

United Kingdom: Top tips for compliance with the cryptoasset financial promotions regime

In brief

The FCA's [final rules for cryptoasset financial promotions](#), published in June 2023, will take effect from Sunday 8 October. Those marketing in-scope cryptoassets to UK consumers, including those based overseas, will need to ensure without delay that preparations are in place for the start of the rules.

There is no doubt that the implementation period, which was shortened to four months from the six months originally proposed, has been a challenging deadline for the industry to achieve. However, in welcome news, the FCA has recognised the technological difficulties in preparing "back end" changes to meet the implementation deadline, offering a partial transition period to certain firms to enable changes to be made.

Whilst many firms already operating in the UK will be well-aware of these rules, overseas firms and new entrants to the market may still be facing a steep compliance build to comply with the new FCA rules. With the introduction of new rules on the financial promotion of cryptoassets fast approaching, we set out a summary of the rules and legal routes for promotion going forward, along with some do's and don'ts to help firms make their final compliance preparations.

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Summary of the rules

The FCA's final rules largely track those consulted on, with relatively few changes – for example, the FCA has shortened and modified the prescribed risk warnings. You can read about the FCA's original proposals in our earlier [client alert](#). In summary:

- Cryptoassets will be classified as "Restricted Mass Market Investments". This is a restricted category of marketing but not the most restrictive. This will allow cryptoassets to be mass marketed to UK consumers subject to certain restrictions, in addition to the overarching requirement that financial promotions must be fair, clear and not misleading.
- New requirements include:
 - Clear risk warnings and risk summaries
 - A ban on incentives to invest
 - Additional restrictions relating to direct offer financial promotions (DOFPs)
 - Positive frictions (like personalised risk warnings)
 - 24-hour cooling-off periods
 - Client categorisation requirements
 - Appropriateness assessments
 - Recordkeeping requirements will apply
 - Date and time stamps for authorised firms approving financial promotions.

As noted, the FCA had proposed a four-month implementation period to comply with the regime. However, given the industry's challenges in implementing "back end" technical changes for the new rules, the FCA has announced that firms registered under the

Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs) or authorised by the FCA can apply for flexibility under a modification by consent. If their application is successful, they will have until 8 January 2024 to implement the personalised risk warning, 24-hour cooling period, client appropriateness testing and client categorisation requirements. All other new rules will still come into effect from 8 October 2023 – and, importantly, firms not registered or authorised cannot avail themselves of the transition mechanism.

Legal routes to promotion

Once the rules take effect and cryptoassets are brought within the financial promotions perimeter, there will be four routes to legally promoting cryptoassets to consumers in the UK:

1. The promotion is communicated by an authorised person. However, remember that a firm only authorised under the Electronic Money Regulations 2011 or the Payment Services Regulations 2017 is not considered an "authorised person" for the purposes of the financial promotions regime, so cannot communicate or approve financial promotions.
2. The promotion is made by an unauthorised person but approved by an authorised person. However, note the caveat in (1) above. Note also that the forthcoming regulatory gateway that authorised firms will need to pass through to approve financial promotions for unauthorised persons will make this process significantly more burdensome and difficult. The FCA's final rules on operationalising the gateway were published on 12 September 2023, closely following those consulted on (with a few changes to the notifications and reporting requirements); for more on the FCA's original gateway proposals, see our related [client alert](#). The gateway will open to applicants on 6 November 2023 and come into force on 7 February 2024.
3. The promotion is communicated by (or on behalf of) a cryptoasset business registered with the FCA for the purposes of the anti-money laundering regime under the MLRs in reliance on the new bespoke, temporary exemption to the financial promotion requirements. Note that the Government intends to remove this exemption when cryptoasset activities are brought within the regulatory perimeter, as cryptoasset firms will be authorised and therefore able to communicate their own promotions without the need for an exemption.
4. The promotion is otherwise communicated in compliance with the conditions of an exemption to the financial promotions regime (but note that these exemptions are not helpful for communications to retail customers as, for example, high net worth individual and self-certified sophisticated investor exemptions will not apply to promotions of cryptoassets).

For firms who cannot fall under any of the above legal routes, it will be a criminal offence to promote in-scope cryptoasset activities to consumers in the UK. The FCA has noted that the level of engagement from unregistered, overseas cryptoasset firms with UK customers has been poor and that it intends to take robust action where it identifies that firms are communicating cryptoasset promotions in breach of the regime. FCA action might include placing firms on the FCA Warning List, taking steps to remove or block illegal promotions, applying to court for injunctions or the payment of compensation or criminal prosecution in the most serious cases.

Social media platforms, ad search engines, App stores and payment firms who support firms promoting cryptoassets (e.g., by publishing ads, accepting payments or listing Apps) are also on the FCA's radar and the FCA will use these routes to apply pressure to cryptoasset firms illegally communicating promotions in the UK.

Compliance do's and don'ts

The new rules are challenging and require the introduction of processes and procedures that may be unfamiliar to many in the crypto industry. To help firms along, we've set out some compliance top tips.

| Do's | Don'ts |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Do carefully review your products – to see if they come within the scope of the regulations and, where they do, a thorough understanding of your products will help to inform other elements of the customer journey (for example, risk warnings, risk summaries and the appropriateness assessment). The FCA expects firms to tailor risk summaries and assessments to the products on offer – higher risk products are expected to require greater customer knowledge and more detailed risk warnings.</p> | <p>Don't forget to review all promotional material for compliance – including communications via newer digital media like websites and Apps. Firms should pay particular attention to brand advertising, sponsorship deals, social media platforms and influencer arrangements. How firms promote through social media generally is also on the FCA's agenda, with new guidelines the subject of a recent discussion paper. See our client alert for more detail</p> |
| <p>Do review your customer journey – to ensure that DOFPs are not marketed to retail investors at too early a stage in the customer journey. Firms need to carry out a number of steps before issuing a DOFP and so it is important to make sure your customer journey meets the expectations throughout.</p> | <p>Don't coach the retail client through passing the client categorisation or the appropriateness assessment.</p> |
| <p>Do expressly invite the customer to say if they want to leave the investment journey – it is not enough to rely on the customer actively undertaking some action that implies they wish to proceed.</p> | <p>Don't encourage the retail client to proceed with the investment in the cryptoasset(s). This is emphasised at various points of the customer journey, for example, at points when the retail customer must be given the optionality of proceeding with the customer journey (noting also the FCA requirement that each option is given equal prominence), as well as on failed customer categorisations and appropriateness assessments.</p> |
| <p>Do go beyond the statutory minimum requirements if you think that this is necessary for the protection of retail customers. For example:</p> <ul style="list-style-type: none"> • There is no statutory cut-off for the number of times that a retail client could re-take the client categorisation or the appropriateness assessment. A firm could, for example, consider putting in place maximum retakes as reflected in the risk profile of a particular cryptocurrency. • The cooling off period required for first-time investors is in place for a minimum period of 24 hours. If a firm's existing KYC/AML checks take longer than this to complete, the cooling off period could be extended to align with the firm's existing processes. • The 24-hour cool-off following the second consecutive failed appropriateness assessment could be extended this for all or particularly risky, cryptoassets, or by implementing further cooling off periods (for example, a 24-hour cool-off period to follow every failed assessment). | <p>Don't forget that financial promotions go beyond marketing communications. The new rules apply to any invitation or inducement to carry out an in-scope activity- this means that your customer journeys, webpages and other collateral will be caught in addition to e.g., explicit marketing materials.</p> <p>A key issue in implementation is determining which communications, webpages and App pages need to comply with the new requirements. The rules include broad requirements on including risk warnings on 'every linked page' from the promotion that relates to the investment – depending on your processes, this might mean that risk warnings need to be included on a significant number of pages.</p> |
| <p>Do educate the retail client on the investment, the different types of cryptoassets available and the risks associated with each.</p> | <p>Don't forget that the rules related to client categorisation and appropriateness assessments apply to existing customers wishing to engage in further investment activity.</p> |
| <p>Do keep records of any retail client that is re-categorised. The FCA will ask firms to provide evidence on how they made an assessment to re-categorise a client, and is requesting that firms intending to treat certain recipients of crypto promotions as elective professionals provide prior notification to the FCA.</p> | <p>Don't deviate from the FCA's client category names, or ignore information from the customer suggesting they may be incorrectly categorised – whilst you don't need to check that a customer has given the right information (e.g., by comparing their income against pay slips or bank statements), you do need to be able to check that the information provided actually meets the criteria for the classification they have chosen.</p> |
| <p>Do consider the need for ongoing monitoring and review of the effectiveness of processes and controls once implemented, and how these support good customer outcomes. This should include increased customer questions and complaints.</p> | <p>Don't ignore the risks presented by unlawful communications, especially for intermediaries and those businesses supporting unregistered cryptoasset firms.</p> |

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