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Dear Treasury,

Consultation Paper - Crypto Asset Secondary Service Providers: Licensing and Custody Requirements

American Express welcomes the opportunity to provide comment on Treasury's Consultation Paper - *Crypto asset secondary service providers: Licensing and custody requirements*.

A lack of regulation in the crypto space makes investment and partnering decisions challenging for organisations wishing to explore crypto. A licensing framework tied to robust, yet scalable compliance obligations and proportionate enforcement will provide certainty.

The existing regulatory framework is understandably deficient when it comes to crypto assets. We submit that these gaps should be addressed quickly, in light of the scale of uptake and pace of industry growth. We do not consider that industry regulation is appropriate given the novelty, complexity and volatility of crypto assets and capacity for significant consumer harm.

We support Treasury's focus on CASSPrs as a grouping (i.e., providers offering custody, storage, brokering, exchange services, or operating a market in crypto assets). These activities constitute a point of vulnerability in the distribution of Crypto assets where human intervention can increase the risk of fraud and data security breaches.

Terminology

American Express does not have a strong view as to appropriate terminology, however a more simplified term such as 'Crypto Asset Participant' (CAP) or 'Crypto Service Provider' (CSP) may be beneficial.

Proposed Definitions

Loyalty schemes that are on a blockchain or that otherwise use cryptography should be carved out from the definition of crypto assets. This would ensure that existing exemptions under the Corporations Act are continued through to the new regime.

Moving loyalty points to a blockchain is likely to be attractive to loyalty scheme operators given operational efficiencies, ability to innovate and to create new value added services, and cost benefits.

It would not make sense for operators to lose the benefit of existing regulatory exemptions, simply because of a change to the underlying technology underpinning that scheme.

We support Treasury's 'technology neutral' approach. As Treasury notes 'if a crypto asset is a representation of an underlying asset - then the regime that already applies to the underlying asset should apply as far as practical'.

We note that loyalty schemes are already notionally regulated as 'Financial Products' under the Corporations Act, on the basis that they are a 'Non-Cash Payment Facility'. ASIC has however exempted loyalty schemes given that they pose limited risk to consumers.

As ASIC noted in its Regulatory Guide 185, loyalty programs are 'generally simple, easy-to-use and well understood by retail consumers. They are usually issued at limited cost (if any) to the client and as marketing tools ancillary to other services (such as credit) provided by the issuer or its business partners.'

As a result of this conclusion ASIC provided an exemption under (Non-cash Payment Facilities) Instrument 2016/211. This exemption applies to Loyalty Schemes where the following applies:

- a) their sole or main purpose is to promote spending on the goods and/or services of the issuer or third parties participating in the scheme;
- b) clients are allocated a measure of value (credits) as a result of acquiring or using goods and/or services of the issuer or third parties participating in the scheme, whether or not a monetary value is expressly attributed to the credits; and
- c) the credits can be used to make a payment or part payment for goods or services or to obtain some other benefit.

Loyalty schemes must still comply with the consumer protection provisions of the ASIC Act or Competition and the Consumer Act (the specific act depends on the nature of the loyalty program).

The ACCC and ASIC have sufficient powers currently to intervene in respect to loyalty schemes with the ACCC conducting a review into loyalty schemes most recently in 2019.

American Express has operated a successful global loyalty program for decades called Membership Rewards. Loyalty programs like Membership Rewards have never posed any threat to the financial or payments system and the risks of potential consumer harm are already subject to existing consumer and data privacy laws.

Competition in the loyalty program market is healthy, with schemes operating across airlines, supermarkets, retail brands and credit cards. There is no indication of any risk of market failure.

Whether or not loyalty programs are operated on or off a blockchain, does not change their fundamental risk profile. As such, they should be exempt from crypto-asset regulation.

Dealers

Limb (v) of the definition of 'Crypto Asset Secondary Service Provider' includes reference to 'participation in and provision of financial services...'. Elsewhere in the consultation paper, Treasury

also proposes that the proposed licensing regime will apply to 'dealers' of crypto assets. These definitions are ambiguous and it is unclear if these are intended to cross-reference existing Corporations Act definitions. Clarity should be provided in respect of the concept of 'dealing' and 'participation in...financial services'.

We do not think that 'dealing' or 'arranging', as such terms are understood in the Corporations Act should be a regulated activity in respect of CASSPRs. The main regulated activities should relate to custody, storage, exchange, and brokerage services in respect of the crypto assets directly.

Parties that are separate from the CASSPR and not involved in the handling of the asset directly (for example, a party that merely introduces, refers, or promotes a CASSPR) should not be subject to regulation.

Conclusion

American Express acknowledges and supports the benefits that a decentralised financial system can bring to both consumers and the economy. The adoption of crypto assets by large financial institutions would improve legitimacy of the crypto asset market. Regulation of crypto assets is key to providing the commercial and legal certainty for both consumers and businesses looking to expand into the space.