

The changing UK regulatory landscape for crypto advertising

In brief

On 18 January 2022, HM Treasury **confirmed** that it will bring certain cryptoassets into the scope of the financial promotion regime. The Treasury's view is that the evidence of risks to consumers provides a strong case for intervention, and as such it intends to expand the scope of the Financial Promotions Order (FPO) to include cryptoassets. The Treasury's announcement was followed the next day by the launch of an FCA **consultation** on strengthening the financial promotion rules for high-risk investments, including cryptoassets.

These proposals also complement broader work by the Treasury to improve the financial promotion regime, including the proposed **new regulatory gateway** (s21 Gateway) for authorised firms who approve the financial promotions of unauthorised firms (s21 Approvers) and the **consultation** on reforms to the FPO exemptions for high net worth and sophisticated investors. The expansion of the FPO regime to include cryptoassets also sits within the Treasury's wider work on bringing cryptoassets within the regulatory perimeter, including its **consultation** on a regulatory regime for stablecoins (for more on those proposals, see our related **alert**).

The expansion of the FPO regime will introduce added complexity to the current regulatory approach to cryptoassets, with the boundaries of application drawn differently in each regime. Crypto businesses will soon need to navigate different and sometimes conflicting scopes of application with respect to the Treasury's proposed regulation of certain stablecoin service providers, the AML/CTF regime under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs), and the forthcoming FPO regime and the FCA's proposed financial promotion rules. For more on this complexity, see ***A mismatch in scope*** below.

In this alert, we consider the scope of the strengthened regime and proposed rules, and what they mean for crypto businesses.

Contents

Key points:

Treasury consultation response

Scope of cryptoassets

Controlled activities

Exemptions

FCA consultation

Scope of investments

Conditions for marketing high-risk investments

The consumer journey into high-risk investments

Strengthening the role of firms approving and communicating financial promotions

Applying the FCA's financial promotion rules to qualifying cryptoassets

ASA guidance on advertising cryptoassets

Timing and next steps

Contact Us

Key points:

- Certain currently unregulated cryptoassets will be brought within the FPO regime under the category of "qualifying cryptoassets". The Treasury proposes to define the scope of "qualifying cryptoasset" as any cryptographically secured digital representation of value or contractual rights which is fungible and transferable, but this definition is still provisional and under development. References to distributed ledger technology (DLT) in the definition have been removed to future-proof the FPO regime and align with the proposals in the Treasury's stablecoin consultation.
- No new controlled activities or exemptions are proposed, although certain existing activities will be broadened to apply to qualifying cryptoassets. The Treasury has chosen to not specifically capture wallet services. Exemptions will apply as they do currently – this means that the FPO exemptions for certified high net worth individuals (HNWIs) and self-certified sophisticated investors will not apply to qualifying cryptoassets.



- The FCA intends to rationalise the financial promotion rules for high-risk investments under the terms "Restricted Mass Market Investments" (RMMIs) and "Non Mass Market Investments" (NMMIs). RMMIs, which will include cryptoassets, can generally be mass marketed subject to certain conditions.
- The FCA has proposed a range of measures including strengthening risk warnings with prescribed language and risk information, banning inducements to invest (including incentives paid in cryptoassets), personalised risk warnings and a 24-hour cooling off period.
- The FCA proposes to develop a robust regime to complement the proposed s21 Gateway, when implemented. This includes a new date stamp for approved promotions and a new competence and expertise (C&E) requirement for firms communicating or approving financial promotions, an ongoing monitoring requirement for s21 Approvers, and extending existing conflicts of interest obligations to prevent anti-competitive behaviour (especially in the cryptoassets market).
- Under the FCA's proposed rules, it will not be possible for direct offer financial promotions (for example, any communication including a means of applying for the product alongside the promotion) of qualifying cryptoassets to be made to self-certified sophisticated investors. Financial promotions relating to cryptoassets will need to comply with the existing financial promotion rules in COBS 4, including the requirements for the promotion to be clear, fair and not misleading, and the changes proposed in the consultation regarding the consumer journey
- There will be a six-month transition period from finalisation of the FPO regime and FCA rules. For requirements relating to cryptoasset promotions, the FCA proposes that any changes apply from the date qualifying cryptoassets are brought within the FPO regime.

Treasury consultation response

The Treasury's consultation response draws the legislative boundary of the FPO expansion to include qualifying cryptoassets. It also sets out how the exemptions in the FPO, which allow promotions to be communicated by unauthorised persons without approval, will apply to qualifying cryptoassets.

Scope of cryptoassets

The Treasury will bring what it has deemed "qualifying cryptoassets" within scope of the FPO regime as controlled investments. As currently drafted, a qualifying cryptoasset is **any cryptographically secured digital representation of value or contractual rights which is fungible and transferable**. This definition notably does not include a reference to DLT, as had been proposed in the Treasury's consultation – the reference to DLT has been omitted to make the definition technology-agnostic, to future-proof for innovations in the underlying technology that cryptoassets utilise, and to align with the proposals in the Treasury's stablecoin consultation. However, the final drafting for the definition is still under development. Notwithstanding this, the Treasury has set out its views on several of the proposed criteria:

- **Transferability:** Including a transferability criteria within the definition will ensure that tokens such as travel passes, lunch passes, and supermarket loyalty schemes that are cryptographically secure are excluded from the regime. Transferability will also distinguish between those tokens that are used specifically and only for payment to a vendor (not in scope), and tokens which can also be traded between users for speculation or other purposes (in scope).
- **Fungibility:** The Treasury has decided to leave non-fungible tokens (NFTs) out of scope. However, regarding the specific issue of token "wrapping", the Treasury's view is that a wrapped token (where a fungible token is wrapped inside an NFT) could present key characteristics of

NFTs

The Treasury has left NFTs out of scope on the basis that the sale of NFTs typically depends on the utility or unique value the NFT gives the holder and is more akin to a digital collector item than a financial services product. Although the Treasury acknowledges that the NFT market has grown considerably in recent months and new types of NFTs have emerged which blur the boundary, it is not the Treasury's intention to apply financial promotions regulation to non-financial products. This means that promotions for NFTs will remain under the remit of the Advertising Standards Authority (ASA) for issues of both misleadingness and social responsibility. For more on this, see [ASA guidance on advertising cryptoassets](#) below.

In addition, as the NFT market is evolving rapidly and remains at an early stage of development, the Treasury does not yet have sufficient information on risks and use-cases. As such, seeking to bring NFTs into scope might have unintended consequences for the market. Instead, the Treasury will closely monitor market developments and take further legislative action if required.



fungibility, if it could be readily interchanged with other similar tokens. Ultimately the question of whether wrapped tokens would be captured depends on a case-by-case assessment.

- **Hybrid tokens:** Although there is no separate category or regulatory classification of "hybrid tokens", the Treasury expects that promotions in relation to these tokens would be within scope as either relating to a qualifying cryptoasset or as another controlled investment. This is because the statutory instrument will bring unregulated cryptoassets such as utility and exchange tokens into the scope of the FPO regime (provided they fall within the definition of "qualifying cryptoasset"), and security tokens are already captured as controlled investments in the RAO, and are therefore subject to the FPO.

The scope of "qualifying cryptoassets" will exclude other controlled investments, electronic money under the Electronic Money Regulations 2011, and central bank money. The Treasury also intends to exclude cryptoassets that are only transferable to one or more vendors or merchants in payment for goods or services.

Controlled activities

The following activities will be amended to apply to qualifying cryptoassets:

- dealing in securities and contractually based investments;
- arranging deals in investments;
- managing investments;
- advising on investments; and
- agreeing to carry on specified kinds of activity.

Promotions relating to crypto wallets

Promotions relating to crypto wallets will not be in scope. The Treasury has decided not to amend the list of controlled activities to include activities relating to custody services. However, custodian wallet providers will still need to register with the FCA under the AML/CTF regime and comply with the MLRs.

The Treasury does not intend to add any new controlled activities to the FPO. Whether certain cryptoasset lending activities or decentralised finance platforms are within scope of the regime ultimately depends on the activities being carried out and promoted, to be considered on a case-by-case basis.

Exemptions

Exemptions set out within the FPO, under which unauthorised persons can communicate financial promotions without approval by an authorised person, will apply to cryptoassets as they do to other assets more broadly. This means that:

- Part IV exemptions (including investment professionals, communications to journalists, and communications to overseas recipients), which relate to all controlled activities, will also apply to qualifying cryptoassets;
- Part V exemptions relating to insurance and deposit-taking will not apply as they are not relevant to cryptoassets; and
- Part VI exemptions (including high net worth companies, governments and central banks, and industrial and provident societies), which relate to certain controlled activities only, will apply where relevant given the existing scope of these exemptions.

Overseas crypto businesses

Overseas crypto businesses are not exempt – the FPO regime will apply to overseas crypto businesses issuing promotions if those promotions are capable of having an effect in the UK. The Treasury does not propose to amend the territorial scope of the FPO for cryptoassets.

Vendors who state that they accept crypto as payment

The Treasury considers that promotions that simply state that a vendor is willing to accept or offer qualifying cryptoassets in exchange for goods and services (for instance, a shop with a sign saying "we accept crypto") would not constitute an inducement to enter into investment activity, and would therefore be out of scope of the FPO regime. Therefore, no new exemptions relating to these promotions are necessary.

However, the Treasury's view is that the exemptions contained in articles 48 and 50A of Part VI of the FPO for certified HNWIs and self-certified sophisticated investors will not apply to qualifying cryptoassets because these exemptions, which were originally implemented for capital raising purposes, apply only to unlisted securities.



FCA consultation

The FCA has published a consultation ([CP22/2](#)) on strengthening the financial promotion rules for high-risk investments, including cryptoassets (when they are brought within the regime). The draft rules will apply to authorised firms approving and communicating financial promotions. The FCA has proposed a range of measures including strengthening risk warnings with prescribed language and risk information, banning inducements to invest, personalised risk warnings and a 24-hour cooling off period. Financial promotions relating to cryptoassets will need to comply with existing financial promotion rules, including the requirements for the promotion to be clear, fair and not misleading, and the changes proposed in the consultation regarding the consumer journey.

FPO-exempt promotions by unauthorised persons

Note that the proposed changes to the FCA's rules will have no impact where an unauthorised person uses an FPO exemption to promote investments.

Scope of investments

The FCA's proposals relate primarily to financial promotions for high-risk investments. "High-risk investments" refers to those investments which are subject to marketing restrictions under the FCA rules, including:

- investment based-crowdfunding (IBCF);
- peer-to-peer (P2P) agreements;
- other non-readily realisable securities (NRRSs), such as shares or bonds in an unlisted company;
- non-mainstream pooled investments (NMPs), including units in an unregulated collective investment scheme or a qualified investor scheme, certain securities issued by SPVs, and traded life policy investments;
- speculative illiquid securities (SISs) – which are debentures or preference shares where the proceeds are used for on lending, buying or acquiring investments, buying real property or funding the construction of property, including mini-bonds; and
- cryptoassets (once brought within the FPO perimeter).

Although units in Long Term Asset Funds (LTAFs) are categorised as NMPs under the current FCA rules, they are generally excluded from the FCA's proposals, with the exception of the proposed changes to the investor declaration. LTAFs are a new category of authorised open-ended investment fund able to invest in long-term illiquid assets and capable of being marketed to professional and sophisticated retail investors. The FCA will consult later in 2022 on potential changes to the distribution rules for LTAFs to further broaden the base of investors.

Conditions for marketing high-risk investments

The FCA intends to categorise high-risk investments in COBS 4 under the new terms "Restricted Mass Market Investments" (RMMIs) and "Non-Mass Market Investments" (NMMIs). RMMIs, which will include qualifying cryptoassets as well as P2P agreements and NRRSs, can generally be mass-marketed subject to certain conditions. Unless the investor is being advised, a firm cannot make a direct offer financial promotion in relation to RMMIs which, in general terms, specifies how consumers can respond or includes a form to do so, unless certain conditions are satisfied:

- the recipient of the promotion must be categorised as either a certified HNWI, a certified sophisticated investor, a self-certified sophisticated investor, or a certified 'restricted' investor according to the FCA Handbook rules; and
- the firm must comply with the FCA Handbook rules on appropriateness.

Note that, although the FCA intends to generally apply the same rules to cryptoassets as will apply to RMMIs, it will not be possible for direct offer financial promotions of qualifying cryptoassets to be made to self-certified sophisticated investors, in alignment with the Treasury's confirmation in its consultation response that the self-certified sophisticated investor exemption in the FPO will not apply to qualifying cryptoassets. However, in contrast to the Treasury's confirmation that the HNWI exemption in the FPO will not apply to qualifying cryptoassets, the FCA intends to allow direct offer financial promotions for cryptoassets to be communicated, or approved for communication, to HNWIs, to avoid the regime being too restrictive.

The mass marketing of NMMIs (which will include NMPs and SISs) to retail investors will be banned. NMMIs can only be marketed under the following conditions:



- an authorised firm can only communicate or approve financial promotions where an exemption to the marketing restrictions applies, including for certified HNWIs, certified sophisticated and self-certified sophisticated investors; and
- the firm must complete a preliminary suitability assessment for certified HNWIs and self-certified sophisticated investors. This requires a firm to acquaint itself with the investor's profile and objectives, to ascertain whether the investment is likely to be suitable.

The consumer journey into high-risk investments

The FCA's consumer research shows that the current approach isn't working as well as it should - consumers are simply 'clicking through' on their journey and accessing high-risk investments without understanding the risks involved. To remedy this, the FCA proposes a package of measures to strengthen its approach by making changes to the following areas:

- strengthening risk warnings with prescribed language and risk information for different types of high-risk investment;
- banning inducements to invest, including incentives paid in cryptoassets for signing up or introducing friends;
- introducing positive frictions for first time investors, including a personalised risk warning and a 24-hour cooling off period;
- improving investor declarations (for high net worth, sophisticated or restricted investors) by implementing an evidence declaration; and
- stronger appropriateness tests for RMMIs.

These proposed interventions are based on the FCA's [research](#) into the effectiveness of behavioural interventions – although, interestingly, the FCA found that FAQ-type summaries led to greater consumer understanding than positive frictions.

A number of quite granular record keeping requirements are also proposed. These include data on whether consumers proceed to access the investment after each intervention, whether consumers click the link in the risk warnings, and the outcomes of appropriateness assessments and client categorisation. Recognising that collecting and maintaining the data necessary to comply with these requirements could become rather burdensome for firms, the FCA has invited views on the specific metrics that would best allow the FCA to assess the efficiency and efficacy of its policies.

Strengthening the role of firms approving and communicating financial promotions

The FCA proposes to develop a robust regime to complement the forthcoming s21 Gateway, when implemented. This includes:

- a new date stamp for approved promotions and a new C&E requirement for firms communicating or approving financial promotions;
- an ongoing monitoring requirement for firms approving promotions; and
- extending existing conflicts of interest obligations to firms approving financial promotions for unauthorised persons or confirming compliance of a financial promotion for an

Improved risk warning requirements

The following wording will be required: *Don't invest unless you're prepared to lose all your money invested. This is a high-risk investment. You could lose all the money you invest and are unlikely to be protected if something goes wrong. Take 2 min to learn more.* Further, the FCA proposes prescribed risk information for different types of high-risk investment. This information would be presented in a pop up box when a consumer clicks on the link in the risk warning. Firms would still be expected to provide further risk information specific to their business model and the product or service promoted (under COBS 4.5.2), in addition to the prescribed pop-up, to ensure the whole promotion is fair, clear and not misleading.

Similarly, the following wording will be required for the personalised risk warning: *[Client name], this is a high-risk investment. How would you feel if you lost the money you're about to invest? Take 2 min to learn more.* The phrase "Take 2 min to learn more" would link to the product specific risk summaries described above relating to improved risk warnings.

Where the financial promotion does not appear on a website, mobile application or other digital medium, firms are expected to provide the "Take 2 min to learn more" risk summary to the consumer in a durable medium.

Vulnerability and debt-based payment options

The FCA is concerned that firms allowing consumers to invest using debt-based payment options (like credit cards) have not adequately considered that allowing these payment options could cause harm – over-indebtedness is a potential indicator of vulnerability. If firms decide to allow debt based payment options they should carefully consider whether they have adequate systems and controls to monitor for indicators of vulnerability and have regard to their obligations under the client's best interest rule and the Principles.



authorised firm, in order to help prevent anti-competitive behaviour. This is especially important in the cryptoassets market, where most cryptoasset firms are unauthorised and will need to have their financial promotions approved by an authorised firm with relevant expertise.

For more detail on the forthcoming s21 Gateway, see our related [alert](#).

Applying the FCA's financial promotion rules to qualifying cryptoassets

As explained above, although the FCA intends to generally apply the same rules to cryptoassets as will apply to RMMIs, it will not be possible for direct offer financial promotions of qualifying cryptoassets to be made to self-certified sophisticated investors, in alignment with the Treasury's decision in its consultation response not to apply the self-certified sophisticated investor exemption contained in the FPO to cryptoassets.

As cryptoassets are not currently subject to the financial promotion regime, it is unlikely that customers will yet have been categorised or passed an appropriateness test set by a firm marketing cryptoassets. Once cryptoassets are brought within the FPO perimeter, firms communicating or approving direct offer financial promotions will need to ensure clients are both categorised appropriately and an appropriateness test is undertaken – importantly, this includes when the direct offer financial promotions are marketed to *existing* customers wanting to engage in *further* investment activity. However, because the rules relating to personalised risk warnings and cooling off periods are only designed for first time investors as they are likely to be less effective in influencing the behaviour of investors that have already bought cryptoassets, the FCA does not propose to apply these rules to any existing customers.

Note, in particular, that many cryptoasset firms are unauthorised and will therefore need their promotions approved by a s21 Approver when they are brought into the FPO regime by the Treasury. Neither cryptoasset firms which are registered with the FCA under the AML/CTF regime nor firms authorised under e-money or payments regulation can communicate or approve financial promotions, unless they are also authorised persons within the meaning of section 31 of the Financial Services and Markets Act 2000 (FSMA). As cryptoassets currently sit outside the financial promotion regime, there is unlikely to be an existing population of s21 Approver firms - the FCA recognises that the population of authorised firms with sufficient C&E to approve cryptoasset financial promotions is likely to be limited at first, with around 300 firms that may be affected.

Relationship with the Consumer Duty

All authorised firms will need to comply with the Consumer Duty – this includes considering their responsibilities when approving promotions for unauthorised persons. However, the FCA acknowledges that it may not be appropriate for the Consumer Duty to apply where the s21 Approver does not have a direct relationship with the retail customer. This includes, for example, when monitoring communications that are not financial promotions, the timing of the communication by an unauthorised firm or requiring the unauthorised firm to test its communications.

For more about the Consumer Duty proposals, see our related [alert](#).

The FCA and advertising platforms

As part of the FCA's focus on financial promotions, it has applied increased pressure on advertising platforms to take responsibility for unauthorised and scam ads. In various statements and speeches, the FCA has made clear that it considers platforms responsible for the ads that they publish and that platforms should consider themselves in-scope of financial promotion rules- including criminal liability for the communication of unauthorised ads. Platforms who are already implementing new compliance measures to meet the FCA's expectation in the space will need to take note of the shift in the crypto space and compliance will need to be expanded to cover crypto activities. Given the strong messaging from the FCA and the Treasury in this area, advertising platforms can expect to see further increased scrutiny on their systems when it comes to crypto advertising under the new regime.

ASA guidance on advertising cryptoassets

While the FPO changes are awaited, cryptoasset firms will need to ensure that they comply with the UK's advertising rules. Until the FPO changes take effect, all unregulated cryptoassets will remain subject to the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code) rules on misleadingness and social responsibility, enforced by the ASA. After the date on which cryptoassets are brought within the FPO regime and issues of misleadingness become regulated by the FCA, the ASA will continue to retain oversight of issues of social responsibility across all forms of cryptoasset advertising. Note that, as NFTs are excluded from the announced changes to the FPO perimeter, advertising relating to NFTs will therefore remain under the remit of the CAP Code for issues of both misleadingness and social responsibility once the FPO changes have taken effect.



On 15 February 2022 the ASA published [guidance](#) on the application of the CAP Code to cryptoassets, following on from several recent ASA rulings relating to cryptoassets (for further discussion on those rulings, please see our related [post](#)). Cryptoasset firms should bear in mind these key points to note when promoting cryptoassets, including NFTs:

- **Make clear that cryptoassets are unregulated and not protected.** Advertisers must clearly state that cryptoassets are not regulated by the FCA. Ads must also make clear that cryptoassets are not protected by financial compensation schemes, so that potential investors are aware that they would not be subject to protections afforded by either the Financial Ombudsman Service or the Financial Services Compensation Scheme. This statement is presented in a sufficiently clear and prominent way, ensuring that it is legible and can be easily seen by consumers. For example, a risk warning that runs for one second at the beginning of a 20-second ad will not be sufficient.
- **Do not take advantage of consumers' inexperience or credulity.** Code [rule 14.1](#) states that financial products must be set out in a way that allows them to be understood easily by the audience being addressed. As cryptoassets are fairly new, and are unique, a lot of the terminology will be new to the majority of consumers and could well be confusing and therefore potentially misleading. The ASA has found that an ad for a promotion which offered free Bitcoin with the purchase of pizza, which required participants to open a trading account, was found to be irresponsible as it took advantage of consumers' inexperience or credulity and trivialised investment in cryptocurrency. The ASA has also found that ads which do not make clear that capital gains tax could be payable on profits from investing took advantage of consumers' inexperience or credulity.
- **Include all material information.** In line with [rule 3.3](#), ads must not mislead consumers by omitting material information. Material information includes the fact that tokens being offered are cryptoassets or that to buy tokens the consumer must first purchase another cryptocurrency.
- **Make clear that value can go down as well as up.** Code [rule 14.4](#) states that ads must make clear that the value of investments is variable and, unless guaranteed, can go down as well as up. Ads must include a statement making this sufficiently clear. Significant limitations and qualifications must be stated and presented clearly.
- **State the basis used to calculate any projections or forecasts.** Code [rule 14.3](#) states that the basis used to calculate any rate of interest, forecast or projection must be apparent immediately. The basis of any projection in ads must be made clear and the advertiser have adequate substantiation to support its claims.
- **Make clear that past performance is not a guide for future performance.** Code [rule 14.5](#) states that ads should make clear that past performance or experience does not necessarily give a guide for the future. For example, the ASA investigated an ad which stated "...£5 in #Bitcoin in 2010 would be worth over £100,000 in January 2021. Don't miss out on the next decade..." and considered that this claim used the past performance of Bitcoin to encourage consumers to use the service. Because the ad did not make clear that past performance or experience did not necessarily give a guide for the future, the ad was found to be misleading.



Timing and next steps

The Treasury intends to put in place a six-month transitional period from both the finalisation and publication of the proposed FPO regime and the complementary FCA rules. The FCA's consultation closes on 23 March 2022, and final rules are expected in summer 2022 – meaning that it is unlikely the new regime will apply before 2023 (and indeed the ASA anticipates that the new rules will not take effect before 2023). The FCA proposes to give firms three months from publishing final rules to comply with the new requirements for the consumer journey and the new requirements for s21 Approvers. For requirements relating to cryptoasset promotions, the FCA proposes that any changes apply from the date qualifying cryptoassets are brought within the FPO regime.

For crypto businesses, compliance may be a huge hurdle to jump. Although the FCA acknowledges that the pool of s21 Approvers for cryptoassets will be quite limited when the regime takes effect, the regulator has indicated that it will take a robust view and expect full compliance from the outset. Citing too many poor quality and non-compliant promotions being approved and communicated to retail investors, the FCA intends to subject approvers of cryptoasset promotions to the same requirements that will apply to all other s21 Approvers, notwithstanding the expected lack of C&E in the industry as the regime begins to apply.

More generally, the FCA has been publicly critical of the poor compliance practices it has seen among crypto businesses seeking AML/CTF registration, and a considerable volume of those applicants have been rejected. Given the regulator's robust expectations of immediate full compliance from an industry largely new to stronger regulatory oversight, crypto businesses navigating the new FPO regime, once it takes effect, should expect the FCA to closely scrutinise the industry's practices and be prepared for swift supervisory action from the regulator.

A mismatch in scope

The FPO regime will only apply to cryptoasset promotions – it will not affect the regulatory status of the underlying activity. To the extent that an activity relating to cryptoassets is unregulated today, it will remain unregulated once the FPO regime and new rules apply. The existing perimeter of the AML/CTF registration regime will also remain unaffected, and firms under that regime will continue to be required to register with the FCA. This is particularly important where businesses are providing crypto wallet services, as custody services will not fall within the FPO regime but remain within scope of the AML/CTF registration regime – and, to make the situation even more complex, custody services will fall within the scope of the Treasury's proposed stablecoin regime when provided in relation to certain stablecoins.

However, the regimes define cryptoassets differently, resulting in a lack of clarity for the industry trying to navigate the different requirements. The MLRs define “cryptoasset” for the purposes of the AML/CTF registration regime as a cryptographically secured digital representation of value or contractual rights that uses a form of DLT and can be transferred, stored or traded electronically. This definition is also used by the ASA in their guidance on advertising cryptoassets (as explained further above). The scope of this definition includes exchange tokens used for speculative purposes, like Bitcoin and Ether, as well as NFTs.

By contrast, the Treasury's stablecoin regime consultation and FPO regime changes deliberately omit any mention of DLT, in order to future-proof the regimes. Further, the Treasury's stablecoin regime proposals would apply, at least initially, only to fiat- or asset-referenced tokens used as a means of payment.

This means that, on the one hand, the scope of cryptoassets included within the perimeter of these regimes has the potential to be wider than the AML/CTF and ASA regimes, because they do not rely on the use of DLT. On the other hand, the AML/CTF and ASA regimes will capture NFTs and other types of tokens relying on DLT that do not necessarily have the characteristic of fungibility. Further, the Treasury's proposed stablecoin regime will apply only narrowly at first, to certain tokens used as a means of payment.

Crypto businesses will need to carefully review how the different regulatory and marketing regimes will apply to their specific activities.



Contact Us



Mark Simpson

Partner

mark.simpson@bakermckenzie.com



Kimberly Everitt

Knowledge Lawyer

kimberly.everitt@bakermckenzie.com



Julian Hui

Senior Associate

name@bakermckenzie.com



Sarah Williams

Senior Associate

sarah.williams@bakermckenzie.com

© 2022 Baker & McKenzie. **Ownership:** This site (Site) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms, including Baker & McKenzie LLP). Use of this site does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion:** All information on this Site is of general comment and for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulation and practice are subject to change. The information on this Site is not offered as legal or any other advice on any particular matter, whether it be legal, procedural or otherwise. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any information provided in this Site. Baker McKenzie, the editors and the contributing authors do not guarantee the accuracy of the contents and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this Site. **Attorney Advertising:** This Site may qualify as "Attorney Advertising" requiring notice in some jurisdictions. To the extent that this Site may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. All rights reserved. The content of the this Site is protected under international copyright conventions. Reproduction of the content of this Site without express written authorization is strictly prohibited.

