development of stablecoin infrastructure domestically. Elevating the risk of businesses being forced to operate outside of Australia's jurisdiction.

The Qoin case confirmed that certain types of wallet constitute a non-cash payment facility.[26] ASIC has taken this further, and proposes classifying stablecoin tokens as non-cash payment facilities or other financial products. Because digital asset businesses facilitate the purchase and sale of stablecoins, if the underlying *token* is a financial product, this would mean that the digital asset business potentially requires a market making AFSL, an AML and/or a CSF licence.

ASIC should take a differentiated regulatory approach that includes:

- Alignment with Treasury's approach, which focuses on regulating issuers and service providers rather than classifying stablecoins themselves as financial products.
- Where stablecoins meet Treasury's definitions of payment stablecoins, ASIC should provide relief until Treasury's reforms are implemented.
- Provision of clear regulatory pathways for different stablecoin models, ensuring that payment-focused stablecoins are not subjected to the same rules as, say, yield-bearing stablecoins.
- Avoiding unnecessary overlap with existing financial regulations, which could create compliance barriers without delivering additional consumer protections.

[26] *Australian Securities and Investments Commission v BPS Financial Pty Ltd* [2024] FCA 457

The UK and EU have developed stablecoin frameworks that focus on issuer obligations rather than treating the tokens themselves as financial products.[27][28] ASIC's proposed classification would place Australia out of step with these major regulatory hubs, discouraging innovation and local issuance.

Commentary

The global interest in stablecoin frameworks is accelerating, with the UK, EU and US staking their claims on the global stage. Australia is already lagging and by adopting ASIC's approach over Treasury's, we will cement our uncompetitive position in the movement of cross border value.

Restricting stablecoin trading through excessive licensing requirements would prevent local stablecoins from competing with offshore (eg. USD) stablecoins, reducing liquidity and increasing foreign exchange costs for Australian consumers.

Treasury officials have suggested that stablecoin regulation is being prioritised for expedited consultation contradicting ASIC's timing assumptions. ASIC should delay finalising views on stablecoins (particularly payment stablecoins) in INFO225 until Treasury's position is fully clarified to avoid implementing a misaligned regulatory framework.

MARKET LICENSING: INCOMPATIBILITY BETWEEN FINANCIAL MARKET STRUCTURES AND DIGITAL ASSET MARKETS

Key Point

[27] Financial Conduct Authority (FCA), *Stablecoin Regulation in the UK*
[28] European Commission, *Markets in Crypto-Assets (MiCA) Regulation*

ASIC's proposal to require digital asset exchanges to hold an Australian Market Licence (AML) or Clearing and Settlement Facility (CSF) licence introduces fundamental operational uncertainty and creates an uneven playing field for businesses seeking to follow the law in Australia.

The proposal is vague and insufficiently detailed. Simply put, the proposed approach does not fit how digital asset markets work.

Response

Unlike securities markets, digital asset platforms are not centralised exchanges that act as intermediaries between buyers and sellers with clearing and settlement happening at different times. Instead, settlement is atomic. These platforms also provide access to global, decentralised and peer-to-peer markets.

Trying to apply AML or CSF licensing obligations to these businesses misunderstands the role that platforms play in the digital asset ecosystem. ASIC's proposal in its current form would shoehorn a traditional licensing model on an industry that functionally operates in a different way.

Key Observations:

- Digital asset markets are global, not intermediary-driven. These platforms connect Australian users to open blockchain networks that are accessible worldwide, operating 24/7 without a central operator.

- Decentralised systems do not operate like traditional markets subject to laws governing traditional AMLs and CSF licensees. Many platforms do not create or manage the underlying market, they provide user interfaces to interact with the blockchain. They do not exercise control over what happens on the

blockchain. Treating these access providers as market operators ignores how these systems fundamentally work.

- Delivery-versus-payment (DVP) models eliminate many traditional market risks. Trades on blockchain networks happen instantly and atomically, both sides of a trade settle simultaneously without needing clearing and settlement facilities. The idea that these platforms need AML or CSF licences to manage clearing and settlement risks makes no sense in DVP-based systems.

- Forcing AML and CSF obligations onto digital asset platforms will drive business offshore. If Australia imposes these unworkable and uneconomic licensing requirements businesses will have little choice but to shutter local operations.

Tier 3 Licence Category

Recent discussions have developed in relation to the creation of a Tier 3 licence category for digital asset market participants. This approach would necessarily involve designing a tailored regulatory framework in close consultation with industry, a process we expect would be very lengthy and require extensive bespoke development.

Given the time needed to finalise such a framework, ASIC should grant interim relief from the need to hold an AML or CSF licence until the new framework is finalised. This relief may be conditional on the licensee obtaining an AFSL with certain authorisations.

ASIC should not seek to apply traditional market licensing to digital asset platforms and instead work with industry to create a fit-for-purpose regulatory framework.

An appropriate framework would:

- Recognise that platforms providing access to peer-to-peer and decentralised networks do not operate "markets" under the law.
- Acknowledge that DVP models remove the need for clearing and settlement facilities, and that AML/CSF licensing is irrelevant for these types of transactions.
- Focus on regulating actual risks such as how platforms handle custody, fraud risks, and on/off-ramp interactions, not risks that don't exist in decentralised markets.
- Avoid creating licensing obligations that cannot be met, which would force platforms offshore and harm Australian consumers.
- Be aligned with international standards, as global regulators increasingly develop frameworks specifically designed for digital asset markets, recognising that they do not function like traditional financial markets.
- Alternatively, be designed by Treasury as a type of Digital Asset Facility, with a rule-making power that allows ASIC to create rules in consultation with industry, that are fit-for-purpose and built “from the ground up”

It is important to note that a proper fit-for-purpose licensing solution (such as a Tier 3 AML or a DAF with certain integrity rules) would not create a regulatory arbitrage opportunity for holders of traditional AMLs or CSF Licenses - in the same way that there are already different categories of AML for, say, certain types of derivatives. The reason for the different category is because of the different instruments traded on that exchange.

ASIC’s proposal to impose traditional AML requirements on digital asset providers contradicts the agency’s own past regulatory interpretations. RG 172 clarifies that facilities that merely facilitate transactions, rather than directly hosting offers and acceptances, should not be classified as financial markets.[29]

[29] Australian Securities and Investments Commission (ASIC), *Regulatory Guide 172: Financial markets: Domestic and overseas operators*, paragraph 78 available at: https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-172-financial-markets-domestic-and-overseas-operators/.

Commentary

DECA has consulted widely among its membership on the commercial case for an AML.

Legal opinions have varied regarding the applicability of existing AML requirements to the digital asset sector with the views detailed above. Notably though, there is a strong view in the legal community that the existing AML and CSF framework as currently designed, is not commercially viable.

The development of regulatory frameworks does not as a necessity have to consider the commercial viability of the outcomes it produces. However, in this instance, the unequivocal advice we've received from industry participants is that the current AML and CSF licensing framework is also wholly unfit-for-purpose..

ASIC officials have acknowledged the risk of market fragmentation and offshore migration if overregulation makes Australian businesses uncompetitive. However, ASIC has not provided any clear strategy or suggestions as to how industry could look to mitigate these risks.

CUSTODY AND WALLET REGULATION: LACK OF CLARITY ON CUSTODIAL OBLIGATIONS

Key Point

INFO225's treatment of custody lacks practical nuance, capturing service providers that do not function as custodians in the traditional sense. The current language creates ambiguity around non-custodial wallet providers, smart contract-based vaults and multi-signature arrangements.

Response

INFO225's proposed approach to custodial obligations fails to account for the dynamic nature of digital assets. It does not provide clear and practical guidance on when a wallet provider is considered to be acting as a custodian, creating significant uncertainty for businesses that provide digital asset custody, wallet and storage solutions.

The Act defines providing a custodial or depository service as holding a financial product, or a beneficial interest in a financial product, on behalf of another person.[30] However, digital asset custody is different, involving a variety of models that range from fully custodial services to user-controlled non-custodial wallets, and more complex solutions like multi-signature arrangements and smart contract-based storage. These distinctions are not properly addressed in ASIC's current approach, which risks applying a one-size-fits-all definition to an ecosystem that requires much greater nuance.

Whilst ASIC maintains that offering a self custody solution or self hosted wallet product is unlikely to amount to providing a custodial and depository service, the industry is calling for more detailed guidance on the differentiation between custodial and non custodial wallets.

Many technology providers offer solutions that enable users to self custody their own assets, including tools for private key management and multi signature wallets. However, if these providers do not hold or control customer assets, they should not be classified as custodians. Imposing custodial obligations on providers that do not hold or control customer assets is inappropriate and amounts to regulatory overreach.

[30] *Corporations Act 2001* (Cth) s 766E

This guidance fails to address decentralised custody models adequately. The growth of multi-signature wallets, smart contract-based vaults and other decentralised custody solutions requires a tailored approach that acknowledges shared control and distributed key management models. Treating all these services as custodial without regard to who has access to or control over the assets would ignore the innovation these models provide in improving asset security and reducing single points of failure.

We submit that ASIC should adopt a technology-neutral, principles-based approach to custody, focusing on what constitutes "control," which includes:

- Providing explicit, practical definitions of how the Act's definition of Custodial and Depository Services applies to digital asset wallets.
- Clarifying that wallet providers without access to customer assets are not considered custodians and should not be subject to custody related regulatory obligations.
- Recognising multi-signature custody models and offering clear guidance on how these arrangements will be treated under the law.
- Ensuring that distributed key management and shared control in decentralised custody models are appropriately acknowledged.
- Clarifying what constitutes "incidental custody" in the context of digital assets. For example, explaining that while custodians are required to hold AUD $10 million, many digital asset service providers in practice use a third party custodian. Even where a third party custodian is not used, a digital currency exchange that does not charge for custody and only provides custody incidentally to trading services, would be an incidental custody provider.
- Clarify whether, in ASIC's view, the issuer of a non-cash payment facility that deals in stablecoins is considered to be an incidental custodian to the extent that they hold the relevant digital assets.
- Align with international best practices including approaches in jurisdictions that distinguish between custodial and non-custodial services.

- Acknowledge that self-custody technology providers should not be regulated as custodians unless they take control of client assets.

We expect that as ASIC considers a large number of new digital asset related AFSL applications, it will be more efficient for both ASIC and the industry if there is a uniform interpretation of custodial obligations.

Commentary

The industry requires clear, technology-neutral definitions that distinguish between custodial and non-custodial functions.

CLIENT MONEY RULES AND THE DEBANKING PROBLEM

Key Point

Regulatory obligations that rely on Authorised Deposit Taking Institutions (ADIs) as gatekeepers to financial services create impossible compliance situations for many digital asset service providers.

Response

While the aim of protecting client money is supported in principle, in practice the widespread refusal of ADIs to bank digital asset businesses has created a structural barrier to compliance which ASIC (and Treasury) have yet to address.

We are advised by our members that most Australian banks regularly refuse to provide banking services to digital asset businesses, including those that operate with high compliance standards and that seek to engage with ASIC's licensing regime. As a result, many firms that wish to comply with client money requirements cannot do so, creating a structural barrier to licensing.

ASIC has not provided any class-wide relief from using ADIs, or guidance on the extent to which non-bank financial institutions, such as payment service providers, can operate client money accounts. This leaves businesses without clear alternatives to ADI banking, despite the broader availability of sophisticated financial infrastructure outside traditional banks.

ASIC must acknowledge these real-world limitations and adjust its regulatory framework to enable digital asset businesses to meet client money obligations without relying on an inaccessible banking system.

To address these issues, ASIC should:

- Provide guidance on the use of non-bank financial institutions as valid holders of client money. This would make it easier for businesses who cannot obtain bank accounts to hold client money securely without relying on ADIs that are unwilling to serve them.
- Allow the use of AUD-backed stablecoins to meet client money obligations, subject to clear requirements for reserve backing, redemption and audit. Stablecoins offer a realistic, secure, and technology-aligned method for holding client funds, particularly where banking access is denied.
- Work with banks, Treasury and other regulators to develop a structured pathway for digital asset firms to access banking services, including guidelines that ensure compliant businesses can access transaction accounts and custody solutions.

Commentary

Despite widespread industry protestations and consistent warnings from DECA, regulators including ASIC have largely ignored the debanking crisis.

This is a systemic issue affecting large segments of the digital asset sector. Businesses are forced into silence out of fear that raising these issues publicly will jeopardise their vital banking relationships (or the possibility of obtaining them). This neglect not only unfairly targets the industry but also risks pushing legitimate, sub-optimal arrangements.

Whilst DECA recognises ASIC's limited powers in this regard, debanking is a pervasive issue with significant negative impact. The digital assets sector is unfairly treated and targeted by banking rails providers, which creates challenges for the sector to meet licensing and regulatory obligations.

INCONSISTENT APPLICATION OF DESIGN AND DISTRIBUTION OBLIGATIONS (DDO)

Key Point

ASIC's proposed application of Design and Distribution Obligations (DDO) does not align with the structure of digital asset markets. It will impose obligations on providers that have no control over token design. This approach limits consumer access and will drive users to unregulated offshore venues.

Response

ASIC's proposed application of Design and Distribution Obligations (DDO) does not align with the structure and operation of digital asset markets. DDO was designed

for financial products that have a clear issuer and distributor responsible for creating, issuing and marketing the product.

However, many digital assets that qualify as financial products do not conform to this model, especially those traded on secondary markets without an ongoing issuer or centralised distribution mechanism.

ASIC's approach may result in exchanges needing to delist tokens that qualify as financial products but lack a central issuer or where the issuer cannot be compelled to comply.

Many widely used and decentralised assets including native blockchain tokens, have no identifiable issuer, making it impossible to produce a Target Market Determination (TMD) or PDS.

ASIC's approach will place obligations on exchanges that lack visibility into or control over the design and distribution of tokens. Obligations are misaligned with the intended purpose of DDO which was designed for the product manufacturer and its direct distribution channel.

The proposed approach will prevent consumers from accessing widely used digital assets simply because there is no central entity to prepare a TMD. In the absence of an issuer or distributor, the required documentation cannot be produced and may render these tokens unavailable to Australian consumers and thereby undermine ASIC's goal of fostering a safe, transparent and regulated market by forcing consumers towards potentially unsafe offshore platforms.

DDO obligations should be narrowly and appropriately applied, limited to:

- Products that are structured as investment schemes, securities or other managed investment products, and
- Situations where there is a clearly identifiable issuer and distribution chain that can produce and monitor a TMD.

DDO should not apply broadly to utility tokens, payment tokens or assets that are not structured to deliver an investment return even if ASIC believes they are financial products. Applying DDO to these assets would mischaracterise them as investment products and create regulatory outcomes that are inconsistent with their real-world use cases.

ASIC should also provide clear guidance on how exchanges and other service providers should manage DDO compliance when no TMD exists or can be created. This includes:

- Clarifying that exchanges are not responsible for DDO compliance where there is no issuer to produce a TMD.
- Providing relief, carve-outs or exemptions for tokens that are not investment products and that do not have an issuer capable of fulfilling DDO obligations.
- Developing a framework that focuses DDO obligations on structured financial products and investment schemes, rather than applying it indiscriminately to all tokens.

ASSET-BACKED TOKENS: INAPPROPRIATE ASSUMPTIONS ABOUT FINANCIAL PRODUCT STATUS

Key Point

There is a pronounced risk that ASIC's approach will over-regulate asset-backed tokens by treating them as financial products without distinguishing between investment schemes and tokens used for ownership or record-keeping.

Response

ASIC's proposed guidance appears to treat asset-backed tokens as if they are financial products, without properly recognising the varied and evolving nature of tokenisation models. While some asset-backed tokens may be structured to function as investment schemes or managed investment products, many others are simply digital representations of ownership or title similar to warehouse receipts, electronic property registers or supply chain records.

Treating all asset-backed tokens as financial products risks over-regulation and will have serious consequences for innovation in real-world asset tokenisation including tokenised real estate, commodities and collectables. It will also discourage the adoption of blockchain technology in industries that are seeking to modernise ownership and provenance records, not create investment products.

This issue is particularly acute where the underlying asset is not itself a financial product and where tokenisation is being used solely for record-keeping, proof of ownership or title transfer purposes without any embedded investment features.

In particular, ASIC should:

- Clarify that asset-backed tokens representing ownership or title to a real-world asset without embedded investment features are not financial products. These may include tokens representing ownership of physical gold, real estate, art, or collectables, where the token simply tracks title and facilitates transfer but does not provide rights to profits, revenue or pooled investments.
- Provide clear guidance to differentiate between investment tokens (structured as schemes or securities) and tokens used for ownership, utility or title purposes. This would give businesses certainty when designing tokenisation models and avoid unnecessary regulatory capture.

- Develop practical compliance pathways for businesses offering tokenised real-world assets, reflecting the actual nature and purpose of the tokens, and ensuring that compliance obligations are proportionate to the risks involved.

WRAPPED TOKENS: FAILURE TO ADDRESS INTEROPERABILITY AND TECHNICAL WRAPPERS

Key Point

Wrapped tokens primarily serve as cross-chain deployment mechanisms, allowing users to interact with multiple blockchain environments. These tokens do not inherently create price exposure to underlying assets but instead enable functionality across networks.

Response

Wrapped tokens are a foundational part of blockchain interoperability allowing assets such as Bitcoin to be used on other chains (e.g., Ethereum) via 1:1 backed representations.

These tokens enable users to access DeFi, liquidity pools and other use cases outside the native chain of an asset. However, ASIC has not adequately clarified whether the wrapped token, the original token or both will be treated as financial products, nor has it addressed who bears regulatory responsibility whether it is the custodian

holding the underlying asset, the protocol issuing the wrapped token or the exchange facilitating transactions.

This lack of clarity creates material compliance risks and uncertainty for businesses seeking to operate within ASIC's framework, including custodians, issuers, platforms and developers.

If ASIC treats wrapped tokens as separate financial products, it would create a situation of double regulation, where both the original asset and its wrapped representation are subject to overlapping compliance requirements. This would severely restrict interoperability and cross-chain liquidity, undermining market efficiency and preventing Australian consumers from accessing key parts of the global digital asset ecosystem.

ASIC's criteria for wrapped tokens suggest that their classification depends on multiple factors, but it is unclear whether these conditions must all be met, or if they are alternatives to one another.

To address these concerns, ASIC should:

- Confirm that wrapped tokens backed 1:1 with an existing asset do not constitute separate financial products. Where the wrapped token is a technical representation of an underlying asset and fully redeemable on demand, it should follow the treatment of the underlying asset, and not be treated as a new and distinct financial product.
- Clarify the obligations of custodians, wrapping protocols and platforms facilitating wrapped token transactions, so that liability and compliance responsibilities are clearly assigned. This would ensure that service providers understand their obligations without overextending regulatory requirements to all participants in the ecosystem.
- Ensure that interoperability and cross-chain solutions are not inadvertently prohibited or over-regulated. Interoperability is a critical feature of digital asset markets and regulation that restricts or complicates this functionality

will harm Australian market participants and consumers, pushing activity offshore.

PROFESSIONAL INDEMNITY INSURANCE: LACK OF MARKET ACCESS

Key Point

ASIC's requirement for AFSL holders to obtain professional indemnity (PI) insurance is unworkable. ASIC must provide alternative pathways, including recognising offshore insurers, issuing temporary exemptions or developing alternative consumer protection models until a domestic insurance market emerges.

Response

ASIC's requirement that Australian Financial Services Licence (AFSL) holders obtain professional indemnity (PI) insurance is unworkable for most digital asset businesses under current market conditions. Despite the introduction of licensing requirements, there is limited access to PI insurance products for digital asset firms, leaving many businesses without access to essential coverage required for licensing.

Even some well-funded and highly compliant digital asset firms are unable to obtain PI insurance in Australia, meaning that they are structurally prevented from meeting a core AFSL condition through no fault of their own. This situation creates a fundamental barrier to entry, particularly for start-ups, smaller businesses and

emerging market participants, who lack the international relationships to explore limited offshore insurance markets.

Alternative pathways are required. To address this, ASIC should take pragmatic and immediate action by:

- Providing more guidance for digital asset businesses on what it would consider appropriate "alternative arrangements" as described in Part D of ASIC's Regulatory Guide 126.
- Recognising overseas insurers willing to offer PI cover to Australian digital asset businesses, including international underwriters and Lloyd's market participants who may have experience in covering digital asset risks in other jurisdictions thus providing at minimum an interim solution until a domestic market develops.
- Considering a temporary exemption from PI requirements for licensed digital asset businesses until an appropriate and functional PI insurance market becomes available in Australia. The exemption may be conditional on certain levels of assets being held on-balance-sheet. This would allow responsible firms to obtain licensing and operate under ASIC oversight without being forced to wait for an unavailable insurance product.
- Exploring alternative consumer protection models, such as compensation funds, industry bonding schemes, or escrow-backed guarantees, that could provide equivalent consumer protections in the absence of insurance markets.

NO ISSUERS: INAPPROPRIATE APPLICATION OF ISSUER OBLIGATIONS TO DECENTRALISED ASSETS

Key Point

ASIC's framework does not account for decentralised digital assets that operate without an issuer or control structure.

Response

ASIC must recognise fully decentralised assets as a distinct category of digital assets, where issuer-based obligations do not apply. Assets like Bitcoin and Ethereum operate on open-source networks without a central issuer and should not be subject to compliance obligations designed for traditional financial products.

Requiring exchanges and other intermediaries to assume issuer responsibilities is unworkable, as they do not issue, control or modify these assets. This could force the delisting of widely used tokens, limiting consumer access and driving Australians toward unregulated offshore platforms.

To address this, ASIC should:

- Clarify that decentralised assets with no issuer are not subject to issuer-based obligations.
- Provide guidance on how intermediaries should manage compliance for decentralised assets without imposing impractical obligations.
- Align with international best practices, where major jurisdictions exempt decentralised assets from issuer-based rules while focusing on market integrity and consumer protection.

Without these changes, ASIC's approach will create regulatory uncertainty, restrict consumer choice, and hinder the responsible development of digital asset markets in Australia. ASIC should collaborate with industry to develop clear, fit-for-purpose rules for decentralised assets that reflect the realities of blockchain technology.

UNCERTAINTY AROUND STAKING SERVICES AND THEIR TREATMENT UNDER LICENSING

Key Point

Staking is a fundamental component of securing blockchain networks that lacks a direct analogue in traditional financial markets.

Response

ASIC's proposed framework fails to provide clear guidance on whether staking constitutes a regulated financial service, creating significant uncertainty for businesses seeking to offer staking services in Australia.

Staking has become a fundamental part of securing blockchain network operations and user participation, particularly in proof-of-stake (PoS) and other consensus-based networks. Yet ASIC has not comprehensively explained whether staking, whether provided directly by users or through intermediaries, will be treated as a financial product, a managed investment scheme or another regulated service.

Key unresolved issues include:

- Many staking services are offered non-custodially, where users maintain control of their assets, while others are offered on a custodial basis, with assets pooled or delegated to validators. ASIC has not clarified whether these models will be subject to different regulatory treatment or licensing expectations.

- Licensing frameworks should focus on arrangements where there is actual custody or pooling of client assets, not on network participation models that are decentralised and user-controlled.

- ASIC has not addressed whether staking rewards, which are typically network generated incentives for validating transactions, will be treated as a form of financial return, triggering licensing requirements for platforms facilitating staking. The function of securing a network and being rewarded it is not analogous to, and should not be treated in the same way as making an investment.

- ASIC has provided no clarity on whether offering pooled or delegated staking could amount to operating a managed investment scheme, creating significant risk for platforms that aggregate staking on behalf of clients.

Without clear regulatory guidance, staking providers cannot determine whether they need an AFSL, nor understand what consumer protections or compliance frameworks are expected of them.

To resolve these uncertainties, ASIC should:

- Clarify the treatment of staking, including a clear distinction between staking as part of native network participation (direct staking) and staking-as-a-service (delegated or pooled staking).

- Ensure that the regulatory treatment of these models reflects the different levels of control, custody, and risk involved and acknowledge that non-custodial staking should not trigger licensing.
- Provide specific worked examples covering key staking models, including non-custodial staking, where users delegate but retain asset control. Custodial staking, where assets are pooled or delegated under a third party's control. Liquid staking, where staked assets are represented by tokenised derivatives.
- Align staking regulation with international approaches. Ensure that Australian consumers are not excluded from participating in staking activities due to regulatory uncertainty.
- Provide guidance on consumer protection measures specific to staking, focusing on transparency, clear custody arrangements, and risk disclosures, rather than applying traditional investment product frameworks that do not reflect how staking operates in practice.
- Courts have pointed out some forms of staking (such as the Access product in the Block Earner case) are not financial products. ASIC should clarify which types of staking are not, and which in its view, are financial products with reference to case law.
- Where it thinks a staking service is a financial product, it should grant relief from certain staking as being considered a financial product, where the staking providers adhere to global security standards such as ISO 27001, the NORS Framework, and the D.U.C.K. Initiative. Industry-led security practices ensure best-in-class risk management without unnecessary regulatory intervention.

Commentary

The UK has explicitly determined that staking does not amount to a collective investment scheme.[31] *Australia should adopt a similar framework to ensure that staking is regulated in a manner that aligns with international best practices.*

We must similarly recognise the opportunity for Australia to position itself as a leader in global blockchain network participation. Australia is well-positioned to serve as a validator hub due to its geographic location and energy infrastructure, which can also support broader national interests in energy, data, and digital innovation.

[31] UK Government, *Financial Services and Markets Act 2000 (Collective Investment Schemes) (Amendment) Order 2025,* available at https://www.legislation.gov.uk/uksi/2025/17/made.