ASIC
Australian Securities &
Investments Commission

Senate Select Committee on Australia as a Technology and Financial Centre: Third issues paper

Submission by the Australian Securities and Investments Commission

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A About this submission

1 ASIC welcomes the opportunity to make a submission in response to the third issues paper of the Senate Select Committee on Australia as a Technology and Financial Centre (Select Committee) released on 19 May 2021. We note that the third issues paper focuses on a range of subjects that relate to Australia's growth as a technology and financial centre.

2 We previously provided a submission to the Select Committee in December 2019 (ASIC's first submission), a supplementary submission in April 2020 and a second submission in November 2020 (ASIC's second submission). ASIC's second submission contains content on ASIC's approach to financial innovation. The content in ASIC's second submission remains materially up to date and so is not repeated in this submission.

3 In this submission, we provide information on a range of topics raised in the third issues paper. In particular:

(a) the regulation of cryptocurrencies and crypto-assets (see Section B);

Note: Crypto-assets are also commonly referred to as 'digital assets', 'virtual assets' or 'digital tokens'. For convenience, we use the term 'crypto-assets' in this submission.

(b) issues relating to 'debanking' of Australian financial technology (fintech) businesses (see Section C); and

(c) retail participation in fundraising (see Section D).

We provide this information to assist the Select Committee in its consideration of the subjects raised in the third issues paper.

4 We also provide an update on a range of topics related to the access to capital, which remains of interest to the Select Committee and was also canvassed in the Select Committee's second interim report in April 2021.

5 For ease of reference, and to provide background to the subjects raised in the third issues paper, we have included:

(a) in Appendix 1—a summary on how crypto-assets are regulated;

(b) in Appendix 2—an extract from our second submission on ASIC's approach to developments in crypto-assets markets;

(c) in Appendix 3—our response on 15 March 2021 to the Select Committee's questions on notice on perceived barriers to the regulation of crypto-assets, and the regulation of crypto-assets in some overseas jurisdictions; and

(d) in Appendix 4 – an extract from our first submission on fundraising

6 We are open to providing more information and answering any questions the Select Committee may share with ASIC. We also look forward to the

opportunity to appear again before the Select Committee should the committee require this.

B Regulation of cryptocurrencies and crypto-assets

Key points

ASIC notes that the Select Committee is assessing options for the development of a comprehensive regulatory framework for cryptocurrency and crypto-assets in Australia.

In this section, we provide information on recent work we have undertaken relevant to the regulation of cryptocurrencies and crypto-assets: see paragraphs 7-13. We also provide information on issues that the Select Committee may wish to consider when exploring subjects relevant to the nature of a regulatory framework for crypto-assets.

We also briefly describe our involvement with the work of the Council of Financial Regulators (CFR) on 'stablecoins': see paragraphs 14-17 We provide an update on crypto-related scams in the period since ASIC's second submission to the Select Committee in November 2020: see paragraphs 18-23.

We also provide a summary below of recent key overseas crypto-related developments: see paragraphs 24-30.

ASIC's proposed consultation paper on exchange traded products over crypto-assets

7 Consistent with global trends, ASIC has seen significant interest in the Australian market for crypto-assets. These assets are available to Australian retail investors through local digital currency exchanges and overseas-based crypto-asset trading platforms.

8 ASIC continues to monitor developments in the crypto-asset industry as it touches the boundaries of financial services and financial markets in Australia. ASIC works closely with both Australian and international regulators in monitoring and understanding crypto-assets, including stablecoins and decentralised finance.

9 ASIC is aware of industry interest in specific financial products called exchange traded products (ETPs) that invest in, or provide underlying exposure to, crypto-assets (crypto-asset ETPs). ETPs include certain managed funds, exchange traded funds (ETFs) and structured products.

10 Given the unique, ever-evolving characteristics and consumer risks associated with crypto-assets, ASIC's current focus is on understanding the global developments in relation to crypto-asset ETPs such as a bitcoin ETF. We have worked with market operators and Treasury to consider the

appropriateness of crypto-assets as permissible underlying assets for ETPs on Australian licensed financial markets and the appropriate minimum standards for such products.

11 To further these efforts, we have published Consultation Paper 343 *Crypto-assets as underlying assets for ETPs and other investment products* (CP 343) on ETPs and other investment products that invest in, or provide exposure to, crypto-assets . In CP 343, we seek feedback on proposed good practices to meet existing legal obligations that apply to:

(a) Australian market licensees that admit such products onto their market; and

(b) issuers of crypto-asset ETPs and other investment products that provide retail investors with exposure to crypto-assets.

12 The proposed good practices in CP 343 cover:

(a) admission and monitoring standards for products on a market, including about:

(i) the nature of crypto-assets that are appropriate as underlying assets of ETPs;

(ii) the reliable pricing of crypto-assets; and

(iii) how crypto-assets should be classified with respect to underlying asset rules; and

(b) standards for issuers of ETPs and other investment products, including in relation to custody, risk management and disclosure.

13 A link to CP 343 follows: Consultation Paper CP 343 Crypto-assets as underlying assets for ETPs and other investment products (asic.gov.au).

Work with the CFR on stablecoins

14 The CFR has established a working group to consider the application of existing regulation to stablecoins and related products and services (CFR Stablecoin Working Group).

15 ASIC is the current chair of the working group; the Australian Prudential Regulation Authority (APRA), the Reserve Bank of Australia (RBA), Treasury and the Australian Transaction Reports and Analysis Centre (AUSTRAC) are also members. The Department of Industry, Science, Energy and Resources attends in an observer capacity.

16 Stablecoins are a form of crypto-asset that aim to maintain a stable value relative to a specified unit of account or store of value. Examples of these units or stores are as a national currency, commodity or other asset. Many other crypto-assets have prices determined solely by supply and demand and

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can be volatile. In contrast to these crypto-assets, stablecoins aim to maintain a specified price level. This makes them more attractive to hold as a means of payment or store of value.

17 The objectives of the CFR Stablecoin Working Group are to:

(a) identify key types of stablecoin arrangements that could affect the Australian financial system or Australian consumers;

(b) assess how these arrangements would be treated under existing regulatory frameworks (including whether the requirements are appropriate and what, if any, changes to the framework should be proposed);

(c) develop recommendations on actions (if any) to address emerging regulatory gaps and risks related to stablecoins, for consideration by the CFR and the Australian Government; and

(d) provide a forum to share information and coordinate Australian contributions on international work related to stablecoins.

Update on crypto-related scams

18 The rise in value of crypto-assets globally has seen a sharp increase in retail investor interest in crypto-assets. Further, the crypto-asset marketplace is technologically complex, online and global. These factors have resulted in a substantial increase in unscrupulous operators seeking to defraud consumers.

19 From the beginning of 2021 to date, ASIC has received a significantly higher number of crypto-related scam reports, compared to previous years.

20 Most reports of misconduct (complaints) lodged with ASIC that involve crypto-assets involve what appear to be outright scams. We are increasingly seeing crypto-wallets as the preferred method of funds transfers to scammers, instead of bank accounts and wire transfers.

21 Many scams originate via either dating apps (‘romance-baiting’) or fake news articles. They are usually coupled with advertisements to trade in foreign exchange or contracts for difference (CFDs) with promises of high returns.

22 Scammers often impersonate Australian financial services (AFS) licensees, and/or use ASIC’s logo to legitimise their operations.

23 ASIC has taken action in response to crypto-related scams, noting a key challenge is that scams are often generated offshore. This diminishes viable intervention options. Actions we have taken in response to scams include:

(a) publishing scam warnings, similar to those issued by our overseas regulatory counterparts;

(b) sharing information with regulators such as AUSTRAC so that they may consider their intervention options;

(c) writing warning and 'reverse onus' letters to issuers of scam-like material, and requesting website owners take down scam webpages; and

(d) issuing warnings on the risks of investing in cryptocurrencies on our Moneysmart website.

International developments

24 We provide a summary below of recent key overseas crypto-related developments that may be of interest to the Select Committee.

FSB's final report into global stablecoin arrangements

25 The Financial Stability Board (FSB) recently released *Stablecoin: Risks, potential and regulation*, its final report into global stablecoin (GSC) arrangements.

26 The FSB's final report sets out ten high-level recommendations. These recommendations seek to promote coordinated and effective regulation, supervision and oversight of GSC arrangements to address the financial stability risks posed by these arrangements, both at the domestic and international level. They also seek to support responsible innovation and provide sufficient flexibility for jurisdictions to implement domestic approaches.

Basel Committee proposals on prudential treatment of crypto-asset exposures

27 The Basel Committee of the Bank for International Settlements (BIS) issued *Prudential treatment of cryptoasset exposures* (PDF 389 KB), a discussion paper for public consultation (closing 10 September 2021). It sets out preliminary proposals for the prudential treatment of banks' crypto-asset exposures.

28 Banks' exposures to crypto-assets are currently limited. However, the continued growth and innovation in crypto-assets and related services, coupled with the heightened interest of some banks, could increase global financial stability concerns and risks to the banking system in the absence of a specified prudential treatment.

29 The proposals split crypto-assets into two broad groups:

(a) those eligible for treatment under the existing Basel Framework with some modifications; and

(b) others, such as bitcoin, that would be subject to a new prudential treatment because they pose additional and higher risks. The Basel Committee proposed a risk weighting for bitcoin, ethereum and other cryptocurrencies, which would translate into a requirement for banks to hold capital equivalent to the face value of their crypto-asset exposure.

BIS publication on central bank digital currencies

30 BIS's Annual Economic Report, issued in June 2021, also included a chapter on central bank digital currencies. The paper noted risks associated with the governance of assets backing stablecoins, and found that cryptocurrencies, stablecoins and 'walled ecosystem' (closed and limited) payment arrangements of large technology companies may work against the public good element that underpins the payment system.

C Issues relating to 'debanking' of Australian fintech businesses

Key points

Through our ongoing engagement with industry, industry associations and other Australian regulators, ASIC is aware that debanking is an issue for fintech businesses, including those in the crypto-asset, payments, remittance and wealthtech sectors: see paragraphs 31-33.

We have taken action in other contexts to increase the availability and accessibility of banking services: see paragraph 34.

ASIC observations on debanking

31 ASIC does not have a regulatory role in relation to concerns about debanking. The laws ASIC administers do not include protections against the non-provision of financial services to other commercial entities. Our mandate does not allow ASIC to force an institution to provide banking services if they choose not to.

32 Generally, we consider that the response to debanking is a policy matter for the Australian Government. Where it raises other concerns, potentially one for regulators with a more direct remit (e.g. the Australian Competition and Consumer Commission (ACCC) if there are competition issues).

33 ASIC regularly engages with Treasury and other policy agencies on this issue, including the Department of Home Affairs and the Department of Foreign Affairs. ASIC also engages with other regulators, such as the RBA, APRA, AUSTRAC and the ACCC. This engagement assists ASIC to understand market developments, including any issues relevant to ASIC.

Our actions to increase the availability and accessibility of banking services

34 In other contexts, some of ASIC's actions have been consistent with increasing the availability and accessibility of banking services. Some examples include:

(a) ensuring (through our engagement with the Australian Banking Association) that the Code of Banking Practice's banking services accessibility provisions are appropriate for vulnerable consumers;

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(b) facilitating easier access to financial services and credit activities for fintech businesses during their start-up and testing phases through our oversight and administration of the enhanced regulatory sandbox;

(c) our efforts in the context of the ePayments Code review to clarify liability in relation to screen scraping until Open Banking provides a feasible alternative;

(d) the relief ASIC provided in 2020 to allow banks to issue debit cards to customers who previously didn't have a card attached to their account. We issued this relief in response to the COVID-19 pandemic and the increased risk that consumers would not be able to access their funds because of public health restrictions and/or branch closures; and

(e) providing guidance about how ASIC-administered laws apply, such as Information Sheet 225 *Initial coin offerings and crypto-assets* (INFO 225) for the crypto-asset industry or Regulatory Guide 185 *Non-cash payment facilities* (RG 185) for the payments sector, so that there is clarity on the nature of our expectations.

D Investment in Australian businesses

Key points

ASIC notes the Select Committee's interest in encouraging investment in Australian businesses (including fintech and regtech businesses) and identifying areas where changes to corporate law can be made to facilitate this.

In this section, we:

- provide an update on changes contemplated by the US Securities and Exchange Commission (SEC) on the operation of Rule 10b5-1 of the *Securities Exchange Act 1934* (US) (see paragraphs 35-40);
- describe the measures we took to facilitate retail participation in fundraising and improve transparency in capital raisings during the COVID-19 pandemic—and the impact of some of those initiatives (see paragraphs 41-57); and
- describe some industry developments relevant to enhancing retail shareholder participation in fundraising opportunities (see paragraphs 58-65).

Proposed new US insider trading rules

35 We note that the Select Committee's second interim report recommended that the Australian Government should provide for an Australian scheme based on the US SEC Rule 10b5-1. The Select Committee also recommended that such a scheme should include integrity measures like a cooling-off period, market disclosure of trading plans, and a minimum plan duration: see Recommendation 10.

36 Given Recommendation 10 and the Select Committee's ongoing interest in whether corporate law holding back investment, we have set out developments in the United States below.

37 On 9 June 2021, the SEC announced that it will be considering making changes to Rule 10b5-1 trading plans: see *Remarks by SEC Chair Gensler at the CFO Network Summit*, Harvard Law School Forum on Corporate Governance. This is because of perceived abuses by insiders (and companies) in these plans. Therefore, it seems likely that a rulemaking process would impose additional compliance obligations and limitations on their use.

38 Rule 10b5-1 provides an affirmative defence to claims of insider trading (i.e. trading by officers and directors of public companies on the basis of material non-public information, or MNPI). Rule 10b5-1 contemplates the use of

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written trading plans (so-called 'Rule 10b5-1 plans') that provide for securities transactions occurring pursuant to formulaic instructions set in advance (e.g. on fixed dates and/or in fixed amounts and/or at fixed prices). The theory of the rule is that, as long as the Rule 10b5-1 plan is put in place by an insider at a time when the insider lacks MNPI and the insider has no discretion over the transactions under the plan, those transactions, even if occurring at a time when the insider has MNPI, are afforded the protection of the rule's affirmative defence. Rule 10b5-1 plans are a popular and practical solution for executives of public companies to comply with insider trading policies and the constant flow of MNPI, which often can result in a near-permanent bar to trading.

39 Based on recent remarks by SEC Chair Gary Gensler, we understand that the SEC is considering the following potential changes to 'freshen up' the operation of Rule 10b5-1:

(a) A 'cooling-off' period between the entry into the Rule 10b5-1 plan and the first trade under the plan—Currently, trades may begin under a Rule 10b5-1 plan immediately after it is adopted (again, as long as the insider does not have MNPI when the plan is adopted). Although many insider trading policies already (voluntarily) impose a cooling-off period, the SEC are considering mandating a longer four-month to six-month cooling-off period.

(b) Limitations on when and how plans can be cancelled—There currently are no limitations on when Rule 10b5-1 plans can be cancelled. As a result, insiders can cancel a plan when they do have MNPI. The SEC considers this may undermine investor confidence, because cancelling a plan may be as economically significant as carrying out an actual transaction—MNPI might influence an insider's decision to cancel an order to sell.

(c) Mandatory disclosure requirements regarding the adoption, modification, and terms of Rule 10b5‑1 plans by individuals and companies—There is currently no obligation to report the adoption of a Rule 10b5-1 plan and the SEC understands that advance disclosure of Rule 10b5-1 plans is relatively rare.

(d) A limit on the number of Rule 10b5-1 plans that insiders can adopt—With the ability to enter into multiple plans, and potentially to cancel them, insiders might mistakenly think they have a 'free option' to pick among favourable plans as they please. In fact, the SEC considers the sequential adoption and termination of plans is likely to call into question the bona fide nature of the plan(s), and thus the availability of the affirmative defence to insider trading.

40 The effective date of any Rule 10b5-1 changes, and the extent of any available grandfathering of pre-effective-date plans, is unclear at this stage.

Analysis of retail participation in fundraising

Analysis of retail participation

41 To assist the Select Committee in its consideration of issues relevant to investment in Australian businesses, we have set out our analysis of retail participation in listed company investment opportunities during 2020: see paragraphs 422–57.

42 Under ASX Listing Rule 7.1, issuers have flexibility to issue up to 15% of issued capital (commonly known as the placement cap) without seeking shareholder approval in a 12 month period. The 15% placement cap does not apply to pro-rata rights issues (accelerated or conventional) or share purchase plans. Share issues of greater than 15% of issued capital within a 12 month period require shareholder approval. Subject to the ASX Listing Rules, it is the directors of a company that determine the form of a capital raising the offer price, and the amount raised. However, in making these decisions, directors must act in the best interests of the company. As described in ASIC Media Release (20-097MR) directors need to consider not only the speed and certainty of a fundraising but also fairness considerations.

43 After consultation with a wide group of stakeholders, to facilitate fundraising following the onset of the COVID-19 pandemic, on 31 March 2020 ASIC and ASX announced temporary measures to facilitate fundraising activity.

> Note: The initial instruments put in place by ASIC were ASIC Corporations (Trading Suspension Relief) Instrument 2020/289 and ASIC Corporations (Amendment) Instrument 2020/290. ASX gave effect to this measures via a class waiver - see: Listed-Compliance-Update-31-mar2020.pdf (asx.com.au) (temporary ASX class waiver).

44 The temporary ASX measures allowed listed entities to place up to 25% of their issued capital (up from the standard 15%) without shareholder approval. To ensure that retail investors had an opportunity to participate, ASX required that a placement using the temporary waiver was followed by an entitlement offer or share purchase plan or unit purchase plan. The underwritten portion of any follow-on entitlement offer could be added when calculating the 25% placement capacity. The one-for-one limit on non-renounceable entitlement offers was also waived.

> Note: See the key terms for the relevant definitions of ‘placement’, ‘entitlement or rights offer’, ‘share purchase plan’ and ‘unit purchase plan’.

45 The ASIC measures enabled certain ‘low doc’ offers (including rights offers, placements and share purchase plans) to be made to investors, even when they did not meet all the normal requirements. The ‘low doc’ capital raising regime is not available if a company has been suspended for a total of more than five days in the previous 12 months. ASIC extended the total permissible suspension period to 10 days.

46 These temporary measures were initially planned to end on 31 July 2020, but were extended to 30 November 2020 for the ASX measures, and 31 December 2020 for the ASIC measures.

Note: ASIC extended the temporary measures by making ASIC Corporations (Amendment) Instrument 2020/862. ASX implemented the extension by issuing replacement class waiver dated 9 July 2020: asx-class-waiver-temporary-extra-placement-capacity-09-15-20-final.pdf.

47 During this period, 38 equity raising transactions relied on the temporary ASX class waiver to place more than 15% of their issued capital and up to a limit of 25% of their issued capital. These transactions raised over $10 million. These types of follow-on offers are summarised in Table 1. ASIC can make available a full list of transactions that includes details of each offering if requested by the Select Committee.

Table 1: Equity raising transactions in 2020 – reliance on temporary ASX class waiver

Item	Entitlement offers	Share or unit purchase plans	Total
Number of issues	17*	21	38
Percentage of total issues relying on relief	44.7%	55.3%	100%
Average size relative to placement	240%	24%	N/A

Capital raisings during the COVID-19 pandemic in 2020

48 We tracked equity raisings of $10 million and above between mid-March 2020 (the onset of the COVID-19 pandemic) to 30 October 2020. In this period, a total of over $41 billion was raised from equity raising transactions by around 240 companies (for transactions raising $10 million and above). This included $26.0 billion from placements, $9.6 billion from entitlement offers, $4.7 billion from share or unit purchase plans and $0.8 billion from initial public offerings (IPOs).

49 The bulk of the money was raised from placements, as these enabled issuers to raise funds quickly to minimise market risk at a time where there was significant share price volatility.

Share purchase plans, unit purchase plans and entitlement offers

50 We note that share and unit purchase plans allow existing holders to acquire up to $30,000 per eligible shareholder in any 12 month period. For example, if a shareholder holds one share, they can apply for up to $30,000 (or the plan cap, which is set by the issuer). As a result, some existing shareholders in a share or unit purchase plan that followed a placement received an

allocation well in excess of their pro-rata amount. This was the situation before the temporary ASX class waiver.

51 Some companies received more demand for a share or unit purchase plan that followed a placement than they were targeting. A number of issuers increased the size of the share purchase plan to cater for more existing shareholders.

52 However, when the demand for a share purchase plan or unit purchase plan that followed a placement exceeded the amount the issuer wished to raise, scale-backs are required. The temporary ASX class waiver set out that in these circumstances that scale-backs would be pro-rata—either based on the size of the applicant's holding before the share or unit purchase plan or based on the amount they had applied for. We encourage issuers to consider these types of scale-back arrangements for equity raisings that did not rely on the temporary ASX class waiver.

53 We also note that in some entitlement offers that followed placements allowed existing holders to apply for more than their pro-rata entitlement (i.e. a 'top-up').

54 From our analysis of transactions in the period, we note that 97 share purchase plans or unit purchase plans closed. Of these:

(a) 43 companies reported participation rates that revealed, on average, 31.5% of eligible shareholders submitted applications for the share or unit purchase plan; and

(b) 86 entities reported that the demand from their share or unit purchase plans was, on average, 1.78 times the size of the share or unit purchase plan offer. We note that some issuers increased the size of their share or unit purchase plan in light of demand they received for the offer.

55 From our sample set, it would appear that a relatively small number of existing retail shareholders apply for share purchase plans and unit purchase plans (31.5% from our sample set). However, the ones who apply generally apply for more than their pro-rata entitlement (1.78 times the offer size from our sample set).

56 Another indicator of retail demand for offers can be seen by looking at participation rates from retail investors in entitlement offers. Of the 49 accelerated entitlement offers that closed, the average take-up from the retail portion of the offer was 58%.

57 Given the unpredictability in retail demand, an issuer relying on retail participation to raise necessary funds would most likely need to underwrite the offer during the retail offer period. This would require underwriting for a period of around three to four weeks, depending on the retail offer type. This would involve the payment of underwriting fees and may result in a bigger

discount in the offer price to complete the transaction. As a result, it is common for share purchase plans and unit purchase plans to not be underwritten. Compare this to a placement where commitments can be obtained from eligible investors within a day or so, with settlement a few days later. These are considerations for the board of an issuer to consider when determining the choice of offer structure and treatment of existing shareholders.

Other ASIC developments on fundraising

Increased transparency in capital raisings

58 ASIC notes Recommendation 11 in the Select Committee's second interim report on post-capital raising disclosure.

59 ASIC expressed support for the amendments to the *ASX class waiver decision—Temporary Extra Placement Capacity Class Waiver (Class Waiver)* dated 22 April 2020 that sought to enhance disclosure requirement for placement allocations: see ASIC Media Release (20-097MR) ASIC supports increased transparency in capital raisings (23 April 2020). Issuers who relied on the class waiver to exceed the 15% placement limit were required to disclose:

(a) the key objectives and criteria that the entity adopted in the allocation process;

(b) whether one of those objectives was a best effort to allocate pro-rata to existing holders; and

(c) any significant exceptions or deviations from those objectives and criteria.

60 These enhanced requirements were consistent with ASIC's expectation that directors will provide transparent disclosure to the market about the capital-raising decisions they are making. These decisions must be in the best interests of the company.

61 At the time we stated:

> ASIC considers that the enhanced disclosure required under ASX's temporary waiver is also appropriate for other capital raisings that do not need to rely on the waiver. We encourage companies to make these types of disclosures for all placements and SPPs.

62 ASIC observed that a number of issuers provided allocation disclosures during this period, regardless of whether they were relying on the class waiver. We would be supportive of the market adopting these disclosure measures on a more permanent basis.

Rights issue timetabling and electronic communications

63 ASIC notes Recommendation 12 in the Select Committee's second interim report about modernising rights issues.

64 From time to time, we have observed issues in relation to the timetabling of secondary capital raisings. In particular, the length of time retail investors in non-renounceable issues are given to participate. Although this is not a new issue, it is clear that postal delivery times have lengthened considerably in recent times. The flow-on effect is that some retail investors may not receive their physical booklets before an offer closes (or very close to the offer closing).

65 ASIC encourages issuers to consider the nature of their shareholder registers when setting their timetables. However, we consider the better solution is that companies and registries make every effort to get as many shareholders as possible to sign up to electronic notifications (which many already do). Our Moneysmart website also encourages shareholders to pro-actively monitor their investments, and sign up to electronic communications, to enable them to be aware of corporate actions on a timely basis.

66 We would support any further initiatives in relation to the adoption of electronic communications.

Appendix 1: Contextual information on crypto-assets and ETPs

Crypto-assets

67 A crypto-asset is a digital representation of value or contractual rights that can be transferred, stored or traded electronically. Crypto-assets use cryptography, distributed ledger technology or other technology to provide features such as security and pseudo-anonymity. A crypto-asset may or may not have identifiable economic features that reflects fundamental or intrinsic value.

Note: This definition is adapted from the UK HM Treasury's *UK regulatory approach to cryptoassets and stablecoins: Consultation and call for evidence* (PDF 444 KB), published in January 2021.

68 We note that crypto-assets are not a homogenous asset class. The rights and features of each crypto-asset can raise different considerations for consumers, product issuers, and regulators. Crypto-assets are commonly regarded as speculative assets, with volatile prices and minimal to no regulatory oversight.

69 ASIC currently regulates crypto-assets and related products and services to the extent they fall within the existing regulatory perimeter of 'financial products and services': see INFO 225. Crypto-assets that are not financial products and services are generally not regulated by ASIC. They may, however, be subject to other Australian laws—for example, the anti-money laundering and counter-terrorism financing laws regulated by AUSTRAC, consumer protection obligations regulated by the ACCC, and the taxation requirements regulated by the Australian Taxation Office (ATO).

Crypto-asset ETPs

70 Almost all Australian interest in crypto-assets relates to crypto-asset ETPs. ETPs are open ended investment products that are traded on a financial market and invest in, or give exposure to, various assets or asset classes.

71 In Australia, there are three broad categories of ETP:

(a) ETFs—Collective investment vehicles that generally aim to track the performance of an index, a currency or a commodity.

(b) Managed funds—Collective investment vehicles that generally follow an active investment strategy that seeks to outperform an index or benchmark, or targets another specified objective. This category includes hedge funds.

(c) Structured products—A security or derivative that gives financial exposure to the performance of underlying instruments. Types of structured products include exchange traded commodities and exchange traded notes.

72 All ETPs are financial products and are regulated by ASIC under the *Corporations Act 2001* (Corporations Act). ETFs and managed funds are registered managed investment schemes. Structured products are generally classified as securities or derivatives.

73 ASIC monitors and promotes market integrity and consumer protection in the Australian financial system: see s12A of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). In performing this function, ASIC, along with Australian market licensees, shares responsibility for ensuring that the admission and monitoring standards for ETPs continue to support fair, orderly, and transparent markets.

Appendix 2: ASIC's work on crypto-assets—Extract from ASIC's second submission

74 Appendix 2 provides an extract from Section B of ASIC's second submission, from November 2020. It provides background on ASIC's crypto-asset related work that is still relevant and current.

ASIC's crypto-asset work

75 We have established an internal cryptocurrency working group, made up of specialist staff from ASIC's stakeholder teams and Strategy Group. The working group is a forum for sharing information and intelligence on domestic and international developments relating to crypto-assets, including on 'stablecoins' and scams.

76 Our general regulatory approach towards crypto-assets includes:

(a) engagement with legitimate crypto-asset businesses to support their compliance;

(b) monitoring the crypto landscape to identify emerging risks;

(c) identifying opportunities to disrupt scams and take enforcement action where required; and

(d) engaging with industry participants on practical proposals involving crypto-assets, to identify any gaps in the financial services regime to share with Treasury.

77 We have met and provided informal assistance to many businesses interested in crypto-assets related services and offerings. We provide this assistance through the Innovation Hub or by stakeholder teams directly engaging with businesses.

ASIC's guidance on crypto-assets and initial coin offerings

78 We provided guidance to industry on crypto-assets and initial coin offerings (ICOs) in INFO 225. This information sheet describes how obligations under the Corporations Act and the ASIC Act may apply to ICOs and businesses involved with crypto-assets.

79 The features of individual crypto-assets and related services will dictate if and how the laws administered by ASIC apply. INFO 225 also sets out how prohibitions against misleading or deceptive conduct apply to all ICOs and business involved with crypto-assets, regardless of whether they are financial products or not. Australian laws will also apply even if the ICO or crypto-asset is promoted or sold to Australians from offshore. Issuers of

ICOs, crypto-assets and their advisers should not assume the use of these structures means that key consumer protections under Australian laws do not apply or can be ignored. We have called for businesses seeking to operate lawfully and legitimately to distinguish themselves from possible scams and comply with the law.

Appendix 3: Extract from ASIC's previous response to the Select Committee's questions on notice—Crypto-assets

80 This appendix sets out our responses of February 2021 to the questions on notice from the Select Committee on:

(a) perceived barriers that prevent retail access to crypto-assets or crypto-based products; and

(b) a general comparison of the availability of crypto-related products in Australia and how key overseas jurisdictions regulate crypto-assets. The overseas jurisdictions covered are the United States, Hong Kong, Canada, Singapore and the United Kingdom.

Perceived barriers to retail access

81 Crypto-assets are available directly to retail investors in Australia through local digital currency exchanges and overseas based crypto-asset trading platforms. These products do not automatically benefit from all the safeguards provided under the Australian financial regulatory framework administered by ASIC, such as upfront disclosure of the risks involved, access to dispute resolution services, or access to compensation funds. The safeguards available depend on the rights and features of each individual crypto-asset. Each crypto-asset service provider or trading platform is responsible for complying with all relevant Australian laws applicable to it. In this context, ASIC's role is to administer the framework set by Parliament in the Corporations Act for the offer of financial products and services and the operation of financial market infrastructure. ASIC's approach to administering this framework is set out in INFO 225, which provides information to assist the crypto industry to comply with their obligations under the Corporations Act. ASIC's approach to regulating crypto-assets is summarised in Supplementary Submission 14.2 to the Senate Inquiry. ASIC makes it clear in INFO 225 that whether a crypto-asset is within or outside the financial regulatory framework depends on particular characteristics of the crypto-asset offering. This can cause uncertainty for investors and consumers as well as issuers and distributors of these assets. It is a policy matter for the Australian Government whether or not there should be clarity on this issue.

82 Where firms seek to offer specific financial products involving crypto-assets within the Australian financial regulatory framework their proposals can involve ASIC. In working through specific business propositions, the product issuer and ASIC are able to identify additional steps that are needed

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to bring a financial product involving crypto-assets within the Australian financial regulatory framework. For example, in considering the proposal for a crypto-asset ETP, we identified that an Australian market licensee had yet to publicly consult and develop a rule framework to facilitate an ETP that would hold crypto-assets. Operating or listing rules on all of the Australian securities markets would need to be either developed or amended to include crypto-assets as approved underlying assets for ETPs, such as managed funds. This process would be subject to ASIC and Ministerial consideration.

83 Crypto-assets are not a homogenous asset class and each crypto-asset raises different considerations. As such, crypto-assets present unique challenges that can make it difficult to meet the safeguards in place to protect retail investors and Australian financial markets. For example, to ensure adequate investor and market safeguards within the Australian financial regulatory framework, the product issuer may need to identify how to:

(a) reliably price underlying crypto-assets that trade on multiple digital currency exchanges (market quality would be a consideration);

(b) hold and reliably audit crypto-assets in custody (this would include considering the control of private keys, wallet types or storage mechanisms, network or cyber security issues, insurance, auditing, and suspicious matter reporting processes);

(c) ensure any third-party service providers connected with the product (such as calculation agents, liquidity providers and authorised participants) have the appropriate competencies to deal with crypto-assets; and

(d) ensure adequate risk management arrangements to manage crypto lifecycle events such as forks.

General comparison of the availability of crypto related products in Australia and in key overseas jurisdictions

84 The broader crypto-asset marketplace is online and global and it is difficult (or even artificial) to draw boundaries between crypto products that are available in different jurisdictions. Globally, as at 25 February 2021, there were 8,484 different types of crypto-assets available via 831 crypto-asset trading platforms.

85 ASIC is not aware of any retail financial products that have crypto-assets as a sole underlying asset that have been issued under the Australian financial regulatory framework (except on an incidental basis) whether on an unlisted or quoted basis. We are aware that AFS licensees may be facilitating access to overseas funds that hold crypto-assets for wholesale or sophisticated investors.

86 In answering this question, ASIC sought information about the availability of crypto-related products in overseas regulators' jurisdictions. We sought information from the US Commodity Futures Trading Commission (CFTC), the US SEC, the Hong Kong Securities & Futures Commission (SFC), the Ontario Securities Commission (OSC), the Monetary Authority of Singapore (MAS) and the UK Financial Conduct Authority (FCA)

87 Below we provide responses (largely in the form we received them) by select overseas regulators about the availability and regulation of crypto-assets in their respective jurisdictions. Where there are references to currency, we have taken this as the overseas regulator's local currency.

Summary of information from overseas regulators

88 In general, there is limited access to crypto-asset 'financial' products by retail investors in most of those jurisdictions. For example, MAS has stated that financial products that are based on or otherwise reference crypto-assets are not suitable for most retail investors, and the UK FCA has banned the sale of derivatives and exchange traded notes that reference certain types of crypto-assets to retail consumers. However, in Ontario, Canada, there are seven investment funds with underlying crypto-assets that trade on the Toronto Stock Exchange. In the United States there are a small number of trust products holding crypto-assets whose trust interests are traded in the over-the-counter-market and two quoted futures contracts that reference bitcoin.

Response from the US CFTC

89 The *Commodity Exchange Act* (CEA) regulates the trading of commodity futures in the United States. The CEA established the statutory framework under which the CFTC operates. Under this Act, the CFTC has authority to establish regulations.

> **1. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to retail clients in your jurisdiction? Further, please indicate if there are listed or quoted products. Do your financial markets rules contemplate potential listed or quoted products of this kind?**

All CFTC-regulated virtual currency derivative contracts have been certified by the exchanges under the Commission's self-certification process[1]. The Commission has not approved a virtual currency product[2]. This is standard practice, as the vast majority of products are certified by the exchanges

[1] The text laying out the 40.2 process can be found at: https://www.law.cornell.edu/cfr/text/17/40.2.
[2] Under the 40.3 product approval process https://www.law.cornell.edu/cfr/text/17/40.3

themselves. The Commission has not adopted any special certification process specific to virtual currencies. There was an advisory released for exchanges and clearinghouses highlighting the Commission's expectation for virtual currency derivative contracts.

As with other products, the exchanges file rule amendments on things like position limits, large trader reporting levels, and other standard rules to support trading products. The clearing houses also adopted rules to support the clearing of these products. These were done through the normal process[3].

Bitcoin and Ether are treated as commodities and subjected to the CFTC regulatory jurisdiction should they be traded in the derivatives markets. As such, the derivatives products the CFTC have seen have been based on Bitcoin and Ether. There are some listed derivatives of this kind available to both retail and wholesale clients in the form of 4 cash-settled and 4 physically-settled contracts.

2. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to wholesale clients in your jurisdiction? Further, are there listed or quoted products that are not accessible to retail clients given suitability or other limitations (e.g. future contracts)?

There is a listed product available solely to wholesale clients on a CFTC regulated Swap Execution Facility (SEF) which has monthly and weekly options, a prepaid day-ahead swap and a prepaid day-ahead option. All these products are cleared, fully-collateralized and physically-settled into Bitcoin.

3. To the extent not answered by the above, what is the nature and scale of current financial market platforms authorised to list or quote financial products where the underlying is crypto-assets?

In the US, under CFTC regulation, currently there are 4 trading venues that list derivatives on crypto products. To date, trading in virtual currency derivatives has been modest relative to futures contracts in other commodities. The most liquid derivative contract on BTC has open interest equivalent to roughly 50,000 BTC[4]. This contract accounts for the majority of the open interest in US listed virtual currency derivative contracts[5].

[3] See the 40.6 process https://www.law.cornell.edu/cfr/text/17/40.6
[4] Roughly US$2.5 billion or A$3.275 billion.
[5] Weekly Commitments of Traders report provides some detail on the type of traders active in this product: https://www.cftc.gov/dea/options/financial_lof.htm

Response from the US SEC

90 The SEC is an independent federal government agency that is responsible under the US federal securities laws for regulating the securities markets and enforcing federal securities laws. Its mission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

1. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to retail clients in your jurisdiction? Further, please indicate if there are listed or quoted products. Do your financial markets rules contemplate potential listed or quoted products of this kind?

The US federal securities laws require all offers and sales of securities, including those involving a digital asset security, to either be registered under its provisions or to qualify for an exemption from registration. There are currently two trust products that are not registered as investment companies in the US and that hold BTC and ETH directly. The trust interests were initially sold in offerings that were not registered under the Securities Act of 1933 ("Securities Act") and subsequently began trading in the over the counter market and are not listed for trading on any national securities exchange in the US. The trust interests are now registered as a class of securities under the Securities Exchange Act of 1934 ("Exchange Act"), thus subjecting the trust issuer to the periodic reporting requirements of the Exchange Act. There are other trusts or similar entities of the same sponsor as well as other sponsors who are selling interests in trusts where the underlying assets are crypto-assets. Like the sale of the BTC and ETH retail trusts, the trust interests in these other trusts were and are being offered and sold pursuant to an exemption from registration under the Securities Act, but currently the trust interests themselves are not registered as classes of securities under the Exchange Act, and the trusts are not subject to the periodic reporting requirements of the Exchange Act. None of these trusts, whether traded over the counter or not yet traded, have any redemption features similar to an exchange traded fund.

91 There are a handful of open-end funds that may hold some portion (limited to 15% or so) of such funds in crypto assets– as permitted under existing US laws for registered trust products.

2. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to wholesale clients in your jurisdiction? Further, are there listed or quoted products that are not

accessible to retail clients given suitability or other limitations (e.g. future contracts)?

Please see answer to question 3 in relation to investments sold privately pursuant to an exemption from registration (as opposed to investments being publicly offered and sold to individuals such as retail investors).

3. To the extent not answered by the above, what is the nature and scale of current financial market platforms authorised to list or quote financial products where the underlying is crypto-assets?

No registered national securities exchange in the US currently has listing standards that would allow the quoting and listing of digital assets that are securities but, as noted in response to question 1 above, there are trusts whose underlying assets are comprised of crypto-assets and whose trust interests are quoted for trading through alternative trading systems and in over the counter markets. However, please note, the SEC generally would not be provided detailed information about privately offered investments (those that have been offered and sold pursuant to an exemption from registration), offerings of crypto-assets that are not securities, and offerings of crypto-assets that are securities and are being sold/traded in violation of the US federal securities laws.

Response from the Hong Kong SFC

92 The SFC is an independent statutory body set up in 1989 to regulate Hong Kong's securities and futures markets.

1. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to retail clients in your jurisdiction? Further, please indicate if there are listed or quoted products. Do your financial markets rules contemplate potential listed or quoted products of this kind.

Under the HK legal and the SFC regulatory regime, only financial products with more than 10% underlying crypto-assets may require more considered regulatory restrictions. For example, there may be funds- with less than 10% crypto-assets underlying- selling to the public in HK. Although all funds selling to the public in HK are legally required to be authorised by the SFC, the funds are not obliged to disclose the specific asset details that constitute less than 10% of the total fund portfolio. Therefore, there is no detailed information on this.

If a security where the underlying is more than 10% crypto-assets and is offered to retail clients, it needs special approval. So far, there is no authorized of listed or quoted product in HK in this regard. There is an

approved crypto fund manager in HK managing 2 crypto funds but those can only be sold to professional investors.

2. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to wholesale clients in your jurisdiction? Further, are there listed or quoted products that are not accessible to retail clients given suitability or other limitations (e.g. future contracts)?

Please see the answer above

3. To the extent not answered by the above, what is the nature and scale of current financial market platforms authorised to list or quote financial products where the underlying is crypto-assets?

There is no such platform in HK. There is an SFC-licensed virtual asset trading platform which provides trading venue to professional investors to trade bitcoins and security tokens.

Response from the OSC

93 The OSC is an independent Crown corporation that regulates Ontario's capital markets by making rules that have the force of law and by adopting policies that influence the behaviour of capital markets participants.

1. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to retail clients in your jurisdiction? Further, please indicate if there are listed or quoted products. Do your financial markets rules contemplate potential listed or quoted products of this kind?

Investment funds

In Ontario, there are 7 investment funds (whose underlying assets are crypto assets) available to retail investors. This includes three recently launched exchange traded funds where the underlying crypto asset is Bitcoin and four closed-end mutual funds where the underlying crypto asset is Bitcoin or Ether. The approximate size of these investment products is $3 Billion CAD and interest in this space is growing rapidly. This includes issuers seeking to launch similar ETFs to those that have already launched or ETFs with exposure to other crypto assets.

In respect of these investment funds, they trade on the Toronto Stock Exchange and comply with all applicable investment fund rules (so there was no change to their operating rules to allow these products).

Derivatives

Some dealers in Ontario offer the bitcoin futures listed on regulated U.S. exchanges to retail (and institutional) clients. However last records suggest volume was insignificant for both client types.

Crypto asset trading platforms

Crypto asset trading platforms generally fall within two categories – those that trade crypto assets that are a digital representation of traditional securities (i.e., security tokens) and those that trade crypto assets such as Bitcoin, Ether, Litecoin, and other "commodity-type" crypto assets and stablecoins.[6]

Despite a large number of platforms that may operate or offer services to Canadians, there is only one platform registered with the OSC to date, that permits the trading of a "commodity crypto assets" (like bitcoin and ether). There is a growing interest in this subject-area, and the OSC actively engages with applicants.

The larger platforms (generally not located in Canada) have client accounts in the hundreds of thousands and the smaller platforms have client accounts in the few thousands. Trading volumes range from $100M to $500M per month for the larger platforms.

In March 2019, the Canadian provincial securities authorities (including OSC) published a proposed framework for crypto asset trading platforms.[7] These firms are expected to comply with existing regulatory requirements. However, this proposal is intended to be a tailored regulatory framework that addresses the novel features and risks of crypto asset trading platforms. As part of registering these platforms, terms and conditions may be placed on their registration to address the unique risks of the business model and an exemption from certain regulatory requirements may be granted to accommodate their business model. This framework addresses issues relating to custody, valuation, prospectus requirements, and appropriate risk disclosure.

Initial coin offerings

There have been a handful (less than 5) "regulated" initial coin offerings that have been conducted in Ontario.[8] However, the total raised capital has been minimal and interest in this space has largely dissipated since 2018.

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[6] https://www.osc.ca/sites/default/files/pdfs/irps/csa_20200116_21-327_trading-crypto-assets.pdf
[7] https://www.osc.ca/en/securities-law/instruments-rules-policies/2/21-402/joint-canadian-securities
[8] https://www.osc.ca/en/securities-law/instruments-rules-policies/4/46-307/csa-staff-notice-46-307-cryptocurrency-offerings; https://www.osc.ca/en/securities-law/instruments-rules-policies/4/46-308/csa-staff-notice-46-308-securities-law

2. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to wholesale clients in your jurisdiction? Further, are there listed or quoted products that are not accessible to retail clients given suitability or other limitations (e.g. future contracts)?

In Ontario, there is a limited number (under 5) of investment funds, intended for only institutional/high net worth investors, where the underlying is a crypto asset. One of these investment funds has approximately $20M in AUM (and invests in bitcoin, litecoin and ethereum). The OSC are also aware of a small number of crypto asset trading platforms that intend to offer trading services to only institutional and/or high net worth investors.

3. To the extent not answered by the above, what is the nature and scale of current financial market platforms authorised to list or quote financial products where the underlying is crypto-assets?

Please see the responses above.

Response from MAS

94 MAS is Singapore's central bank and integrated financial regulator. MAS promotes sustained, non-inflationary economic growth through the conduct of monetary policy and close macroeconomic surveillance and analysis. It manages Singapore's exchange rate, official foreign reserves, and liquidity in the banking sector.

1. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to retail clients in your jurisdiction? Further, please indicate if there are listed or quoted products. Do your financial markets rules contemplate potential listed or quoted products of this kind?

MAS currently takes the view that financial products which are based on or otherwise reference crypto-assets are not suitable for most retail investors.

However, MAS have taken a calibrated step to regulate crypto-derivative products that are listed and traded on Approved Exchanges, to ensure effective regulatory oversight over such entities. Currently, the only such regulated contract that is available to retail investors is the Bitcoin monthly futures. However, the target clientele for the contract is not retail investors. MAS has also issued guidance to intermediaries offering crypto-derivative products to put in place additional safeguards when dealing with retail investors – these include disclosures on the risks of trading in crypto-derivative products, not advertising such products to retail customers and collecting higher margins.

2. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to wholesale clients in your jurisdiction? Further, are there listed or quoted products that are not accessible to retail clients given suitability or other limitations – e.g.: future contracts.

As above.

3. To the extent not answered by the above, what is the nature and scale of current financial market platforms authorised to list or quote financial products where the underlying is crypto-assets?

As above.

Response from the UK FCA

95 The FCA is the conduct regulator for nearly 60,000 financial services firms and financial markets in the United Kingdom, and the prudential supervisor for 49,000 firms, setting specific standards for 19,000 firms. It focuses on protecting consumers, enhancing market integrity and promoting competition.

1. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to retail clients in your jurisdiction? Further, please indicate if there are listed or quoted products. Do your financial markets rules contemplate potential listed or quoted products of this kind?

In October 2020, the FCA published final rules banning the sale of derivatives and exchange traded notes (ETNs) that reference certain types of cryptoassets to retail consumers from 6 January 2021. The prohibition includes unregulated transferable cryptoassets that are defined as;

(a) capable of being traded on or transferred through any platform or other forum;

(b) not limited to being transferred to its issuer in exchange for a good or service, or to an operator of a network that facilitates its exchange for a good or service;

(c) not electronic money, or Central Bank Digital Currency or a commodity; and

(d) not a specified investment.

Prior to the prohibition and in terms of the scale of the UK market, CFDs are the main derivative product that reference cryptoassets. Based on figures obtained from firms, between August to October 2017, there was c £3.4bn in retail client trading volume, representing 0.7% of total retail CFD trading volumes. This fell to £77m in the same three months in 2018. The decline in

trading volumes is partly linked to the introduction of ESMA's temporary intervention measures restricting leverage to 2:1 from 1 August 2018, as well as a significant decline in the price of cryptoassets during this period.

Two UK firms offer futures contracts on exchange tokens versus US Dollar. They reported having just over 13,000 retail clients trading these products monthly between June 2017 and December 2018.

Three firms offer retail clients access to ETNs on exchange tokens that are listed on the Nordic Nasdaq. They reported c.11,000 clients with c.£97m invested as of the end of January 2019 and 30 December 2018 respectively.

2. What is the nature and scale of regulated financial products/securities/derivatives where the underlying is crypto-assets that are offered to wholesale clients in your jurisdiction? Further, are there listed or quoted products that are not accessible to retail clients given suitability or other limitations – e.g.: future contracts.

Mainstream authorised retail funds, Undertakings for Collective Investments in Transferable Securities (UCITS) schemes and non-UCITS retail schemes (NURS), cannot currently invest in unregulated cryptoassets directly, or in derivatives and ETNs referencing them. This is due to restrictions on the types of 'eligible' assets such funds can invest in. That situation might change over time if the cryptoasset market evolves such that eligibility standards can be met.

Qualified investor schemes (QIS) and unauthorised alternative investment funds (AIFs) could potentially invest in derivatives referencing unregulated tokens. Unauthorised AIFs could also invest in the tokens themselves if permitted by their investment mandate. However, QIS and unauthorised AIFs are subject to rules that restrict promotion of non-mainstream pooled investments to certified high net worth or sophisticated retail clients. We view the combination of existing restrictions on the promotion of unauthorised AIFs, the diversification of risk in a pooled fund structure and existing regulatory obligations on AIF managers, as sufficient to protect the limited subset of retail clients who can access them.

To the extent not answered by the above, what is the nature and scale of current financial market platforms authorised to list or quote financial products where the underlying is crypto-assets?

Answered in relation to question 2.

Appendix 4: Fundraising and access to capital—Extracts from ASIC's first submission

96 In this appendix, for the assistance of the Select Committee we include the content from Appendix 3 of ASIC's first submission. This appendix provides general information on capital raising options available to fintech and regtech businesses in Australia. ASIC provides this information because of the Select Committee's interest in encouraging investment in Australian businesses (including fintech and regtech businesses).

Raising funds at early stages

97 The Corporations Act regulates fundraising activity, including all financial products that are offered in Australia.

98 Many early stage fintech and regtech companies commence operations as a proprietary (Pty) company. Proprietary companies are generally prohibited from having more than 50 non-employee shareholders and commonly raise funds from founders. However, proprietary companies can also raise funds from other investors if the fundraising is exempt from the requirement for a disclosure document or by equity-based crowd-sourced funding. The main types of offers that a tech company can make without a disclosure document are:

(a) personal offers accepted by less than 20 investors, which raise no more than $2 million in aggregate in any rolling 12-month period (s708(1));

(b) offers where the amount paid (or topped up) results in a total investment by a person of at least $500,000 in the class of securities (s708(8)(a) or (b));

(c) offers to sophisticated investors (who have a certificate from a qualified accountant saying that the investor has net assets of at least $2.5 million or gross income of at least $250,000 per year for each of the last two financial years) (s708(12));

(d) offers to a senior manager (or their family) (s708(8)); and

(e) offers to professional investors (such as superannuation funds, ASX listed entities, persons controlling gross assets of at least $10 million or ASX listed entities or their related bodies corporate) (s708(11)).

Crowd-sourced equity fundraising

99 Since September 2017, Australia has maintained an equity-based crowd-sourced funding (CSF) regime. The CSF regime aims to facilitate access to capital for small-to-medium-sized unlisted Australian public companies (and

since October 2018, Australian proprietary companies) by reducing the regulatory and disclosure requirements for making public offers of shares, while seeking to ensuring adequate protections for retail investors.

100 CSF offers provide an avenue for early-stage growth, as shares issued under a CSF offer do not count towards the 50 shareholder limit for non-listed entities.

101 The CSF regime allows Australian eligible companies (those with less than $25 million of consolidated gross assets and less than $25 million of annual revenue) to raise up to $5 million in a 12-month period. One example is the ridesharing company Shebah Pty Ltd. This company recently raised $3 million via a CSF offer and maintained its proprietary status while expanding its register to include more than 2,000 individuals.

ASIC guidance on crowd source equity fundraising

102 As the regulator responsible for fundraising activities and financial services, ASIC has engaged with Treasury and the Australian Government in the development of the CSF regime.

103 To further assist with the development of a CSF industry, ASIC has published updated regulatory guidance for intermediaries seeking to provide CSF services and for companies seeking to raise funds on a platform of a CSF intermediary.

104 Regulatory Guide 261 *Crowd-sourced funding: Guide for companies* (RG 261) will assist companies seeking to raise funds through crowd-sourced funding to understand and comply with their obligations in the new regime, particularly as many of these companies will not have experience in making public offers of their shares. ASIC has also published a template CSF offer document to help companies prepare their CSF offers.

105 Regulatory Guide 262 *Crowd-sourced funding: Guide for intermediaries* (RG 262) will assist intermediaries seeking to provide CSF services, particularly as this is a new type of financial service and there are unique gatekeeper obligations for operating platforms for CSF offers.

106 ASIC has also provided relief for intermediaries and eligible public companies from certain requirements under the Corporations Act to help facilitate crowd-sourced funding.

Growing the business

107 A start-up business transitioning into a public company may raise funds from the public through disclosure documents. These documents contain certain

key pieces of information that allow prospective investors to judge the merits of a particular offer.

108 If the company has audited accounts for at least a 12-month period, it can use an ‘offer information statement’ to raise up to $10million.

109 Another option is using an initial public offer with a prospectus. A start-up company can raise funds using a prospectus and list on ASX.

Capital raising once listed

110 Once a company is listed, it can take advantage of a number of fundraising opportunities, including secondary raisings from existing investors (including pro rata offers under s708AA and offers up to $30,000 per investor under ASIC’s exemption for share and interest purchase plans in ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547). These secondary raisings are an important source of revenue for start-ups that are still commercialising their technology or seeking to expand their work in related areas.

Employee incentive schemes

111 ASIC has issued relief for employee incentive schemes: see Class Order [CO 14/1000] *Employee incentive schemes: Listed bodies* and Class Order [CO 14/1001] *Employee incentive schemes: Unlisted bodies*. This relief enables companies to incentivise employees with equity-based remuneration. This is popular among tech companies that require highly skilled staff but are unable to offer competitive salaries.

112 Treasury recently consulted on law reform that will make it easier for companies, particularly unlisted companies, to raise funds from employees.

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Key terms

Term	Meaning in this document
ACCC	Australian Competition and Consumer Commission
ADI	An authorised deposit-taking institution—a corporation that is authorised under the *Banking Act 1959*. ADIs include: • banks; • building societies; and • credit unions
AFCA	Australian Financial Complaints Authority—AFCA is the operator of the AFCA scheme, which is the external dispute resolution scheme for which an authorisation under Pt 7.10A of the Corporations Act is in force
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
APRA	Australian Prudential Regulation Authority
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ASIC's first submission	*Submission by the Australian Securities and Investments Commission*, December 2019
ASIC's second submission	*Submission by the Australia Securities and Investments Commission, November 2020*
ASX	ASX Limited or the exchange market operated by ASX Limited
AUSTRAC	Australian Transaction Reports and Analysis Centre
BIS	Bank for International Settlements
CFD	A contract for difference
CFTC	Commodity Futures Trading Commission (CFTC)
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act

Term	Meaning in this document
CSF offer	An offer of ordinary shares that is made under the CSF regime in Pt 6D.3A of the Corporations Act Note: See s738B of the Corporations Act.
CSF intermediary	An AFS licensee whose licence expressly authorises the licensee to provide a crowd-funding service Note: See s738C of the Corporations Act.
Entitlement offer	An entitlement or rights offer is an offer to existing shareholders to purchase a certain number of securities based on a pre-determined ratio, at a specified price. Rights issues may be renounceable or non-renounceable. In a renounceable rights issue, the rights can be traded if there is a market for them. Acquirers of these rights may subsequently exercise them to acquire shares in the company. The entitlements of shareholders under a non-renounceable rights issue cannot be transferred
ETP	Exchange traded product
ETF	Exchange traded fund
FCA	Financial Conduct Authority (UK)
fintech	Financial technology
FSB	Financial Stability Board
ICO	Initial coin offering
INFO 225 (for example)	An ASIC information sheet (in this example numbered 225)
MAS	Monetary Authority of Singapore
OSC	Ontario Securities Commission
OTC	Over the counter
Placement	A placement is an allotment of shares made directly from the company to institutional or wholesale investors
RBA	Reserve Bank of Australia
regtech	Regulatory technology
REP 616 (for example)	An ASIC report (in this example numbered 616)
RG 185 (for example)	An ASIC regulatory guide (in this example numbered 185)
Rights offer	See Entitlement offer

Term	Meaning in this document
s1043A	A section of the Corporations Act (in this example numbered 1043A), unless otherwise specified
SEC	Securities Exchange Commission (US)
Select Committee	Senate Select Committee on Financial Technology and Regulatory Technology
SFC	Securities and Futures Commission (HK)
Share purchase plan	A share purchase plan is a form of capital raising by a listed company that offers its existing shareholders the opportunity to apply for new additional shares. Regulations limit the maximum application per shareholder to $30,000. Typically, a share purchase plan is conducted at a discounted price to the current listed price of the stock to encourage shareholders to purchase more shares. In order to participate in the share purchase plan, the person must have been a shareholder on the record date set by the company
Unit purchase plan	A unit purchase plan or interest purchase plan is an offer to existing holders of interests in a managed investment scheme listed on the ASX

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