STIRLING &ROSE

Response to CP381 - Updates to INFO 225: Digital assets: Financial products and services

5 March 2025

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Digital Assets Team
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001
email: digital.assets@asic.gov.au

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Dear Digital Assets Team

Response to CP381 - Updates to INFO 225: Digital assets: Financial products and services

Stirling & Rose welcomes the opportunity to comment on Consultation Paper 381.

We address questions; A1, B1, B2 and B3 in CP 381. In addition, we address three topics raised during the consultation period, namely:

(a) that a stablecoin is not a non-cash payment facility (**NCPF**),

(b) if there is no issuer of a financial product there is no financial product, and

(c) that stablecoins are akin to cheques which are not NCPFs.

Kind regards

STIRLING & ROSE

2 Responses

Proposal A1

We propose to update INFO 225, subject to feedback from this consultation. See draft updated INFO 225 in the attachment to this consultation paper.

Question A1Q1

Are there any topics or guidance that have not been included in draft updated INFO 225 that you think should be? Please provide details.

2.1 Need for guidance regulatory treatment Computation Systems as Legal Persons

The following comments may be relevant to ASIC's regulatory position on cryptoassets (and inclusion in INFO 225) – but are also proposed to ASIC as having broad scale regulatory impact and will increasingly have legal implications for regulated entities.

Stirling & Rose notes that there is currently no guidance on the regulatory treatment of non-legal "persons" such as Distributed Ledger Technology (**DLT**), Autonomous Organisations (**AOs**) or Artificial Intelligence (**AI**) Systems (**Computational Systems**) in circumstances where, if they were a legal person, they would be regarded as carrying on a financial services business for the purposes of Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

While, at present, it is still generally possible to trace the act of issuing a financial product back to a legal person under the Corporations Act, we consider that there may be future scenarios under which this is no longer the case (assuming the definition of "person" in the Corporations Act remains as is).

The problem of how Computational Systems do not easily fit within existing legal frameworks has been labelled the "Responsible Machine Problem" or "Responsible AI Problem". It refers to the inability of the legal system to effectively integrate AI because the law allocates rights, responsibilities, liabilities and punishments to human beings. Stirling Rose's previous discussion of this issue is available here.

We submit that the financial services laws should be technologically neutral in their application, and consumers of Australian financial products and services should be protected from harm, irrespective of whether the harm is caused by a legal person (as currently defined in the Corporations Act) or a Computational Systems, and that there must be "someone" who can be held to account to take legal responsibility when harm occurs.

We invite ASIC to consider the following potential regulatory positions with respect to the issue of a financial product by a Computational System:

(a) establishing a framework for attributing responsibility for the conduct arising from the use of the Computational System to a legal person; or

(b) holding a Computational System itself responsible for carrying on a financial services business and/or engaging in prohibited activities under the Corporations Act.

If ASIC were to entertain the latter approach, then we note that significant work would need to be done, including:

(a) potential legislative reform to extend the Corporations Act concept of a "person" to include a Computational System;

(b) consideration as to how a Computational System might legally meet the requirements to hold an Australian financial services licence (**AFSL**)[1]; and

(c) how a Computational System could be held to account if it was in breach of provisions for which monetary or criminal penalties may be invoked.

Stirling & Rose would be pleased to further discuss this challenge with ASIC and to collaborate with ASIC and other stakeholders in developing a solution.

Question A3Q1

Do you think it would be helpful to include an example of a wrapped token and/or a 'stablecoin' in INFO 225? If so, do you have any suggestions on the features of the potential examples in paragraphs 20-21?

Yes, we think it would be useful.

Proposal B1

We are considering a class no-action position for digital asset businesses that are in the process of applying for or applying to vary an AFS licence, Australian market licence or clearing and settlement (CS) facility licence.

Question B1Q1

Do you agree that ASIC should progress with a class no-action position as proposed here? If not, please give reasons.

Stirling & Rose are generally in support of the no-action period as proposed by ASIC.

Stirling & Rose notes that in keeping with RG 108 No-Action letters are not binding on ASIC and can be withdrawn by ASIC. We agree with the Law Council of Australia that that relief via

[1] For example – this would directly impact any answer to CP question B2Q4 – that is "*In relation to organisational competence, what are your views on what ASIC could consider in applying Option 5 in Regulatory Guide 105 AFS licensing: Organisational competence (RG 105) for entities providing financial services in relation to digital assets that are financial products?*"

an exemption made using ASIC's power under subsection 911A(2) of the Corporations Act would provide digital asset firms with greater protection and certainty than the proposed class no-action position.

Question B1Q3

Do you agree that the class no-action position should be dependent on a person lodging an AFS licence application or written intention to apply for a market and/or CS facility licence? If not, please explain and suggest an alternative.

Stirling and Rose support making the no-action position dependent on lodging a license application or written intention to apply for relevant licenses. This position creates a clear demarcation between entities actively working toward compliance and those potentially seeking to exploit regulatory gaps.

Without this requirement, the no-action position could inadvertently provide cover for operators who have no genuine intention or ability to obtaining proper licensing. This could lead to prolonged periods of unlicensed operation, potentially harming market integrity and consumer protection.

Proposal B2

The existing AFS licence processes, regulatory guides and conditions will apply to persons providing financial services in relation to digital assets, including those that are based on the type of financial product involved.

Response B2Q1

Do you agree that the same regulatory obligations should apply to digital asset and traditional financial products of the same category (e.g. securities, derivatives)? Please explain your response and provide specific examples.

Where digital assets are within the financial regulatory perimeter? Yes.

The law should be technologically neutral.

If there is another set of regulations that is applied to the digital asset market, the opportunity for traditional finance to digitise traditional financial products to sidestep financial product regulation may encourage legal arbitrage style behaviours. In addition to undermining the legislative intention behind the Corporations Act, this may also perversely undermine genuine competitive advantage of legitimate digital asset operators as they face competition from well-resourced traditional players.

Proposal B3

We propose to tailor licence authorisations in relation to certain digital assets that are derivatives, and for digital assets that are 'miscellaneous financial investment products'.

Response B3Q1

In relation to the authorisations sought during an AFS licence application, do you agree that the existing authorisations are generally appropriate to digital asset service providers?

The existing authorisations generally cover what is required.

Having said that - some additional "marketing" of the types of authorisations that may be relevant for crypto-assets could be broadened e.g. in INFO 225, for example there is a tendency to focus on MIS, security, non-cash payment facility and derivatives – we consider that many crypto products and facilities in the market may better suit existing authorisations like Investor Directed Portfolio Scheme (**IDPS**), Corporate Collective Investment Vehicle, that also allow for access to the Asia Region Passport Fund – which many regulated entities with global platform ambitions find practically useful.

Stirling & Rose supports the inclusion of a broader category of authorisation of "a facility for making a financial investment".

Response B3Q2

Do you agree with the proposal to tailor the derivatives and miscellaneous financial investment product authorisations? Are there any others that you would recommend?

See Response B3Q1 above.

3 Responses to statements made during the consultation process

Statement (a)

"A stablecoin is not NCPF on the basis that it is the intangible value that is the NCPF, the stablecoin itself is a nothing and thus not regulated"

Statement (b)

"An issuer is required for a financial product. Thus, if there is no issuer of a token" …(e.g. the issuer is a Computational System)…, "there is no financial product"

Statement (c)

"Stablecoins are akin to cheques which are not NCPFs"

3.1 Position and response to statement (a)

Stirling & Rose does not agree with statement (a).

Stirling & Rose considers that in general a stablecoin can be a NCPF.

While we appreciate the argument that the utility of a NCPF comes with the intangible value of facilitating transactions and allowing these transactions to take place, we consider that the argument that because there is no structure facilitating the transaction there is therefore no NCPF is erroneous.

Stirling & Rose further argues that the stablecoin itself offers the structure that facilitates the transactions. The Transactions are proof that there is an underlying structure that is facilitating those transactions and is also the intangible value that is the defining characteristic of a NCPF. Accordingly, we believe that comments raised in consultations that the stablecoin is not an NCPF because: (a) the stablecoin represents 'something else' (it was not postulated in discussions what the 'something else' could be, e.g. perhaps a bare instrument of title), and (b) the NCPF lies 'elsewhere' and separate to the stablecoin, are challenging to uphold based on current stablecoin structures.

3.2 Position and response to statement (b)

Stirling & Rose considers that a digital asset not having an identifiable issuer (because that issuer is a type of Computational System) is not and should not be relevant to whether the asset is subject to financial product laws.

See further discussion on the need to include (and complexities associated with including) Computational Systems as legal persons under Corporations Law - as set out in section 2.1 above.

3.3 Position and response to statement (c)

Stirling & Rose does not agree with statement (c).

Notes to Section 763D Corporations Act: “When a Person makes non-cash payments”, specifically includes making payments by means of a facility for the use of cheques. Further, the regulation of cheques is well understood and extensive[2] and deployed within a framework that is fundamentally underpinned by ADIs and their prudential responsibilities. That is, if the analogue is given of a stablecoin to a cheque, then it is a comparison of a stablecoin to a regulated instrument.

[2] Cf without limitation *Bills of Exchange Act 1909* (Cth)

Clarity for the unknown.

STIRLING &ROSE