

A series of briefings that take a "bite-size" look at international trends in different jurisdictions, drawing on Baker McKenzie's expert financial services practitioners.

Cryptoasset regulation - Update May 2022

This edition of Bite-size Briefings explores the regulation of crypto (or digital) assets across a number of jurisdictions: Australia, Brazil, Hong Kong SAR, Singapore, the UK and the US. We last reviewed the state of play just a year ago (click [here](#)) but, given the pace of development in the meantime, an update is now due. To give some context, according to the Financial Stability Board (FSB) cryptoasset market capitalization increased by 3.5 times in 2021 to USD 2.6 trillion (although it remains a small part of the global financial system's assets). Moreover institutional participation in crypto asset markets as investors and service providers has grown significantly over the last year. Different jurisdictions remain at varying stages of development in terms of growing and regulating their markets. Despite the efforts of global entities such as the FSB and the International Organization of Securities Commissions, the response by regulators has been disjointed. The more advanced jurisdictions, having implemented anti-money laundering and counter terrorist financing controls, are now introducing consumer and investor protection rules, including restrictions on financial promotions to ordinary consumers. The EU's MiCA framework is notable for its holistic approach. Of special interest, Brazil, Latin America's largest economy, which to date has refrained from intervening, is now debating proposed legislation to regulate the crypto market and protect consumers. Meanwhile, in the US, there is vigorous discussion over the need for and extent of additional regulation, with the White House's latest executive order seen as likely to delay new measures, despite calls to act from the chair of the Securities and Exchange Commission.

Australia

On 21 March 2022, the Australian government released its consultation paper "Cryptoasset secondary service providers: Licensing and custody requirements." The consultation paper sets out the Australian government's proposed approach to licensing centralized "cryptoasset secondary service providers" (CASSPrs), including those who offer cryptoasset custody and storage (where software and hardware are used to store and handle private keys), brokering, exchange and dealing services, or operating a market in cryptoassets for retail consumers (i.e., facilitating peer-to-peer exchange of cryptoassets). This is likely to include "on-ramp" services within its scope.

The purpose of these proposals, as underlined in the comments of various government members at Blockchain Week 2022, is the following:

1. To recognize the growing importance of the cryptoasset ecosystem in the Australian and global economy
2. To recognize the need for regulatory certainty to encourage innovation and competition
3. To seek to give consumers greater confidence in their dealings with CASSPrs

In regulating the crypto space, a key message from Senator Bragg in his Blockchain Week address was that the government is keen to create a local crypto ecosystem that Australian consumers can trust, while managing the risks cryptoassets could present to a consumer's assets (including risks from operational risks such as business continuity, illiquidity and inadequate capital, insolvency and disorderly wind down, fraud and key personnel risk, misleading or deceptive conduct, and cybersecurity risk), and the financial system and the real economy.

Clearly, this will have important implications and provide new opportunities for token issuers, asset managers, brokers, traditional markets, centralized crypto markets, and post-trading infrastructure (custodians) in the Australian market.

It is proposed that the term CASSPr will cover persons conducting one or more of the following activities: fiat/crypto exchange, crypto/crypto exchange, transfer of cryptoassets, safekeeping and/or administration of virtual assets or instruments enabling control over cryptoassets, and participation in and provision of financial services related to an issuer's offer and/or sale of a cryptoasset. The proposed definition of "cryptoasset" includes assets "operating as a representation of value or contractual right." However it is certainly possible that this definition may be amended through the course of the consultation.

Under the consultation paper, the proposal is to regulate the following CASSPrs:

- CASSPrs that provide retail consumers access to non-financial product cryptoassets
- CASSPrs that provide safekeeping, custody or storage of all cryptoassets on behalf of a consumer
- CASSPrs that are captured by the FATF's definition of a virtual asset service provider (VASP) for AML/CTF reasons

To the extent entities provide a service in respect of a financial product cryptoasset under Chapter 7 of the Corporations Act, they will need to comply with the financial services regulatory regime. Consideration will also be given during the consultation as to how the existing AML/CTF registration requirements may be integrated with the new regulatory model proposed.

It is proposed that there will be one license type for CASSPrs facilitating the buying and selling of cryptoassets and custodians; however, the obligations would be graduated based on the number/type of services ("Proposed Model"). Under the Proposed Model, certain obligations would fall on CASSPrs, including certain obligations mirroring the general obligations of AFSL holders and capital requirements, as well as complying with the AML/CTF provisions (whereby breach of these provisions becomes grounds for license cancellation), and taking reasonable steps to ensure the cryptoassets are "true to label." Obligations with respect to custody would be imposed under the Proposed Model, including holding assets in trust for consumers, ensuring that consumers' assets are appropriately segregated, and ensuring that private keys used to access a consumer's cryptoassets are generated and stored in a way that minimizes risk of loss/unauthorized access.

In addition to the Proposed Model, the consultation paper sets out two alternative models ("Alternative Option 1" and "Alternative Option 2"). Under Alternative Option 1, cryptoassets would be defined as "financial products" under section 764A of the Corporations Act. The government (or, where the power is delegated, the Australian Securities & Investments Commission) could be provided powers to exempt certain cryptoassets. This would mean that some CASSPrs would need to comply with the financial services regime, including potentially obtaining an Australian market license. Under

Alternative 2, the crypto industry would develop a code of conduct for cryptoasset services, which would be approved by a regulator and meet minimum regulatory policy goals. The existing regulatory regime for AML/CTF would continue to apply.

Finally, the Australian government has set out a non-exhaustive list of tokens including: utility cryptoassets, collectable cryptoassets, zero utility cryptoassets, membership cryptoassets, algorithmic stable cryptoassets whether under-collateralized or over-collateralized, and hybrid cryptoassets. It will conduct a "token mapping exercise" by the end of 2022 for which further consultation will follow. The consultation paper comprises 32 consultation questions, and the closing date for submissions is 27 May 2022.

Brazil

Cryptoasset regulation is a subject that has been avoided for years by Brazilian regulators due to the potential intrinsic risks. As a result, all discussion and developments on this topic are still at an early stage. Currently, the trading of cryptoassets is considered a lawful and valid activity by the Brazilian authorities. However, cryptocurrencies are neither recognized as a proper currency by the Brazilian Central Bank nor as a security by the Brazilian Security and Exchange Commission, although the Brazilian Central Bank has commissioned a study on this subject. Moreover, while the Central Bank has recently issued regulations on electronic currency, it has not done so for crypto or other types of virtual currency.

There are several bills before the Brazilian legislature that seek to regulate crypto assets and crypto currencies, but none of them has been approved to date. In February 2022, the Senate Commission on Economic Affairs approved Bill No. 3,825/2019, to recognize the cryptocurrency market in Brazil and provide for an initial level of regulation. In parallel with this approval, a second bill, Bill No. 4,401/2021, originally presented to the Brazilian House of Representatives, is also being debated in the Brazilian Senate. In very similar ways, both bills aim to establish guidelines and rules for crypto service providers, as well as to counter the risk of money laundering and the illegal transfer of funds. Among their proposed provisions are the following:

- Establishing principles that must be followed by the crypto market (such as competition, data protection, consumer protection, effective corporate governance and risk management)
- Requiring the Brazilian Federal Government to appoint a specific agency to regulate the crypto market and improve its rules
- Treating crypto service providers as financial institutions, in order to subject them to Law No. 7.492/86, which makes the illicit transfer of funds abroad a crime
- Imposing the obligation on crypto service providers to report suspected money laundering to the Brazilian Council of Control of Financial Activities (COAF)
- Requiring prior authorization from public agencies for crypto service providers to operate
- Making it an offense to manage, offer or intermediate "virtual assets" in a fraudulent way to obtain undue advantage. In addition, Bill No. 4401/2021 provides that the criminal sanction for money laundering is to be increased when committed with the use of virtual assets.

For its part, the Central Bank of Brazil has finally changed its position and signaled its intention to regulate crypto markets. At the end of 2021, the leadership of the Central Bank publically announced that the agency's objective is, firstly, to focus on virtual exchange companies and investments and, then, on crypto as an alternative payment method.

The Brazilian Central Bank and the Brazilian Congress have been working closely on these potential regulations. Both bills would establish a safer environment for investors and prevent fraud without impairing the development of the cryptocurrency market. If they succeed, it may provide the space to allow for the growth of crypto in Brazil.

European Union

The European Commission's Digital Finance Strategy, launched in September 2020, proposes the introduction of strict and harmonized rules on digital operational resilience and a new regulatory framework for cryptoassets, whilst also promoting open finance data sharing and enabling EU-wide interoperable digital identities in finance. The Strategy promises to ensure "same activity, same risks, same rules" by applying the same supervision to traditional market actors, such as banks, insurance and investment firms, as well as fintechs and bigtechs which are increasingly entering the financial services sector through their product offerings. The new regulatory framework for cryptoassets, set out in the Commission's proposed Regulation on Markets in Cryptoassets (**MiCA**), would establish the first EU-wide regulatory regime for cryptoasset providers and hold them to a similar regulatory standard as applies to investment firms.

MiCA will establish a regulatory regime applying to any person providing cryptoasset services or issuing cryptoassets in or into the EU. It covers cryptoassets falling outside existing EU financial services legislation, as well as e-money tokens, and introduces a specific regulatory regime for certain stablecoins. Agnostic on technology, MiCA defines "cryptoasset" as "a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology". While utility tokens are within scope, algorithmic stablecoins and central bank digital currencies (CBDCs) are excluded.

MiCA's proposed regulatory regime is derived from MiFID and other EU legislative measures for financial services, and will impose similar requirements on cryptoasset service providers, cobbled together from other EU financial services' Single Market regimes. For example, the services to be regulated under MiCA map to a certain extent those in MiFID (e.g., "the reception and transmission of orders" for cryptoassets on behalf of third parties), and the regime for offers and placings is inspired by existing capital markets and transparency measures. In addition, MiCA will also regulate the provision of advice on cryptoassets.

The proposed Regulation will apply to the issuance or offer of cryptoassets in the EU, or to the provision of services related to cryptoassets in the EU. Under MiCA, cryptoasset service providers must be registered and authorized in the EU. It also provides for passporting across the EU, in line with other Single Market measures. However, there are no provisions on third-country equivalence, which may cause potential duplicative regulation issues for third-country service providers seeking to offer services in the EU.

The European Parliament's Economic and Monetary Affairs Committee (ECON) adopted its **negotiating position** on MiCA in March 2022, proposing amendments which would require the Commission to adopt a legislative proposal to include in the EU taxonomy for sustainable activities certain cryptoasset mining activities. Negotiations are set to continue in 2022. For more detail on the MiCA proposals, see our related **alert**.

Member state level

Individual EU member states have also taken regulatory action in the crypto space in 2022. In Spain, new rules regulating the advertising of cryptoassets have applied from 17 February 2022. The rules, set out in Circular 1/2022 of the Comisión Nacional del Mercado de Valores, apply to any advertising activity aimed at Spain-domiciled investors, if the goal is to promote cryptoassets as a form of investment. The Circular imposes new requirements on cryptoasset advertising, including the inclusion of disclaimers and references to risk factors, notification requirements prior to mass advertising campaigns, and the obligation to keep a register of the advertisements published in the previous two years. For more on the new Spanish advertising requirements, see our related [alert](#).

More recently, in Belgium, a new AML regulatory regime for virtual currency service providers was published on 23 February 2022 and will enter into force on 1 May 2022, implementing the EU's Fifth Anti-Money Laundering Directive. Belgian crypto exchange service providers and custodian wallet providers will need to register with the Financial Services and Markets Authority (FSMA). In order to obtain FSMA registration, virtual currency service providers must comply with new registration conditions, including fitness and propriety and appropriate expertise. In addition, minimum capital and AML requirements apply. Shareholders must also be fit to ensure sound and prudent management of the company. While EEA virtual currency providers without a physical presence in Belgium will be able to provide services in Belgium on a cross-border basis without FSMA registration, the regime will prohibit non-EEA third-country service providers from doing the same. For more on the new Belgian requirements, see our related [alert](#).

Hong Kong SAR

The Hong Kong Securities and Futures Commission (SFC) and the Hong Kong Monetary Authority (HKMA) issued a [Joint Circular](#) in January regarding intermediaries' virtual asset-related activities ("VA-related Activities") and the expectations on how virtual asset-related products ("VA-related Products") should be treated. The requirements are part of ongoing efforts to reform and strengthen the licensing regime and investor protections for virtual assets and will apply to existing licensed corporations (LCs) or registered institutions (RIs) and will also impact authorized institutions (AIs) that may consider providing VA-related Activities in the future. In formulating its [regulatory approach](#) for virtual assets in 2018, the SFC imposed a "professional investor only" restriction on various virtual asset related activities, including virtual asset funds.

For the purposes of the Joint Circular, the HKMA and SFC have adopted the following key definitions:

Virtual assets or VA	Digital representations of value that may be in the form of digital tokens (such as utility tokens, stablecoins or security- or asset-backed tokens) or any other virtual commodities, crypto assets or other assets of essentially the same nature, irrespective of whether or not they amount to "securities" or "futures contracts" as defined under the Securities and Futures Ordinance (SFO), but excludes digital representations of fiat currencies issued by central banks.
VA-related Products	Investment products which: a. have a principal investment objective or strategy to invest in virtual assets

	<p>b. derive their value principally from the value and characteristics of virtual assets</p> <p>c. track or replicate the investment results or returns which closely match or correspond to virtual assets</p>
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The Joint Circular provides important guidance on the revised obligations of LCs, RIs and AIs in three key areas, which can be summarized as follows:

Distribution of VA-related Products

Classification as complex products	VA-related Products are very likely be complex products and the complex product regime, including the Suitability Requirements in the SFC Code of Conduct supplemented by the Suitability FAQs is applicable irrespective of whether there has been a solicitation or recommendation (unless otherwise exempted).
Selling Restrictions	With limited exceptions, VA-related Products that are complex products should only be offered to professional investors as defined in Section 1 of Part 1 of Schedule 1 to the SFO.
Virtual asset knowledge test	With limited exceptions, intermediaries will be required to assess whether clients have knowledge of investing in virtual assets or VA-related products.
Sufficient net worth	Intermediaries should ensure clients have sufficient net worth to assume the risks from trading VA-related Products and be cautious over providing any financial accommodation (e.g., margin loans).
Provision of information and warnings	Information on VA-related Products should be provided to clients in a clear and easily comprehensible manner along with warnings on the risk associated with the products.

Provision of virtual asset dealing services ("VA Dealing Services")

SFC-licensed platforms and professional investors only	Intermediaries can only partner with SFC-licensed VA trading platforms and provide services to professional investors.
Wide application	The revised requirements will apply to dealing in VA assets irrespective of whether they are "securities" as defined in the SFO.
Existing clients	VA dealing services may only be provided to existing Type 1 customers of the intermediary.
Licensing terms and conditions	– New conduct requirements for the provision of VA Dealing Services using an omnibus structure will be imposed as licensing or registration terms and conditions.

	<ul style="list-style-type: none"> – Clients should only be able to withdraw fiat currencies from their accounts and the deposit or withdrawal of virtual assets should not be permitted.
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Provision of virtual asset advisory services.

Existing clients	The services should only be provided to existing clients to which Type 1 or Type 4 regulated activities are provided.
Conduct requirements	New conduct requirements will be imposed as part of the terms and conditions that also apply to VA Dealing Services. The suitability obligations will need to be complied with as will the requirement to conduct a virtual asset knowledge test.
Applicable to all virtual assets	Intermediaries are expected to comply with all of the regulatory requirements imposed by the SFC and HKMA when providing advisory services, irrespective of the nature of the virtual assets.

Implementation timeline

The updated guidance in the Joint Circular will have a six-month transition timeframe and supersedes the SFC **circular** from November 2018 regarding the distribution of VA funds.

Singapore

The Monetary Authority of Singapore (MAS) requires all providers of cryptocurrency, known as Digital Payment Tokens (DPTs) under the Payment Services Act (PSA), to acknowledge that DPT trading is high risk and thus unsuitable for the general public.

MAS issued **PS-G02**: "Guidelines On Provision Of Digital Payment Token Services To The Public" on 17 January 2022 to all DPT service providers. This seeks to ensure that marketing campaigns, advertisements and promotions for buying or selling DPTs or facilitating the exchange of DPTs are consistent with the risk disclosures under the PSA. All actual and potential customers must be provided with a risk warning highlighting the risks associated with trading in DPTs.

PS-G02 discourages these DPT service providers from the following:

- Portraying DPT trading in a manner that trivializes the high risks of trading in DPTs
- Releasing any form of public advertisements or promotional materials to the general public or a specific consumer segment in Singapore, including broadcast media, newspapers and magazines, public events or roadshows
- Engaging third parties, such as social media influencers or third-party websites, including banners or pop-up advertisements on third-party social media platforms
- Promoting payment token derivatives to the public as a convenient unregulated alternative to trading in DPTs

While PS-G02 does not set out financial penalties, MAS has indicated it will consider noncompliance as part of its regular supervisory engagement of regulated entities.

MAS' requirements are similar to steps taken to regulate the advertisement of cryptocurrencies and crypto assets by securities market and prudential regulators in other countries.

United Kingdom

In the UK, policymakers and the regulators remain focused on interventions to reduce risks in the crypto sector, including in relation to marketing and financial promotions. HM Treasury has recently **confirmed** that it will bring certain cryptoassets into the scope of the UK's financial promotion regime, which regulates the marketing of financial services and investments. The Treasury's view is that the evidence of risks to consumers provides a strong case for intervention, justifying an expansion of the Financial Promotion Order (FPO) to include cryptoassets. 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 unauthorized persons without approval, will apply to qualifying cryptoassets.

The Treasury's announcement was followed by the launch of a Financial Conduct Authority (FCA) **consultation** on strengthening the financial promotion rules for high-risk investments, including cryptoassets. The FCA has proposed a range of measures including strengthening risk warnings with prescribed language and risk information, banning inducements to invest, personalized 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 on the consumer journey.

These proposals also complement broader work by the Treasury to improve the financial promotion regime, including the proposed **new regulatory gateway** for authorized firms which approve the financial promotions of unauthorized firms 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 **decision** to introduce a regulatory regime for stablecoins (for more on the Treasury's January 2021 stablecoin regime consultation, 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 need to navigate different and sometimes conflicting scopes of application with respect to the Treasury's future regulation of certain stablecoin service providers, the UK's AML/CTF registration regime, and the forthcoming FPO regime and the FCA's proposed financial promotion rules.

The Treasury intends to allow a six-month transitional period from both the finalization and publication of the proposed FPO regime and the complementary FCA rules. The FCA's consultation has closed with final rules expected in summer 2022, so it is unlikely the new regime will apply 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 for approvers of financial promotions. 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 firms permitted to approve cryptoasset promotions will be quite limited, the regulator has indicated that it will take a robust view and expect full compliance from the outset. Citing too many poor quality and noncompliant 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 approvers of financial promotions, notwithstanding the expected lack of competence and expertise 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 many applicants have been rejected. Given the FCA's robust expectations of immediate full compliance from an industry largely new to stronger oversight, crypto businesses navigating the new FPO regime, once it takes effect, should expect the FCA to closely scrutinize the industry's practices and be prepared for swift supervisory action from the regulator. For more on the changing UK regulatory landscape for crypto advertising, see our related [alert](#).

United States

On 9 March 2022, President Biden signed an Executive **Order** on Ensuring Responsible Development of Digital Assets. This is in response to the explosive growth in recent years of digital assets, including cryptocurrencies, and the order acknowledges their potential to foster innovation and inclusion. While crypto proponents have welcomed this development, critics say that it will delay what they claim is much-needed legislation. The chair of the Securities and Exchange Commission has, for example, called for crypto to be regulated by applying bespoke rules beyond existing securities laws. Since the order contemplates reports in six months' time, legislative action by Congress to regulate digital assets has therefore at minimum been delayed.

The order outlines six principal policy objectives for the development of a national policy on digital assets as follows: (i) consumer, investor, and business protection; (ii) financial stability and mitigation of systemic risk; (iii) mitigation of illicit finance; (iv) promotion of US leadership and competitiveness; (v) equitable access to financial services; and (vi) support for responsible innovation. It requires certain actions and reports from various government officials to support these policy objectives.

- Central bank digital currency: In support of the development of a United States central bank digital currency (CBDC) consistent with these objectives, the Treasury secretary is to report within six months to the president on the future of money and payment systems. Additionally, the chair of the Federal Reserve is to provide the president with an assessment of whether legislative changes would be necessary in order to issue a CBDC and any other required legislation based upon the Treasury secretary's report. The Federal Reserve has already started to assess the potential for a digital dollar.
- Protection of consumers, investors and businesses: To ensure that digital assets do not pose an unreasonable risk to consumers, investors and companies, the order requires detailed reports, within six months from the Treasury secretary, the director of the Office of Science and Technology Policy, the chief technology officer of the US and the attorney general. These reports are to be prepared in coordination with other government officials and agencies.
- Promotion of financial stability: To identify risks that digital assets pose to financial stability and financial market integrity, the order requires the Treasury secretary to report on the specific financial stability risks and regulatory gaps posed by various types of digital assets and provide recommendations to address these risks.
- Limit illicit finance and national security risks: After submission of the National Strategy for Combating Terrorists and Other Illicit Financing to Congress, the Treasury secretary, the secretary of state, the attorney general, the secretary of homeland security and other agency

heads are to submit reports to assess and plan a response to the illicit finance risks posed by digital assets. These reports are to provide views on the extent of illicit finance risks posed by digital assets. An action plan is to provide a coordination plan based upon the conclusions of the strategy for mitigating national security and illicit finance risks associated with digital assets.

Additionally, the US continues to support the G20 roadmap for addressing challenges and conflicts with cross-border funds transfers and payments and the work of the FSB on issues related to stablecoins, cross-border funds transfers and payments. To build on this support, the secretary of commerce is to establish a framework for interagency international engagement with foreign counterparts and international organizations in consultation with other relevant governmental officials. Within a year of creating this framework, the Treasury secretary is to report to the president on the actions taken under the framework and their effectiveness. Additionally, the secretary of commerce will need to establish a framework for leveraging digital asset technologies and the attorney general's report on how to strengthen international law enforcement cooperation related to digital assets.

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