ISDA RESPONSE TO HMT REGARDING DRAFT FINANCIAL SERVICES AND MARKETS ACT 2000 (REGULATED ACTIVITIES AND MISCELLANEOUS PROVISIONS) (CRYPTOASSETS) ORDER 2025

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23 May 2025

Response to His Majesty's Treasury ("HM Treasury") draft Financial Services and Markets Act 2000 (Regulated Activities and Miscellaneous Provisions) (Cryptoassets) Order 2025 (the "SI")

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] welcomes the opportunity to provide feedback on the draft SI.

ISDA is committed to promoting safe and efficient derivatives markets. A key part of this commitment involves developing robust contractual standards and guidance to support innovation. To this end, ISDA recently published its Tokenized Collateral Model Provisions for inclusion in the ISDA 2016 Credit Support Annex for Variation Margin (VM) (the "**Model Provisions**"), together with a guidance note setting out (i) a basic taxonomy of common tokenization structures and (ii) a non-exhaustive list of key issues to consider when analyzing the enforceability of collateral arrangements involving tokenized collateral. The Model Provisions are intended for use by parties transferring tokenised securities or 'stablecoins' that utilise distributed ledger technology as collateral pursuant to standard collateral support documentation.

ISDA and its members are keen to support the development of a clear and effective regulatory framework for cryptoassets in the UK. While we appreciate HM Treasury's efforts, we have identified certain aspects of the draft SI that could create uncertainty or lead to unintended consequences, particularly with respect to certain activities in the derivatives markets, including the use of tokenized collateral. Our response focuses primarily on the scope of the "safeguarding" activity, especially as it may impact on collateral arrangements, and on the proposed definitions of "qualifying cryptoasset" and "specified investment cryptoassets".

1 Safeguarding Activity: Potential Impact on Derivatives Collateral Arrangements

HM Treasury proposes in Article 3(5) of the SI to introduce a new regulated activity of "safeguarding of qualifying cryptoassets and relevant specified investment cryptoassets" under Article 9O of the Regulated Activities Order ("**RAO**"). The activity is defined to include circumstances where a person has "control of the cryptoasset through any means that would enable [that person] to bring about a transfer of the benefit of the cryptoasset to another person". The definition of "on behalf of another" extends to situations where the other person has "a right against [the safeguarder] for the return of

[1] **About ISDA**: Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 76 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on LinkedIn and YouTube.

a qualifying cryptoasset or relevant specified investment cryptoasset". Articles 9P-9S provide various exclusions to this activity.

The definition of "safeguarding" is very broad. Coupled with an unclear interpretation of "control," this could have unintended consequences some of which are considered further below. The proposed regulated activity of "safeguarding of qualifying cryptoassets and relevant specified investment cryptoassets" is of concern to ISDA members due to its potential to capture standard collateral practices within the derivatives market.

1.1 Impact on Collateral Arrangements for Qualifying Cryptoassets

It is unclear whether a collateral taker, who obtains "control" over cryptoassets (for example, in a manner analogous to that required under the Financial Collateral Arrangements (No. 2) Regulations 2003 ("**FCARs**") to perfect a security interest, allowing transfer upon the collateral provider's default) would be deemed to be "safeguarding". Such arrangements are fundamental to secured derivatives transactions. We note that the exclusion in RAO 9V (absence of holding out) may not be available if the collateral taker is otherwise holding themselves out as providing other financial services in relation to cryptoassets, such as lending or hedging and, indeed, if control for purposes of the FCARs is within scope, then the exclusion in RAO 9V would not be available to a person that holds itself out as taking security over qualifying cryptoassets.

In addition, we note that the definition of being "on behalf of another" includes where the other person has "a right against C for the return of *a* qualifying cryptoasset." ISDA is concerned that this could inadvertently capture title transfer collateral arrangements, where title to collateral passes to the collateral taker, who has an obligation to return an *equivalent* cryptoasset. Title transfer collateral arrangements are widely used in the derivatives market.

The imposition of a licensing requirement for engaging in the standard collateralisation practices outlined above would create significant disruption and operational burdens.

Recommendations: To avoid unintended disruption to derivative markets, ISDA suggests the following changes:

- Clearly delineate that standard collateral arrangements (both security interest and title transfer) and securities financing transactions do not fall within the scope of the safeguarding activity. This could be achieved by refining the definition of "safeguarding" and/or providing explicit exclusions for persons not holding themselves out as providing custody services (eg. collateral takers acting within typical market structures). This could be achieved by refining the definition of 'safeguarding' and/or by strengthening the exclusion in Article 9S(2) of the RAO. The exclusion should clearly state that a person is not considered to be conducting the regulated activity of safeguarding if they are not specifically holding themselves out to their client as providing cryptoasset custody or safeguarding services.
- Provide clear guidance on the meaning of "control" in the context of safeguarding, particularly as it relates to the mechanisms specified in Article 9O(3) of the RAO. This guidance should specifically address whether 'control' encompasses concepts such as legal control (as distinct from practical ability to transfer alone) and how the definition applies in scenarios involving joint control or multi-signature arrangements where no single party has unilateral control over the cryptoasset.

1.2 Impact on Collateral Arrangements for Specified Investment Cryptoassets

Under Article 3(5) of the SI, the safeguarding activity would apply not only to qualifying cryptoassets but also to "relevant specified investment cryptoassets", defined in Article 9O(4)(a) as specified investment cryptoassets that are securities or contractually based investments.

ISDA is particularly concerned about the inclusion of "relevant specified investment cryptoassets" within this new safeguarding activity. Safeguarding and administration in respect of traditional specified investments (such as securities) are already well-defined regulated activities.

Applying a new, potentially broader, safeguarding definition to cryptoassets that are, or represent, specified investments (such as tokenised securities) could create an uneven playing field. It would introduce unnecessary complexity to collateral management processes where such assets are used, diverging from established practices for their non-tokenised equivalents. This outcome would not be technologically neutral. ISDA sees no policy rationale for imposing a new regulated activity of safeguarding “relevant specified investment cryptoassets” that is distinct from the activity of safeguarding and administering specified investments under article 40 of the RAO. If there are particular concerns relating to safeguarding certain instruments that are represented by qualifying cryptoassets, this can be achieved equally effectively by the FCA rules and policies applicable to the existing regulated activity.

The concerns raised in paragraph 1.1 regarding the scope of “control” and the potential impact on collateral arrangements are equally relevant in the context of specified investment cryptoassets. As with qualifying cryptoassets, a collateral taker who obtains "control" over specified investment cryptoassets (for example, in a manner required under the FCARs to perfect a security interest) could potentially be deemed to be conducting the safeguarding activity. Title transfer collateral arrangements involving specified investment cryptoassets could also be inadvertently caught within the safeguarding activity, despite being well-established within the market.

Recommendation: It would be helpful for HM Treasury to clarify the policy rationale for including "relevant specified investment cryptoassets" within this new regulated activity, noting the need to ensure that the regime promotes technological neutrality and consistency with existing frameworks for specified investments. An ideal outcome would arise if HM Treasury were to conclude that the existing regulated activity of safeguarding and administering specified investments under article 40 of the RAO is adequate (subject to any appropriate refinements) to address the policy concerns.

1.3 Cross-Border Impact

Article 4(3) of the SI provides that where a person is carrying on a regulated activity specified in article 9O of the RAO it will be treated as conducting that activity in the UK if it is doing so “directly or indirectly on behalf of a consumer in the United Kingdom” and “is not carrying on the activity at the direction of a person who is authorised to carry on a regulated activity of that kind”.

The proposed amendments to section 418 of the Financial Services and Markets Act 2000, concerning when overseas firms are deemed to be carrying on regulated activities "in the UK," could have significant implications for global derivatives markets and would benefit from further clarification.

In particular, the proposed test of acting 'directly or indirectly on behalf of a consumer in the United Kingdom' presents significant operational challenges. Global custodians, including those who solely service wholesale clients, may find it difficult to ascertain whether a UK consumer ultimately lies at the end of a complex custody chain. This could inadvertently bring such firms within the UK regulatory perimeter for cryptoasset safeguarding, even when their activities with traditional specified investments would not trigger UK regulation.

In addition, it is unclear whether a collateral taker would be seen as acting “at the direction” of a person who is authorised to carry on a regulated activity of the relevant kind. While the policy intent may be to exclude overseas firms serving only UK institutional customers for certain activities, this is not framed as a clear exclusion in the SI. This contrasts with existing approaches for specified investments and could create substantial uncertainty for firms engaging in cross-border derivatives business, potentially disrupting well-established global collateral management practices. It also exposes such custodians to a requirement to analyse distinct regulatory regimes for their activities that might currently fall within a single regime, significantly adding to their regulatory compliance burden.

Recommendation: If HM Treasury is unable to conclude that the existing regulated activity of safeguarding and administering specified investments under article 40 of the RAO is adequate to address the policy concerns, we encourage HM Treasury to ensure a clear and explicit approach to the jurisdictional scope, particularly for overseas firms servicing institutional customers or authorised intermediaries in the UK, to maintain consistency and predictability for global market participants. To achieve this clarity and consistency, we recommend that the jurisdictional scope for safeguarding cryptoassets, especially “relevant specified investment cryptoassets”, be closely aligned with the established principles for traditional specified investments, such as those under Article 40 of the RAO, including its exclusions. Any deviation from this established approach should be clearly justified with a publicly articulated policy rationale, on which the market has an opportunity to provide substantive feedback.

2 Definition of Qualifying Cryptoasset

HM Treasury proposes to introduce a definition of "qualifying cryptoasset" in Article 88F of the RAO as a cryptoasset that is "fungible" and "transferable", with various carve-outs as specified in Article 88F(4). Article 88F(2) further defines "transferable" to include circumstances where the cryptoasset "confers transferable rights" or is described in communications as being transferable or conferring transferable rights.

ISDA is concerned that the proposed definition of a "qualifying cryptoasset" is broad and could inadvertently capture a wide range of digitalisation initiatives that utilise cryptographic technology but do not represent distinct, transferable digital objects of property in themselves.

A key concern is the definition of "transferable" in the proposed RAO Article 88F(2), which encompasses situations where an asset merely "confers transferable rights" or is described in a communication as conferring such rights. This could potentially bring arrangements into scope where a distributed ledger is used simply as a record or register for rights in other assets, rather than the cryptoasset itself being the object of transfer.

Additionally, the term "fungible" lacks precise definition in this context, which could potentially lead to the inconsistent application of the regulations. The concept of fungibility is particularly challenging in the cryptoasset context as many digital assets may be individually distinguishable through their transaction history while still being treated as interchangeable for certain purposes. Without clear guidance, market participants will face uncertainty when determining which assets fall within scope.

Furthermore, the existing carve-outs in 88F(4) appear limited. As drafted, cryptoassets that merely record or evidence interests in specified investments or other regulated assets could be categorised as "qualifying cryptoassets," rather than being treated under their existing frameworks. We are also concerned about the absence of specific carve-outs for cryptoassets representing unregulated

contractual rights, commodities or electronic trade documents which could cause digitalisation initiatives occurring outside financial markets to move offshore.

For ISDA members, the lack of clarity outlined above creates uncertainty regarding the regulatory treatment of assets that may be used in the context of derivative transactions or be used as collateral. If a digital representation of a commodity, for example, becomes a "qualifying cryptoasset" due to these broad definitions, it could unnecessarily complicate its use in established commodity derivatives markets or as collateral.

Recommendation: ISDA suggest refining the definition of "transferable" under RAO 88F(2) to ensure it captures only genuinely transferable cryptoassets that are distinct objects of property. We also recommend providing clear guidance on the interpretation of "fungible" and considering additional carve-outs, for example, for cryptoassets that represent or evidence interests in commodities.

3 Definition of Specified Investment Cryptoasset

Article 3(2) of the SI introduces a definition of "specified investment cryptoasset" in the RAO as "a cryptoasset that is a specified investment, as specified within Part 3 (specified investments), including where the cryptoasset is a right to or an interest in such a specified investment within article 89 (rights to or interests in investments)".

Further to the safeguarding concerns, there is perceived uncertainty around the scope of "specified investment cryptoasset." It is not clear whether this category is limited to cryptoassets that are themselves specified investments, or if it could also capture cryptoassets that merely evidence or record interests in specified investments (for example, a digital bond where a distributed ledger or blockchain serves as the legal register).

If the latter, or if such recording mechanisms were inadvertently caught as "qualifying cryptoassets" due to the broad definition discussed earlier, it would create confusion and could subject instruments with the same legal nature as traditional securities to a different and potentially more burdensome regulatory regime without a clear policy justification. This clarity is important for the use of tokenised securities in derivatives transactions or as collateral.

Recommendation: We support calls for clear guidance confirming that the category of "specified investment cryptoassets" does not include cryptoassets that merely evidence or record interests in specified investments where no distinct digital asset is created.

We would welcome further discussion on any of these matters. Please do not hesitate to contact me or Marcus Hunter, Counsel, +1 (917) 993 0828 should you have any questions.

Yours sincerely,

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