

## UK: Operationalising the new financial promotions gateway – the FCA sets out its proposals

### In brief

Following the Treasury's [confirmation](#) that it intends to introduce a new "regulatory gateway" for authorised firms approving financial promotions, the FCA has launched a consultation ([CP22/27](#)) on proposals to operationalise this new gateway. Complementing a wider programme of reform to the financial promotions regime, the proposals will affect both authorised firms approving financial promotions as well as unauthorised firms communicating approved financial promotions. In this alert we provide an overview of the gateway structure, explain the FCA's proposals in more detail, and set out the wider context of reform to the regime.

### Key impact

This regime is primarily targeted at what are referred to as "financial promotions" under the UK regulatory framework. The UK financial promotions regime covers a broad range of marketing activities, and will be relevant wherever a firm wishes to market financial products or services to UK end clients.

Although certain exemptions apply, financial promotions will generally be prohibited in the UK unless the person making the promotion is an FCA authorised firm, or where the promotion itself has been approved by an FCA-authorized firm. It is this second limb of the prohibition that the regulatory gateway is aimed at addressing.

### Scope of products and services

The policy rationale is that a consumer or retail client's first contact with financial firms and investment opportunities will generally be their exposure to marketing materials. For this reason, there is a clear potential for harm to end-investors if the product or service in question is misrepresented or marketed aggressively towards an inappropriate audience. As many firms will be aware, the financial promotions framework extends well beyond retail clients; however, there are a number of exemptions that can be applied in the case of more sophisticated clients. We therefore expect this development to have the greatest impact in the consumer/retail space.

Indeed, one of the catalysts for these measures was the "mini-bond" scandal that resulted from the inappropriate marketing of risky mini-bonds to retail clients, and the FCA's [finding](#) that many consumers are at present investing without being aware of the associated risks.

The gateway reforms therefore form part of a suite of measures aimed at ensuring that firms being used as a conduit for financial promotions and marketing of investment products or services truly understand the nature of the product or service involved, and that they identify an appropriate target audience based on risk profile.

### Which firms will need to consider the new standards?

The financial promotions gateway will clearly be relevant to UK firms that approve the promotions and marketing materials of others in the market. It will also be of interest to overseas firms that wish to promote financial products or services to UK retail clients. Unless a financial promotion made by an overseas firm is exempt, it must be made through or approved by a UK authorised firm.

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However, there is a helpful exemption applying to approvals of financial promotions for unauthorised firms within a UK authorised firm's corporate group – this means that overseas firms which currently rely on their UK authorised affiliates to approve promotions can continue to do so.

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## The gateway structure

Amendments to the Financial Services and Markets Act 2000 (FSMA) set out in the Financial Services and Markets Bill (the **Bill**) will create the gateway. The amendments to FSMA proposed in the Bill will impose the new Financial Promotion Requirement (FPR) on all existing and newly authorised firms, restricting them from approving financial promotions. When the gateway takes effect (subject to Parliamentary process and Royal Assent), FCA-authorised firms will no longer be able to approve financial promotions on behalf of other organisations by default – instead they will need their FCA permissions to include a specific ability to give such approvals. As a result, existing authorised firms wishing to undertake approval of financial promotions will need to apply for permission to approve financial promotions by submitting a Variation of Permission (VOP) application. EEA firms in the Temporary Permissions Regime will also be able to apply. Firms applying for authorisation who want to apply for permission to approve financial promotions at the same time will be able to do so as part of their application for authorisation. The FCA plans to make information about firms' permission to approve financial promotions publicly available on the Financial Services Register.

The Treasury indicated in its consultation response that the gateway will not apply to authorised firms communicating their own financial promotions, approving their own promotions for communication by unauthorised persons, or approving the promotions of unauthorised persons within the same corporate group. Further, principals approving promotions for appointed representatives will not be subject to the gateway where the promotion relates to a regulated activity for which the principal has the relevant permissions and has agreed to accept responsibility. However, the Treasury decided against grandfathering-in permissions for sectors that approve financial promotions as part of their core business model and which may have provided information on that activity to the FCA as part of previous authorisation applications. The precise contours of these exemptions will be set out in secondary legislation.

Supervisory and enforcement powers will be available to the FCA in the event of noncompliance. Where the FCA identifies a financial promotion that has been approved by a firm but does not meet the requirements, it can:

- Ask the firm that approved the promotion to ensure that the promotion is changed or withdrawn
- Direct the firm to withdraw its approval of the financial promotion
- Direct the firm to have the FPR reinstated, in part or in full
- Open an enforcement investigation.

The Treasury's consultation response set out plans for a transition period on introduction of the gateway, beginning with an initial application period. Provided this transition period is legislated for as set out in the consultation response, it would begin as soon as the initial application period has closed. In brief, the application process and transition period would work as follows:

- **Application period:** A specific application period is to be prescribed, during which existing authorised firms can apply for permission to approve financial promotions. During this period, all authorised firms can continue to approve financial promotions.
- **Transition period:** During the transition period, firms that submitted applications during the application period can continue to approve promotions. The FCA will have up to 12 months to determine applications for permission to approve financial promotions. Other firms (i.e. those that have not made an application) are no longer able to approve promotions during the transition period (unless an exemption applies).
- **Fully in force:** After the transition period ends, only firms with permission to approve promotion can do so (unless an exemption applies). The transition period will end on a firm-by-firm basis on the determination of the firm's application for permission to approve financial promotions.

For more detail on the gateway structure, exemptions and transition timing, see our earlier [alert](#) on the Treasury's consultation response.

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## The FCA's proposals

### Assessing applicants

The FCA will assess whether firms seeking permission to approve financial promotions can satisfy (and continue to satisfy) the Threshold Conditions. The FCA will also consider whether it is desirable to refuse the application to advance any of its operational objectives. Firms seeking permission to approve financial promotions should review and consider the FCA's updated **guidance** for firms approving financial promotions.

The FCA proposes to assess applications for permission to approve financial promotions on a sectoral basis. Applicants will need to specify the type(s) of financial promotions they are seeking permission to approve, and will be assessed by reference to the relevant rules that apply to the promotions of the type they have indicated that they wish to approve.

An applicant firm will need to demonstrate that it has systems, controls and processes in place to maintain adequate records, ensure that the promotions which it approves are fair, clear and not misleading, and properly monitor promotions it has approved. From the consultation, it appears that the FCA will expect a robust level of due diligence to be carried out by the approving firm on the business for whom it is approving promotions. This includes, for example, how a firm will assess the commercial viability of a proposition, the veracity of a service to be provided, and whether there are any fees, commissions or other charges within the investment's structure or elsewhere that could materially affect the ability of the product provider to deliver advertised or headline rates of return. These requirements complement the FCA's **rules** coming into force on 1 February 2023 which will require approvers to have relevant competence and expertise in the investment to which the financial promotion relates, impose date stamp requirements, implement ongoing monitoring obligations, and extend existing conflict-of-interest requirements.

Where a firm applies to be able to approve financial promotions of investment types that are outside the scope of the firm's Part 4A permissions to carry out regulated activity, the FCA will apply additional scrutiny to the applicant's systems and controls. These measures appear to be targeted at firms wishing to approve promotions in respect of products and/or services that are outside the scope of the approving firm's own business model and regulated activity, have the expertise and infrastructure to do so.

If the FCA is minded to refuse an application, it may indicate that it would consider granting permission in relation to a narrower range of investment types than the firm has applied for. If permission is refused, the FCA will follow the normal process set out in DEPP, including the issuance of a warning notice and the right to make representations in the usual way.

### Redress

As confirmed in the Treasury's consultation response, consumers who invest in a product issued by an unauthorised person on the basis of a financial promotion communicated by that person would continue not to be covered by the Financial Services Compensation Scheme purely as a result of the failure of the issuer. Further, complaints about the approval of a financial promotion are generally not covered by the Financial Ombudsman Service (FOS), and the FCA does not propose to extend FOS jurisdiction to financial promotions.

### Notification and reporting requirements

The new regime will come with an increase in the ability of the FCA to gather data on financial promotions, through the imposition of notification and reporting obligations on approving firms. Firms will be required to submit a notification to the FCA within one week when they approve, or amend or withdraw approval of, a financial promotion, including the reason for amendment or withdrawal. Further, firms will be required to report a number of different financial promotion metrics on a bi-annual basis. Note that, for reporting purposes, a financial promotion will be considered distinct when it is for a different product, or a new campaign for the same product – the same promotional content displayed across different types of media will not be considered as separate approved financial promotions.

Existing authorised firms which apply for permission to approve financial promotions during the initial application period, but are waiting for their application to be determined, will need to begin complying with the proposed reporting requirements once the application period has ended and the transitional period has begun. The reporting requirements would only apply to other firms once the permission is granted to approve promotions.

## Next steps and wider context

The consultation closes on 7 February 2023, and final rules are expected in the first half of 2023 (subject to final legislation establishing the gateway).

The FCA's proposals will affect both authorised and unauthorised firms. Authorised firms approving financial promotions and wishing to continue after imposition of the gateway should carefully review the FCA's proposals with a view to ensuring that their systems and controls for financial promotions are in an application-ready state once the changes are in place. Unauthorised firms relying on authorised firms to approve their financial promotions should begin to consider whether their arrangements will need to change if, for example, their approvers do not seek gateway permission – including whether an exemption to the financial promotions regime might apply.

The gateway proposals also sit within a wider programme of reform to the financial promotions regime, complementing other initiatives from the Treasury and FCA. These include:

- **Strengthening the financial promotions regime.** The FCA is introducing **new rules and guidance** to amend the financial promotion approval regime and strengthen the rules for high-risk investments. Amendments to the approval regime will require approvers to have relevant competence and expertise in the investment to which the financial promotion relates, impose date stamp requirements, implement ongoing monitoring obligations, and extend existing conflict-of-interest requirements. For promotions relating to high-risk investments, the measures being introduced include:
  - strengthened risk warnings with prescribed language and risk information;
  - a ban on inducements to invest;
  - positive frictions (including a personalised risk warning and a 24-hour cooling off period);
  - changes to investor declarations; and
  - stronger appropriateness tests.
- **Buy-now-pay-later (BNPL) promotion reform.** While BNPL agreements are currently unregulated themselves, the financial promotions regime captures those communications that are invitations or inducements to enter into a credit agreement (including an exempt BNPL agreement) and requires those communicating them – whether they are merchants or credit providers – to either be FCA-authorized or to obtain approval from an FCA-authorized person (though merchants are likely to be exempt when promoting BNPL where the communication is made to introduce customers to an authorised firm offering BNPL agreements to cover the purchase cost). The Treasury has **confirmed** the government's intention to regulate BNPL products, and to bring all promotions of BNPL agreements within the financial promotion regime; ahead of all BNPL agreements being brought into the regulatory perimeter, the FCA outlined in a **Dear CEO letter** its expectations that firms review their financial promotions for unregulated BNPL products.
- **Cryptoasset promotion reform.** The Treasury has **confirmed** its intention to bring the promotion of "qualifying cryptoassets" within the financial promotion regime, and it is likely that there will be strong demand from crypto firms seeking approval of their financial promotions given the lack of any parallel regulated activities regime in the cryptoassets space that would enable crypto firms to obtain their own FCA permissions. Although the FCA acknowledges that the pool of financial promotion approvers with sufficient competence and expertise to approve cryptoasset financial promotions 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 approvers, notwithstanding the expected lack of competence and expertise in the industry as the regime begins to apply. For further information on cryptoasset promotion reform, see our related **alert**.
- **Consumer Duty.** When the Consumer Duty takes effect in July 2023, authorised firms approving financial promotions on behalf of unauthorised third parties, or communicating promotions, will be subject to the Consumer Duty and will need to consider, in particular, the Consumer Principle, cross-cutting rules and consumer understanding outcome. This means that approvers will need to ensure that the financial promotions they approve support retail consumers' understanding by ensuring that they meet the information needs of customers, are likely to be understood by customers intended to receive them, and equip them to make decisions that are effective, timely and properly informed. They should also ensure that the financial promotion is tailored to the characteristics of the customers intended to receive the financial promotion (including by reference to any characteristics of vulnerability). For further information on the Consumer Duty, see our related **alert**.

- **A proposed anti-greenwashing rule.** The FCA has **proposed** a general "anti-greenwashing" rule reiterating requirements for all regulated firms that sustainability-related claims must be clear, fair and not misleading. The rule is expected to take effect by the end of the first half of 2023 (once it is finalised).
- **Financial promotion exemptions reform.** The Treasury has **consulted** on tightening exemptions to the financial promotion regime that allow unauthorised firms to lawfully communicate financial promotions to high net worth and sophisticated investors. If the consultation results in a tightening of these exemptions, there may be an increase in demand for financial promotion approvals.
- **Online platforms.** Although most of the largest search engines and social media platforms have implemented new verification policies to ensure they only allow financial promotions that are made by, or with the approval of, regulated firms, adaptations may be necessary to reflect the new approvals gateway.

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