Caleb & Brown

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Digital Assets Team
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Consultation Paper 381 | Caleb & Brown Submission

Caleb & Brown welcomes the opportunity to respond to ASIC's consultation regarding the proposed *Updates to INFO 225: Digital assets: Financial products and services* (**INFO 225**) in Consultation Paper 381 dated 4 December 2024 (**Consultation Paper**). Attached to this letter is our response to questions raised in the Consultation Paper, as well as general observations from an industry perspective.

We welcome the opportunity to discuss the matters in this submission with ASIC.

Yours sincerely

Jackson Zeng
Chief Executive Officer – Caleb & Brown

Background

Caleb & Brown is an Australian based digital asset brokerage firm founded in 2016. Caleb & Brown's mission is to champion consumer protection and deliver high touchpoint guidance to clients at all crypto experience levels. Each client is assigned their own personal broker from whom they can access educational information and technical support, as well as place orders to trade digital assets.

Caleb & Brown differs from other digital asset exchange providers, as our services are not exclusively provided via self-directed mobile applications or websites. Rather, we provide services through high contact direct communication between brokers and clients. In addition to educational information, our brokers support clients through all technical processes relating to cybersecurity and wallet management to ensure that technical competency risks are appropriately managed. By providing ongoing and direct broker access for each client, Caleb & Brown ensures that client support, education and protection is established from the outset. This engagement method provides a graduated framework to help clients access a vibrant and emerging asset class in a safe manner that prioritises positive consumer outcomes.

Caleb & Brown (through Caleb & Brown Asset Management) also manages two Australian wholesale managed investment schemes that hold actively managed positions in various digital assets. These financial services are provided under the auspices of a corporate authorised representative appointment from a third party licensee. This arrangement has allowed Caleb & Brown to obtain comprehensive knowledge regarding the practical application of Australia's financial services regime to the digital assets space. Such experience informs this response, including the challenges and opportunities faced by regulated providers.

Caleb & Brown has a strong commitment to ensuring that the Australian economy can prosper under appropriate regulatory guidance and consumer protections. Jackson Zeng (Caleb & Brown's CEO) serves on the board of directors for the Digital Economy Council of Australia and is a long time advocate of appropriate crypto regulation for both prior Australian Governments. Our breadth of experience in the digital assets space, along with our close ongoing consultation with members of the Australian Government, sits behind our responses to ASIC's questions and our submission reflects Caleb & Brown's experience in the Australian digital assets industry since its inception.

Observations

We appreciate ASIC's efforts in the Consultation Paper to clarify the regulatory perimeter as it relates to digital assets and services that comprise financial products and services. We also commend ASIC in its approach of obtaining industry feedback prior to publishing any updates to INFO 225. In addition to our question responses, we make the following observations that may assist ASIC in concluding its guidance for industry participants.

Practical guidance

- The objective of regulatory guidance is to provide practical information regarding how ASIC interprets and applies the law, including as it relates to particular industries. In our view, the proposed updates to INFO 225 as set out in the Consultation Paper do not yet achieve this objective.

- Many of the structures in the worked examples either do not currently exist, are not commonly adopted, or include multiple variables that make it unclear as to which features cause an arrangement to be a financial product or service. Further, the emphasis placed on clarifying what *is* a financial product or service in highly specific scenarios creates a deficiency in clarity as to what *is not* a financial product or service in that same scenario. For example, ASIC provides a worked example as to how a yield bearing stablecoin (a relatively uncommon structure) is a financial product, but does not provide clarity regarding non-yield bearing stablecoins (a common structure). We consider that providing clarity regarding the features of commonly adopted arrangements, including where the line of regulation lies, will greatly assist the industry in determining its obligations. Further, using consistent language throughout the guidance will greatly reduce misinterpretations; currently the Consultation Paper and updated INFO 225 uses the terms 'token', 'digital asset', 'crypto asset' and 'cryptocurrency' interchangeably.

- ASIC notes in the Consultation Paper that its updated guidance is (at least in part) a result of the outcomes of domestic legal cases. However, neither the Consultation Paper nor the updated INFO 225 reference any case law at all. Most notably, consideration of *ASIC v BPS Financial Pty Ltd* [2024] FCA 4574 (**Qoin Case**), *ASIC v Web3 Ventures Pty Ltd* [2024] FCA 64 (**Block Earner Case**) and *Australian Securities and Investments Commission v Finder Wallet Pty Ltd* [2024] FCA 228 is absent. Interpretation of case law should be a core tenet of ASIC's application of regulatory regimes in an emerging industry. Absent direct reference to such case law has, in our view, led ASIC to inconsistent interpretations regarding the regulatory outcomes for the worked examples.

- While we provide detailed responses to ASIC's questions regarding the worked examples in our submission, we wish to emphasise the fundamental importance of ensuring that ASIC's approach to regulatory guidance satisfies its core objectives and remains practically useful for industry to understand how ASIC interprets and applies the law in this developing industry.

Regulatory focus

- A core feature of Australia's financial services regime is that it regulates commercial relationships, not assets. This is reflected in the definitions that focus on concepts of 'arrangements' and 'facilities'. While drafted broadly to intentionally capture all manner of commercial relationships, this has never extended to regulating underlying products. As examples only:
    - two parties can enter into a derivative contract where the underlying or reference asset is gold. While the features of the contract amount to a financial product (a derivative), that does not make the underlying asset (gold) a financial product; and
    - in the case of a cheque account (a type of non-cash payment (**NCP**) facility), the transfer of a cheque is the transfer of value (or 'use' of the facility) from the linked account, but it does not result in the transfer of the account itself (which is a financial product) (as set out in ASIC's Regulatory Guide 185). That is, while an NCP facility (eg, a card or cheque instrument that instructs the holder of value to initiate a transfer) is a financial product, the value that is the subject of that facility is not a financial product (although stored value is separately prudentially regulated).
- While we agree with ASIC that the financial product analysis of a digital asset should take into consideration all of the inherent features and rights that specifically attach to that asset, it should not be conflated with the arrangements or systems in which that asset can be used. For example, while tokens such as Solana can be used to participate in a pooled staking scheme (which would be a managed investment scheme), staking is not a core requirement of holding Solana as a standalone asset and should not be conflated with separate facilities that may be financial products.
- The appropriate identification of a 'facility' was a primary consideration in the Qoin Case, which looked individually at the token, the blockchain, the wallet and platform in determining which aspects constituted a financial product or service. Further, the Court did not agree that the token was a financial product simply because it was arguably bundled with the wallet, blockchain or other arrangements. As ASIC notes that a token cannot be separate from its associated bundle of rights, benefits, expectations and features, we consider there is a risk that glossing over key functional distinctions will result in incorrect regulatory views that are inconsistent with

established case law. The manner in which the updated INFO 225 is drafted suggests an intention to provide such gloss, which we strongly caution against.

Compliance capabilities

- Issues regarding the practical ability for some digital asset providers to comply with regulatory obligations under the Australian financial services licence (**AFSL**) framework is well known to ASIC. ASIC has received industry feedback in many forums that there are practical difficulties with complying with some AFSL obligations, particularly those that rely on the participation of third parties (such as professional indemnity insurers, payment providers, financial auditors and banks). Industry participants have been met with comments from ASIC that it cannot force third parties to service the digital asset industry and that if obtaining such services is proving difficult, then that may be an indication that the affected firms should not hold an AFSL. This commentary is unhelpful as third party service providers look to ASIC's statements and guidance to inform their internal risk frameworks regarding the serviceability of the industry.

- While we accept that ASIC cannot force third parties to service the industry, we submit that the lack of serviceability is an indicator that either the framework is not fit for purpose in this industry or that ASIC should consider implementing relief for certain licence obligations if it is determined to pull digital asset firms within the AFSL regime. For example, to address issues relating to insurance, ASIC may consider requiring the implementation of an industry compensation fund (as currently exists for the Australian Securities Exchange) or an alternative industry wide compensation scheme that it considers appropriate, rather than placing the emphasis on individual applicants to propose their own alternative compensation arrangements in the hope that ASIC will find it acceptable. We have provided further commentary in this submission regarding areas for relief.

- We note that such issues are not isolated to a small number of firms. They are pervasive across the industry and geographies (in the US, one such banking issue has been coined Operation Choke Point 2.0 further evidencing its pervasiveness and threat).[1] The Australian experience is particularly detrimental as domestic banks actively target the debanking of the crypto industry, do not provide regulated trust accounts to crypto entities and block outbound transactions. Further, there is a foreign exchange bottleneck in the Australian market as only the Big 4 banks (which actively target crypto providers) provide foreign currency accounts. If digital asset firms are forced into a regime with which ASIC knows they cannot practically comply, this will create an enforcement vector that provides no further support or clarity for industry or consumers.

[1] United States House Financial Services Committee, 'Meuser: The Biden Administration's Operation Choke Point 2.0 Was Carried Out by The Prudential Regulators to Target and Debank the Digital Asset Ecosystem' (Press Release, 6 February 2025).

Regulatory compatibility

- Regulatory compatibility is of fundamental importance to the appropriate application of multiple regimes within the same industry. As ASIC noted in its submission to Treasury regarding crypto asset secondary service providers:

> *"Inconsistent regulation and oversight of the crypto-ecosystem risks vulnerabilities and regulatory gaps emerging. Risks in some areas of the crypto-ecosystem have the potential to affect other areas, or the broader financial system, particularly as interlinkages deepen.* ***We therefore think that there is a strong case for consistent regulation and oversight of cryptoassets****"* [emphasis added].[2]

- In the Consultation Paper, ASIC states "*We consider that* ***many digital assets*** *(whether alone or in combination with other products or services)* ***are financial products*** *under the Corporations Act*" [emphasis added].[3] However, Treasury noted in its proposal paper for regulating digital platforms that "***many digital assets are not financial products***" [emphasis added].[4] ASIC's updated view is also at odds with its own statements to a Senate Inquiry that "*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"* [emphasis added].[5]

- On this basis, there appears to be a disconnect between how ASIC views the application of the financial services regime to digital assets as against the view taken by Treasury. As Treasury, the central policy agency within the Australian Government, has a mandate to inform the Government regarding the intended purpose and application of laws, it is difficult to reconcile its binary opposite view against ASIC's view on the same subject matter.

- Further, there appears to be an overlapping approach proposed by ASIC in stating that stablecoins are NCP facilities (a point that we specifically address in this submission) as against Treasury's intention to separately regulate them as a form of stored value rather than considering they currently exist as NCP facilities.

- We agree with ASIC's view that there should be consistent regulation and oversight of digital assets. Given that ASIC and Treasury appear to reach different conclusions regarding the current application of the financial services regime to digital assets, we submit that ASIC provide a no-action position on the enforcement of the financial services regime to digital assets until Treasury and the Office of Parliamentary Counsel have exposed legislation that dictates how the Government intends to regulate digital assets as a whole (which is expected this year).

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[2] Australian Securities & Investments Commission, *Submission to Treasury consultation paper Crypto-asset secondary service providers—Licensing and custody requirements*, June 2022, para 54.

[3] Australian Securities & Investments Commission, Consultation Paper, para 27.

[4] Australian Treasury, *Regulating Digital Asset Platforms – Proposal Paper*, October 2023, p.9.

[5] Australian Securities & Investments Commission, Submission to Senate inquiry into digital currency, December 2014. para 45.

Response to questions

A1 Q1. Are there any topics or guidance that have not been included in the draft updated INFO 225 that you think should be? Please provide details.

We appreciate ASIC's efforts in the draft updated INFO 225 as they relate to broadening the guidance provided. We consider that such guidance would benefit from:

- clarification from ASIC regarding digital asset products and arrangements that it considers fall within the 'facility for managing a financial risk' category of financial product;
- a definitive view on specific tokens that ASIC considers are financial products. While we understand that ASIC does not publish its views on specific tokens (despite previously doing so in relation to bitcoin), as noted above ASIC states that it considers many digital assets to be financial products. On this basis, it must be the case that ASIC has a view of the regulated status of at least the major digital assets (including Bitcoin, Ethereum, XRP, USDT and Solana) that have not fundamentally changed their token structure since creation. Industry has provided ASIC with significant feedback that there are differing views regarding the financial product analysis between participants, law firms and even within law firms (including those that have received regulator pressure to similarly conclude that many digital assets are financial products). Given the risk that varying interpretations can have on consumer outcomes, we submit that it would be in the market's and consumers' best interest for ASIC to provide definitive guidance regarding the regulated status of major tokens currently listed on all exchanges;
- guidance as to how ASIC expects participants to deal with digital asset structures that may change over time. For example, if a provider supports an asset that is launched via a structure that is not a financial product but subsequently the structure is changed in a manner that makes it a financial product, how providers can safely transition out of supporting those assets without forcing inappropriate consumer events (eg, by immediately liquidating customer positions without their instruction) and also without being the subject of ASIC enforcement for not holding an AFSL during this period or not providing associated disclosure material that ordinarily would have been required to be provided; and
- guidance as to how ASIC expects digital asset firms to comply with certain licensing obligations. As noted in the 'Observations' section, it is practically difficult for digital asset firms to comply with some aspects of the financial services law in the context of how products in the industry are structured. This includes difficulties associated with disclosure and distribution (as set out in our response to question B2 Q1); and

- clarifications and additions to the worked examples that we have noted in response to question A2 Q1.

A1 Q2. Are there any topics or guidance that were included that you think should *not* have been included? Please provide details.

None beyond our comments in response to question A2 Q1.

A1 Q3. Do you agree that the good practice guidance in INFO 225 directed to responsible entities is applicable to providers of custodial and depository services that provide custody of digital assets that are financial products? Are there any good practices that you would like added (e.g. on staking services)? Please provide details.

While we broadly agree that the good practice guidance in INFO 225 can equally apply to responsible entities and custodians that provide custody of financial product digital assets, this should not be extended to the extent that it would effectively impose retail requirements on custodians that provide services to wholesale clients.

We also consider that it would be beneficial to:

- include the ability to use omnibus accounts, rather than requiring blockchain segregation. This is a common structure that is well understood by the industry and discussed in our response to question B2 Q3; and
- confirm the extent to which digital asset custody software providers fall within the scope of regulated custody and depository services, particularly if ASIC's current interpretation focuses on control over the relevant private key. We strongly recommend introducing the concept of 'effective control' as it relates to private key management. For example, it is common for custody software providers to hold a partial key shard (or equivalent), with the digital asset platform holding the remaining shards, and therefore has partial control of the key (but not full effective control). However, the partial key shard held by these providers is typically subject to specific, unalterable conditions that mean that only the customer has sole effective control over the full private key. Alternatively, if the custody software provider has the practical ability to access the full private key (and thereby the digital assets), despite being contractually bound by the user not to do so, then in our view this may constitute a custody service. This delineation is important and ASIC should address the use of partial keys to manage misinterpretations regarding the ultimate responsibility (and corresponding AFSL obligations) for custody of client digital assets.

A2 Q1. Do you have comments on any of the proposed worked examples? Please give details, including whether you consider the product discussed may/may not be a financial product.

We set out below our comments on each of the proposed worked examples. As a general comment, we wish to caution the use of generic terms to refer to the arrangements contemplated in the worked examples. This is to avoid a situation where industry participants conclude that ASIC considers all arrangements referable to a particular term will result in the same regulatory outcome. For example, in the Consultation Paper ASIC uses the term 'yield-bearing stablecoin' to refer to Example 4 of the updated INFO 225. While accurate, the example provided is highly specific and ASIC should avoid giving the impression that all yield-bearing stablecoins will be regulated in the same manner, regardless of specific features.

Example	Comments
Financial investment facility	
Example 1 – Exchange token	• Clarity should be given as to what "potentially obtaining a financial return, or other benefit" means in this context. Simply using exact terminology from the definition is not useful if it cannot be applied to the scenario. • Clarity should be given as to what "at least some consumers" means. For example, this could mean 10 or 1000 consumers. Or this could mean 1% or 10% of the consumer base. • Clarity should be given as to where the requisite intention originates. For example, if the whitepaper states that there will be a financial return, that indicates an investment intention. However, there can be a mismatch between what the issuer intends and what the consumer intends. The latter cannot be inferred simply because a digital asset's value increases. It should be made clear that the requisite intention is also at the establishment of the relevant arrangement; it should not be the case that ASIC starts with the fact that a digital asset's value has significantly increased and reverse engineer an intention if none existed at the commencement. • It is not uncommon for substantial (and sometimes majority) portions of a digital asset's supply to be issued under varying circumstances. For example, while 30% of a digital asset's total supply may have been sold initially, another 30% might later be airdropped to users simply engaging with the ecosystem (and therefore for no consideration). In such cases, the issue then becomes how intermediaries are expected to classify the digital asset. It would be useful for ASIC to adopt the approach taken in the *SEC v. Ripple Labs, et al., 20-cv-10832 (S.D.N.Y)*, which looked at

Example	Comments
	the different issuance arrangements. In this way, only direct sales of the XRP token to institutional investors were classified as 'securities' in the US, whereas the following were not securities: ○ algorithmic sales on digital asset platforms (ie, blind bid/ask transactions) because both Ripple did not know who was purchasing and retail buyers did not know who was selling, therefore there can be no expectation of profits in reliance of third party efforts. In other words, buyers were wholly unaware of Ripple and therefore did not invest their money in Ripple; ○ employee compensation because it never received payments or monetary contributions (although noting that in Australia the contribution does not need to be monetary); and ○ sales of XRP by executives (in their individual capacities) via digital asset platforms were all not 'securities'. The Court found that it was not a security transaction for the same reason as in the first dot point. Such an approach is consistent with financial service regimes placing an emphasis on regulating commercial relationships, not assets. ● Clarity should be given that although a voting mechanism to consider certain matters does not amount to day-to-day control, if the governance framework is such that the tokenholders have direct control over how funds are used (ie, there is no discretion by the operator), this can amount to day-to-day control.
Example 2 – Native token staking service	● Clarity should be given that where the relevant service overlays (ie, no minimum balance, no immediate withdrawal and no participation limit) are removed, the arrangement is not a financial product or service. That is, where the only service provided by the operator is the administration of directing digital assets to a staking validator node or smart contract where the customer complies with the native requirements of the blockchain (ie, balance, unlocking periods etc). Such administration aspects were addressed in the Block Earner Case. ● ASIC refers to the fact that the contribution is pooled or used in a common enterprise as a limb for this arrangement to be a financial investment facility. This is a feature of the managed investment scheme definition, not the financial investment facility definition. ● If ASIC is to address a managed investment scheme analysis in this section, it should be made clear that where there is a functional ability to avoid pooling (eg, by sharding validator contributions), such staking arrangement is not a financial product or service.

Example	Comments
	• It should be made clear that while a digital asset may be used in an associated staking arrangement that may be a financial product or service, that does not make the underlying digital asset a financial product.
Example 3 – In-game non-fungible token (NFT)	We agree with the regulatory outcome in this example and note that there may be a regulatory change in relation to Treasury's proposals regarding the financialisation of non-financial product digital assets.
Managed investment scheme	
Example 4 – Yield-bearing stablecoin	• Yield-bearing stablecoins do not constitute a majority of stablecoin structures currently in the market, as opposed to commonly adopted non-yield-bearing stablecoins. While we note that ASIC is considering including guidance on its views of whether non-yield-bearing stablecoins are NCP facilities (for which we make separate comments in this submission), clarity should also be provided in this section as to whether ASIC considers non-yield-bearing stablecoins constitute managed investment scheme (MIS) interests. • In yield-bearing stablecoin structures, it is not common for a tokenholder to have the right to redeem the token for cash or the underlying assets. Issuers typically use a network of institutional distributors that have such redemption rights, but this is a contractual right that is not specific to, and does not travel with, the token. • In the worked example, ASIC refers to this arrangement as a fund (ie, "less the fees and costs of running the fund"). Although a trust structure is used, we caution against mischaracterising a stablecoin structure as a fund. • We note that under ASIC's proposed taxonomy and logic in the Consultation Paper, a yield-bearing stablecoin could technically be characterised as both an MIS interest and an NCP facility. The potential for digital assets to fall into two financial product categories is problematic and we recommend that ASIC wait to receive Treasury's proposals regarding taxonomy and regulated structures before publishing preliminary views that could result in overlapping regulatory outcomes.
Example 5 – Gold asset referenced token	• Although a token representing an undivided interest in gold related trust assets is clearly an MIS interest, this is not the most common structure. An increasingly common structure is where a token is a digital

Example	Comments
	representation of an entitlement to an exact ounce of gold (sometimes numbered) held in the issuer's custody. That is, a representation of a specific physical item, not a right to a portion of a pool of items. In our view, tokens that are digital representations of a single and identifiable physical item are not MIS interests. This interpretation also aligns with legal views in comparable jurisdictions. • We strongly encourage ASIC to make this clarification in the updated INFO 225. The alternative risks the industry concluding that all gold asset referenced tokens are financial products (which is incorrect).
Example 6 – Membership NFT	We encourage ASIC to provide clarity as to whether digital assets that entitle discounts within a particular environment (eg, whether a book store or a decentralised finance protocol), of themselves, is not a benefit of the kind that would be captured within the meaning of financial investment facility or MIS interest.
Example 7 – Token representing claim for pre-paid services	• In our view, ASIC's use of a lawn mowing business as an example is peculiar and does not have material value to the industry as a practical example. That is, there are very few (if any) lawn mowing businesses that are pre-selling services through initial token sales. However, conceptually we consider that ASIC has indirectly addressed one of the most common token issuance structures in the digital assets space (being a simpler version of Example 8), and we strongly encourage ASIC to use those real world scenarios as examples here to ensure it is helpful for industry. • For example, the most widely adopted token issuance structure is where an organisation pre-sells tokens to raise funds to develop a particular protocol and in turn the tokens can be used to access services on that protocol. This may be in the form of gas or as a broader utility or access method, and in most cases the entitlement attached to the token is largely fixed even though the price of the token may fluctuate. • We consider it would be more useful for ASIC to address this type of arrangement, not a lawn mowing business.
Example 8 – Fundraising for a new blockchain	• While this example, in part, deals with the issues described in Example 7, it is not a common structure for there to be two tokens involved. If the token does not exist at the time of the fundraising activity, it is more common for there to be a contractual right to receive X number of H2 tokens at a future date (which is typically airdropped to the contributor's wallet). It would be more useful for ASIC to address the more common

Example	Comments
	structure of users prepurchasing what is effectively a redeemable coupon to receive a utility token at a future date, rather than a convertible token structure (which is uncommon). In our view, the former does not commonly involve an expectation of financial return or benefit. • Separately, we disagree that the expectation of receiving H2 tokens is, of itself, an intention to receive a financial return. As H1 tokens are converted to H2 tokens on a 1:1 basis, the entitlement remains fixed (which, as ASIC notes in Example 7, is not indicative of an MIS).
Security	
Example 9 – Meme coin	• While we agree that the provided meme coin is not a security, in our view there is a cleaner manner in which to come to this conclusion. ASIC notes that it is not a security on the basis that there is not a sufficient connection between the use of raised funds, any capital gain or the efforts of the issuer. However, a security is required to be issued by either a government or a 'body' (meaning a body corporate or unincorporated body). As this meme coin was issued by a private individual in their personal capacity, it is not a 'body' for the purposes of the *Corporations Act 2001* (Cth) (**Corporations Act**) and therefore not capable of being a security (unless it separately falls into the category of MIS interest, which is dealt with in a separate section). • As a general comment (not specific to meme coins), it is a common structure for tokenholders to have the ability to vote on governance decisions at the product or protocol level, but not at the issuer or business level. We consider that it would be useful for ASIC to clarify what types of decision making powers would be indicative of an arrangement amounting to a security where there is a corporate issuer involved. • Separately, we note that while meme coins are unlikely to constitute financial products, in recent years there has been a surge in meme coin offerings that has resulted in the creator providing highly speculative bases through which to obtain initial contributions and then immediately sell a large volume of the coin's supply (sometimes referred to as a 'rug pull'). This is particularly prevalent through platforms such as pump.fun. We consider it would be useful for ASIC to focus its attention on these types of activities that have a greater benefit for a broader base of customers. ASIC may use its delegated powers from the Australian Competition and Consumer Commission in relation to Australian consumer laws for digital assets to remind industry that even though meme coins are unlikely to be financial products, that general consumer

Example	Comments
	and corporate laws will apply to these arrangements. We also note that regulation of 'financialised' assets that are not financial products is also being considered by Treasury.
Example 10 – Tokenised concert ticket	We have no comments on this example.
Example 11 – Tokenised security	• While we agree that the tokenisation of debentures is likely to result in the token being a security, we encourage ASIC to clarify the distinction between the token *being* the financial product as opposed to the token being used to *track* a financial product entitlement. That is, to delineate from the use of technology to simply provide administrative services. • For example, if a company uses tokens to digitally represent an investor's share in a company, but that the transfer of that token does not result in the transfer of the share (which must be completed by the company itself on its own ledgers), is not a financial product. However, if the token is used as the final source of truth and share entitlements are transferred with the transferring of the token, that is a financial product.
Derivatives	
Example 12 – Contracts for difference over a digital asset	• While we have no comments on the provided example, we make the following comments on ASIC's commentary regarding products that might be derivatives, including: ○ "*assets where the price references a real world asset (eg, gold), and can include some digital assets such as 'algorithmic stablecoins';* ○ *wrapped digital assets where the price is derived from another digital asset (eg, wrapping between L1 and L2 blockchains); and* ○ *contracts for difference, options, forwards or futures (including perps).*" • We strongly discourage the use of these dot points as we disagree with their content and there is a risk that it may cause industry wide misinterpretation. For example: ○ a digital asset having a price that is by reference to a real world asset (eg, gold) but does not require any party to provide any different consideration at any time (ie, it synthetically tracks the price of gold but is not an arrangement) is not a derivative; and ○ a wrapped 1:1 digital asset may not be a derivative if, for example, 1 BTC = 1wBTC on redemption. People may enter into derivatives over these assets, but the wrapping of itself does not appear to be a

Example	Comments
	derivative as it is a contemporaneous technological solution (ie, no identified or prescribed future date) at the time of wrapping and 'unwrapping'. The purpose of wrapping is to give an asset new technical properties that are native to the receiving blockchain, not to provide a synthetic exposure to the price differential between two assets. Wrapping an asset only provides a fixed entitlement to receive the same amount of that asset on unwrapping (on a 1:1 basis) and this technical capability is not supplemented by any alternative cash settlement process (contemplated by the existing exemption for the delivery of physical goods that cannot be cash settled).
NCP facility	
Example 13 – Digital asset wallet	• We have serious concerns with ASIC's misinterpretation in the Consultation Paper and updated INFO 225 as to how NCP facilities function and how they are regulated under the Corporations Act. NCP facilities are well understood arrangements, and constitute arrangements whereby a customer can instruct the operator of a facility to transfer non-cash value to an identified third party. Although the facility, as a whole (including any instrument used to initiate a payment), is classified as a product, it is in fact a service based arrangement. • ASIC's own RG 185 makes this position clear. For example: ○ "for a stored value facility, the NCP facility is the arrangement (which may include a physical device) that gives a person the ability to make non-cash payments to various payees from time to time, while presentation of the device to make a purchase is a 'use' of that facility;"[6] • For clarity, the use of a debit card (instrument/device) is the use of an NCP facility, whereby the underlying facility is the arrangement between the cardholder and the card issuer to make payments from the linked account in accordance with the instructions initiated by the use of the debit card. • ASIC states in the updated INFO 225 that "the meaning of 'makes non-cash payments' in the Corporations Act also allows for the possibility of **payments being made by passing the *ownership* of a non-cash payment facility from one person (the payer) to another person (the payee)** [emphasis added]. This is an example of a facility 'through the [disposal and] acquisition of which' a person makes a payment, being a

[6] Australian Securities & Investments Commission, *ASIC Regulatory Guide 185: Non-cash payment facilities*, at RG185.60(c).

Example	Comments
	type of bearer instrument."[7] Such a view is incorrect and is categorically inconsistent with the interpretation of the meaning of NCP facilities (from a legal and functional perspective) by the payments industry and the courts. It is not possible to transfer the ownership of an NCP facility, as the facility is the commercial arrangement, not the device. This would be akin to ASIC saying that making a payment using a debit card is akin to a consumer transferring the ownership of the debit card and the underlying account to the payee. Further, such an interpretation would result in NCP facilities being treated as a form of financial product that can only be held by an entity that is authorised to provide custodial and depository services in NCP facilities. Not only is there not a single individual in Australia that would have the experience to act as a responsible manager for such a service, it is not even an option to request an authorisation to provide custodial or depository services in NCP facilities; because it does not exist. • We strongly encourage ASIC to reconsider its view as to how it interprets the meaning and regulation of NCP facilities. • In relation to Example 13, we disagree with the view that a non-custodial wallet is an NCP facility. We also disagree with ASIC's statement in the updated INFO 225 that "Digital wallets made available to consumers, whether custodial **or non-custodial**, may be non-cash payment facilities" [emphasis added].[8] It is a fundamental feature of NCP facilities that the facility issuer or operator takes possession of the funds in transit when directing them to the payee; it is the funds at risk that is regulated by the financial services regime. The nature of non-custodial wallets means that no person except the owner of the wallet is able to access or hold the assets in the wallet. The wallet merely acts as a front end interface that allows for the broadcasting of instructions to the relevant blockchain, which can be provided with any non-custodial wallet (ie, it is not tied to a specific program) and can be provided without any front end interface at all if required. In this example, if the wallet is a non-custodial wallet and the transaction is a payer-wallet to payee-wallet transaction, that does not involve the Company M taking possession of any assets at any point in time (all transfers are completed by the underlying blockchain). If the wallet issuer does not have control (ie, the private key) of the assets in the wallet, it does not have any requisite possession and is not an NCP facility. However, if the issuer provides a custodial wallet (ie, there is a risk that the issuer does not transact assets as instructed),

[7] Australian Securities & Investments Commission, Consultation Paper, p.16.

[8] Australian Securities & Investments Commission, Consultation Paper, p.16.

Example	Comments
	that is an NCP facility. We are happy to discuss the distinction between custodial and non-custodial wallets with ASIC if that will assist.

A2 Q2. Are there any additional examples you would like to see included? Please give details of the suggested example(s), and why you consider the digital asset discussed may/may not be a financial product.

See our comments in response to questions A2 Q1 and A3 Q1.

A2 Q3. For any of these examples, are there any unintended consequences? If so, what are these and what do you propose in response?

See our comments in the 'Observations' section of this submission, as well as our response to questions A2 Q1 and A3 Q1.

A3 Q1. 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?

We consider that it would be helpful to include worked examples relating to wrapped tokens and non-yield bearing stablecoins in INFO 225. However, we disagree with the regulatory outcomes that ASIC proposes in the Consultation Paper.

Wrapped tokens as derivatives

- In our view, wrapped tokens that involve the 1:1 technical wrapping of one token to be functionally compatible with another blockchain is not, of itself, a derivative. We consider that the conclusion that ASIC has reached in considering these to be derivatives is incorrect, which stems from an inaccurate description of the mechanisms involved in token wrapping. For example:
    - regarding paragraph 20(a), it is not typically the case that a company offers wrapping functionality as a product. This is usually provided as a technical service that is implemented through deterministic smart contracts; and
    - regarding paragraph 20(b), the added functionality and lower fees is as a result of the relevant blockchain, not as a result of the wrapping. The wrapping itself does not change the economics of the underlying token.

- Irrespective of whether there may be a deviation between the underlying token price and the wrapped token price, a single wrapped token can only always be 'unwrapped' for a single underlying token. That is, the wrapping/unwrapping process is on a fixed 1:1 basis and these fixed rates do not change by reference to their respective prices. For clarity, at no point is a person required to provide more or less of a given token in the wrapping and unwrapping processes.

- Finally, the process of wrapping a token takes place through a smart contract that the tokenholder initiates themselves. It is not the case that they transact with a company for this service. Therefore, the tokenholder is only entering into a wrapping/unwrapping process with themselves. The concept of a derivative requires there to be two parties involved in the transaction and it is not possible for a person to enter into a derivative contract with themselves. Therefore, it is not technically possible to be a derivative as the tokenholder would be both the issuer and the acquirer against themselves as counterparty.

Stablecoin as an NCP facility

- For the reasons discussed in our comments to Example 13 in question A2 Q1, we strongly disagree with ASIC's view that a non-yield-bearing stablecoin (or any stablecoin) is an NCP facility. Such a view is inconsistent with the functional characteristics of NCP facilities, the functional characteristics of stablecoins, both the industry's and ASIC's own views (as set out in RG 185) regarding the regulation of NCP facilities, and also cuts across Treasury's intentions to regulate stablecoins as a form of stored value (which is more appropriate).

- Adopting such a view would have a catastrophic impact on the industry from a compliance and costs perspective. This includes the requirement to have a regulated custodian hold stablecoins as financial products, which does not currently exist as a financial service or as an AFSL authorisation, and may require many exchanges to be authorised to make a market in NCP facilities (which also does not exist). Further, stablecoins could then only be traded through licensed financial markets, which is not only incongruous with their functionality but there are currently no licensed financial markets that could support such transactions. As the prevailing legal view is that stablecoins are not, of themselves, NCP facilities, we submit that ASIC should work with Treasury's law reform agenda (or even the Australian Courts) before imposing a definitively disruptive minority legal view on the industry.

- Additionally, it is worth noting that ASIC's statement in paragraph 21(c) regarding the issuer redeeming the tokens for cash from any tokenholder is inaccurate for almost all stablecoin structures. Issuers typically use a network of institutional distributors that have such redemption rights, but this is a contractual right that is not specific to, and does not travel with, the token.

- Due to the unavailability of trading pairs, many stablecoins are used as a method to facilitate swaps into tokens with lower liquidity or smaller market capitalisations. Should stablecoins be considered NCP facilities, any advice given to clients on trading pairs that inherently involve the use of stablecoins would be more complex and ultimately result in increased costs being passed onto the client with no additional benefit. Alternatively, it would force exchanges to implement transactions using trading pairs that are unstable and lead to worse consumer outcomes (eg, price slippage).

- It cannot be overstated how much of a legal departure it would be for ASIC to view stablecoins as NCP facilities, and we are happy to engage in any discussions or consultations to further emphasise the detrimental impact that this would have.

A3 Q2. What are the practical implications for businesses (e.g. for issuers or intermediaries) in providing services in relation to wrapped tokens and/or 'stablecoins' that are financial products? Please give details.

Please see our comments to Example 13 in question A2 Q1 as well as question A3 Q1.

A3 Q3. Would any transitional provisions or regulatory relief be needed to facilitate transition from regulation of a wrapped token or a 'stablecoin' as a financial product under the current law to the Government's proposed approaches to 'stablecoins' and wrapped tokens? Please give details.

As noted in our comments to Example 13 in question A2 Q1 and question A3 Q1, we do not consider that either of these tokens are financial products under the current law. If ASIC is to expand the regulatory framework and pull these tokens into the regime, there will need to be significant transitional provisions implemented, particularly in relation to stablecoins. At the very least, this includes ASIC authorising custodians that have specific expertise in relation to holding stablecoins to be able to provide custody services for NCP facilities, implementing an authorisation for providers to make a market in NCP facilities and approving the establishment of a regulated market venue in order to deal in these assets. ASIC will also need to update its guidance to address its change in views and provide enough time for impacted firms to comprehensively consider the implications and appropriate legal avenues.

B1 Q1. Do you agree that ASIC should progress with a class no-action position as proposed here? If not, please give reasons.

We agree with the proposal to issue a class no-action position, and we have suggested additional no-action positions throughout this submission. However, please see our comments regarding the proposed conditions in response to question B1 Q2.

B1 Q2. Are the proposed conditions appropriate? Are there any additions or changes to the proposed conditions that will be more effective for investor protection?

We broadly agree with the proposed class no-action conditions with the following comments.

- The condition in para B1(c) should be amended such that the no-action position applies retrospectively to all historical conduct that has not separately been the subject of ASIC enforcement. As ASIC and Treasury have noted in their various consultation papers and submissions, the view as to whether certain digital assets are financial products is complex and there are varying views within the industry. Further, ASIC itself has changed its view from stating that no digital assets were financial products in 2014 to stating that many digital assets are financial products in 2024. Given Australia's primary financial services regulator has changed its views over time, it is inconsistent to apply today's view as against historical activity when ASIC did not make any public statements regarding digital assets being financial products. Further, recent digital asset case law has in fact narrowed the application of the financial services regime, not broadened. On this basis, so long as participants have not historically been the subject of ASIC enforcement and are actively attempting to obtain an AFSL (subject to our below comments), they should receive retrospective relief.

- The condition in para B1(e) should be varied to allow for a transition out period. As noted throughout this submission, and through various feedback channels, it is practically difficult for digital asset businesses to be able to comply with all AFSL obligations where they are strictly interpreted and rely on the ability to be serviced by other industries. In addition to providing relief regarding specific aspects of the AFSL obligations, where an AFSL application has been withdrawn or rejected (for reasons other than those beyond the applicant's reasonable control), ASIC should allow for a transition out period to move customer assets and engagements to another provider. This will allow for a smooth transition and benefit consumers by not immediately 'turning off' a service.

- Subject to ASIC concluding its position on controversial views such as stablecoins, it may be that digital asset firms require additional time to locate and engage appropriate responsible managers to support the required AFSL authorisations. On this basis, the 6 month timeline should be extended to 12 months. This will allow enough time to engage appropriate responsible managers and avoid submitting deficient applications to meet the proposed deadline, and will also allow enough time for industry to receive the outcomes of any legislative changes proposed by Treasury.

B1 Q3. 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.

Yes, subject to our comments above.

B1 Q4. Should there be a deadline for applying for an AFS licence or commencing pre-lodgement discussions in relation to a market and/or a CS facility licence? Please provide reasons.

Please see our comments in response to question B1 Q2.

B1 Q5. For product issuers, should the no-action position extend to other obligations—for example, to prepare a Product Disclosure Statement (PDS)? Why or why not?

To the extent that a no-action position is issued, it should apply to all licensee obligations. It would not be the case that a business would consider that they need to issue a product disclosure statement if they were not of the view that they needed an AFSL. Failing to extend the no-action position to all licensee obligations would create an unnecessary enforcement vector that would not benefit consumers.

B2 Q1. 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.

- This is difficult to answer before ASIC publishes its definitive view regarding which types of digital assets it considers are financial products. However, in our view there will need to be significant updates to regulatory obligations as they apply to digital assets.
- For example, it is commonly the case that digital assets do not have (or do not have a discernible) issuer or are issued through a decentralised manner via bonding curves. Even where there is an identifiable issuer, it is often the case that they are not in Australia and have no intention of complying with associated obligations, including as they may relate to product disclosure documents and design and distribution obligations (**DDO**). However, the absence of an issuer's compliance does not alleviate the obligations that reside with secondary market participants (including brokers). Therefore, there may evolve a situation where an Australian digital asset broker is not able to comply with obligations to provide product disclosure documents or distribute digital assets in accordance with target market determinations under DDO, because such documents and processes were not established by the issuer.
- Many of the obligations under Chapter 7 of the Corporations Act are predicated on the assumption that there is an identifiable issuer. We submit that as part of its renewed approach

to digital assets, ASIC reviews associated obligations that rely on the existence of an issuer (eg, disclosure documents, DDO) and provide guidance or relief as to how digital asset firms can comply in a manner that maintains consumer protection. For example, it may be that ASIC requires secondary market participants to develop a document similar to a disclosure document that sets out the features, benefits and risks of identified tokens that is based on reliable and verified publicly available information. We are happy to discuss specific workarounds with ASIC as it progresses through this process.

B2 Q2. Are there any aspects of ASIC's guidance that may need to be tailored for digital assets that are financial products?

Please see our response to question B2 Q1 and B2 Q3.

B2 Q3. Do you agree that the approach proposed for custodial and depository services is appropriate for holding custody of digital assets? Do you agree that extending the omnibus client accounts is appropriate for digital assets that are financial products? Please explain, providing examples, if relevant.

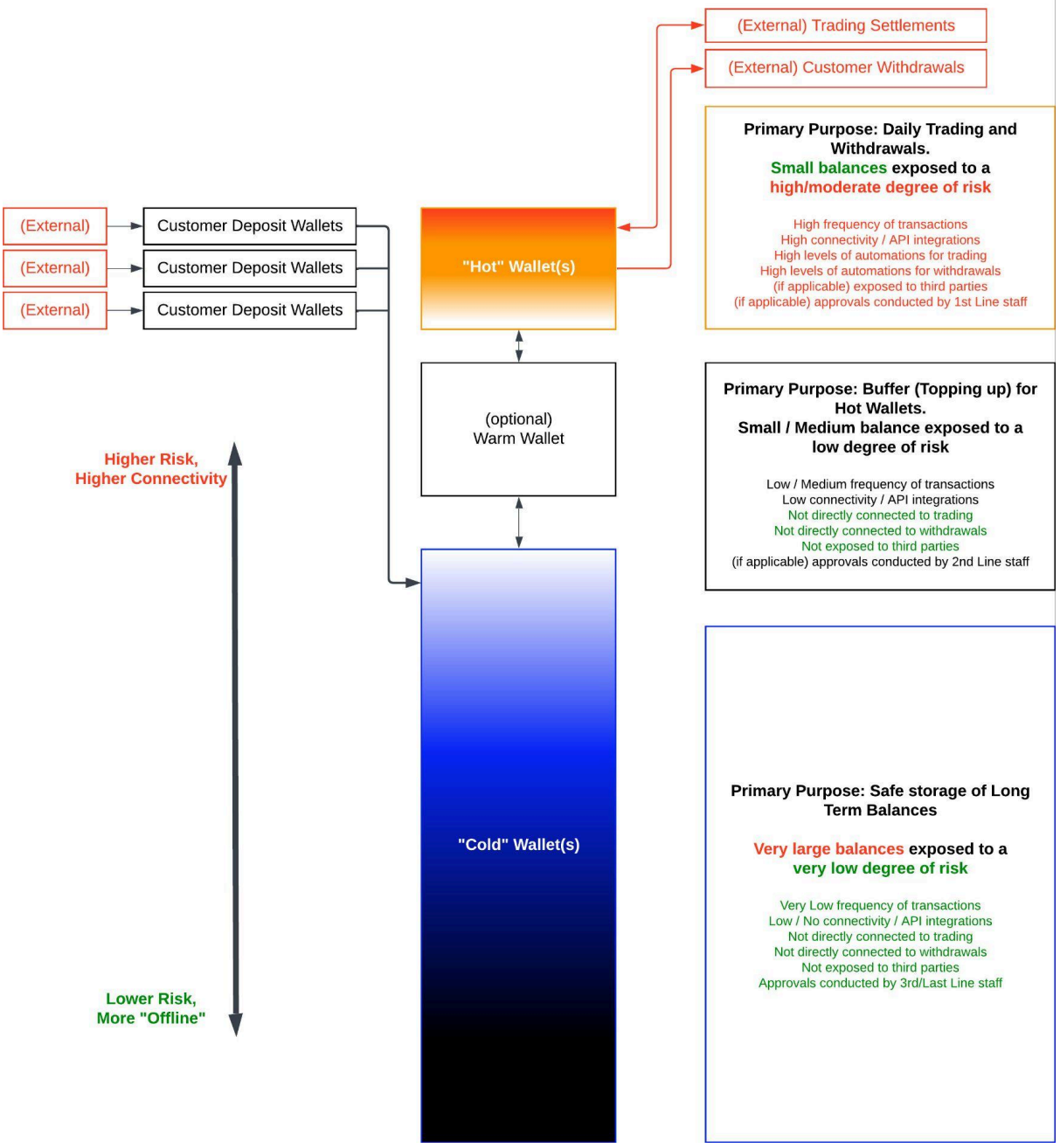
We have no comments on the first question beyond our response to question A1 Q3. We agree that omnibus accounting should be permissible for digital asset holdings. The use of an omnibus structure to hold digital assets is the most effective way to achieve a practicable balance of security, fees, and speed of transaction. We have included a generic diagram to visualise the concepts.

Platform wallet structures typically resemble the diagram below, making use of omnibus accounts which enable the platform to only expose a small amount of capital (eg, average daily transaction volume) to the systems that hold the greatest amount of risk. This structure allows for daily trading and withdrawal transactions to occur whilst keeping the vast majority of assets protected in the most secure conditions which may involve greater manual approvers from last-line staff which otherwise would not be feasible to secure for every single transaction.

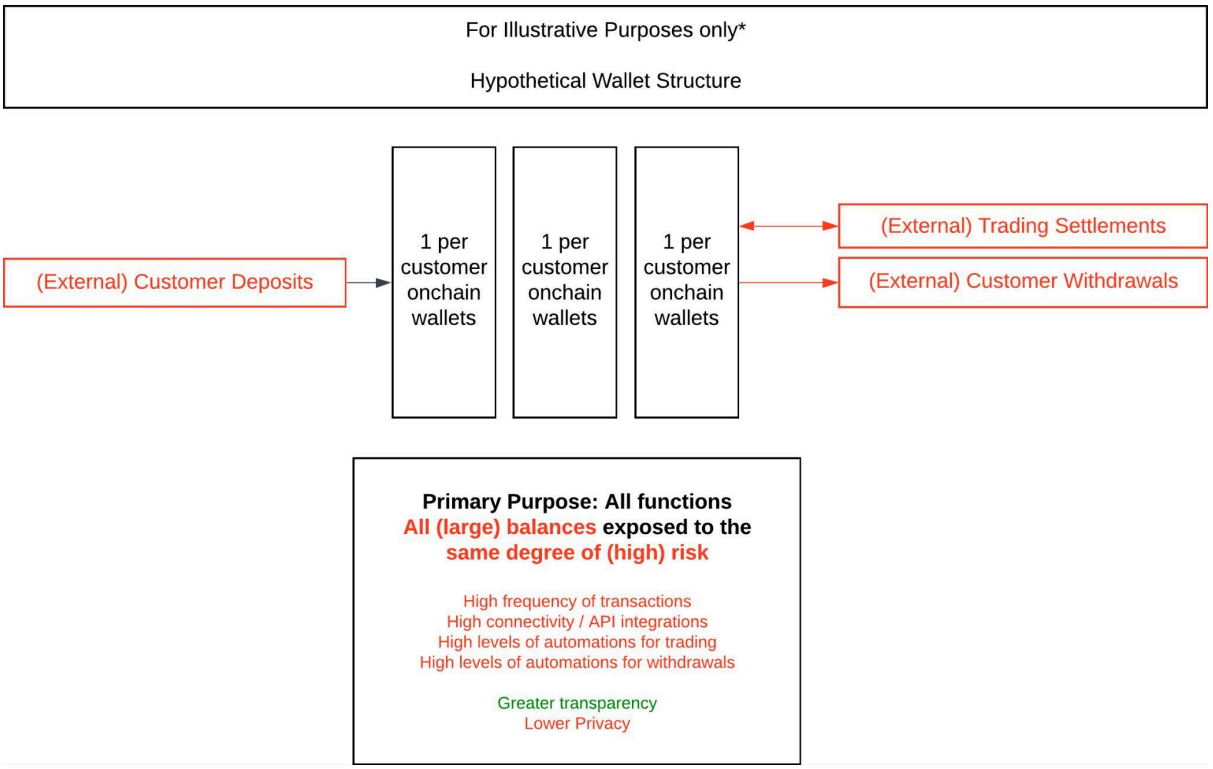
For example, a platform may hold $10,000,000 in total assets under custody and observe that they typically experience daily settlement needs of $100,000 (only 1% of AUC). They may structure their hot wallets in the following manner to enable all clients to trade at efficient speed and pricing, and withdraw quickly, up to $100,000 before additional approvals are required. The platform may also observe that in "peak times" they experience up to $500,000 in daily settlement needs and have structured "2nd line" or "warm" wallets that require additional approval to access greater-than-usual balances. Finally, the platform observes 95% of their balances are rarely accessed, and can therefore store them under the most secure "cold" environments, which require further, slower approvals.

For Illustrative Purposes only*

Typical Platform Wallet Structure



Without the use of an omnibus account, each wallet would be exposed to the same degree of integration connectivity (and therefore risk) in order to facilitate daily functionality for trading and withdrawals. This design would significantly sacrifice cybersecurity (and client privacy) for the benefit of reserve transparency. Our recommendation is for auditors to perform the function of verifying the reserve transparency (existence of assets), and leave the wallet security architecture of digital asset platforms undisrupted.



B2 Q4. 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?

We consider that ASIC should continue to adopt the approach of viewing appointed responsible managers as a whole, rather than requiring individual responsible managers to comply with all aspects of organisational competence. That is, appointed responsible managers should, together, have the requisite knowledge and experience to supervise financial services. In the digital assets context, this should involve a combination of individuals that have experience in a regulated environment (ie, an AFSL holder) as well as individuals that have deep knowledge of the products that will be the subject of the proposed financial services. ASIC should review these individuals together to understand how they can complement each other in the appropriate provision of financial services in a new context. ASIC should take a broad view as to what constitutes experience in the digital asset space, and should appreciate that (given the nascency of the industry) time based roles is not the only indicator of experience.

B3 Q1. 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?

Subject to our comments regarding the absence of authorisations regarding custody of stablecoins as NCP facilities, we do not see the existing authorisations as incongruous with digital asset providers.

B3 Q2. Do you agree with the proposal to tailor the derivatives and miscellaneous financial investment products authorisations? Are there any others that you would recommend?

We have no comments on this question.