

FCA issues final rules for marketing cryptoassets in the UK



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Key Takeaways

- 1** Financial promotions of qualifying cryptoassets are now within the scope of the UK financial promotion regime.
- 2** The FCA has published its final policy statement on rules for communicating financial promotions of qualifying cryptoassets and has issued guidance on compliance with these rules.
- 3** Qualifying cryptoassets will be treated as “restricted mass market investments” for the purposes of the FCA’s financial promotion rules.

1. The new regime

The United Kingdom Financial Conduct Authority (FCA) published its final policy statement in June 2023 setting out its rules for FCA-authorized firms communicating the ‘financial promotion’ of cryptoassets (PS 23/6). The rules in PS 23/6 come into force on 8 October 2023.

To supplement this, the FCA has also issued Guidance Consultation GC 23/1 (GC 23/1), which proposes guidance on how firms should comply with, the FCA’s requirement that cryptoasset financial promotions must be fair, clear and not misleading. GC 23/1 closes for responses on 10 August 2023, with final guidance likely be published in Q3 of this year.

2. Means to promote cryptoassets in the UK

As highlighted in our “Treating Crypto Fairly” OnPoint¹, the UK government has now legislated to bring financial promotions of “qualifying cryptoassets”² within the scope of the UK financial promotion regime.

This has been implemented by an amendment to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the **FPO**), so that the following ‘controlled activities’ now include qualifying cryptoassets:

- (i) dealing in securities and contractually based investments;
- (ii) arranging deals in investments;
- (iii) managing investments;
- (iv) advising on investments; and
- (v) agreeing to carry on specified kinds of activity.

The amendment to the FPO comes into force on 8 October of this year.

There will then be four routes to communicate a financial promotion in the UK relating to a qualifying cryptoasset:

- (i) The financial promotion is communicated by an FCA- or PRA- authorised person.
- (ii) The financial promotion is made by an unauthorised person but approved by an FCA- or PRA- authorised person.
- (iii) The financial promotion is communicated by (or on behalf of) a cryptoasset business registered with the FCA under the UK Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the **MLRs**) in reliance on the exemption in Article 73ZA of the FPO.
- (iv) The financial promotion is otherwise communicated in compliance with the conditions of an exemption in the FPO.

¹ OnPoint is available [here](#).

² A “qualifying cryptoasset” is any cryptoasset which is:
 (a) fungible; and
 (b) transferable.

For these purposes, the circumstances in which a cryptoasset is to be treated as “transferable” include where:

- (a) it confers transferable rights; or
- (b) a communication made in relation to the cryptoasset describes it as being transferable or conferring transferable rights.

A “cryptoasset” means any cryptographically secured digital representation of value or contractual rights that:

- (a) can be transferred, stored or traded electronically, and
- (b) uses technology supporting the recording or storage of data (which may include distributed ledger technology).

3. The new rules in PS 23/6

PS 23/6 sets out the final rules that an FCA- or PRA-authorized person must follow when communicating a financial promotion relating to qualifying cryptoassets.

(a) Qualifying cryptoassets as “restricted mass market investments”

PS 23/6 confirms that qualifying cryptoassets will be treated as “restricted mass market investments” (RMMIs) for the purposes of the FCA’s financial promotion rules in COBS 4 (*Communicating with clients, including financial promotions*) and will be subject to the specific rules in COBS 4.12A (*Promotion of restricted mass market investments*).

As such, risk summaries and a specific risk warning will need to be included in the financial promotion if it is made available to a retail client.

Risk summaries: The risk summaries that apply to RMMIs under COBS 4.12A have been amended to include qualifying cryptoassets and to set out that consumers should not expect to be protected by the FSCS or the ombudsman service if something goes wrong.

Firms will be allowed to vary the prescribed risk summary in COBS 4.12A where they have a good reason – for example, the wording would be misleading or irrelevant. Equally, a firm can include any key investment risks that are not covered by the template risk summaries in COBS 4.12A, but it must make an adequate record of any divergence and the rationale behind any change.

Risk warnings: The mandatory risk warning that the financial promotion must contain is:

Don’t invest unless you’re prepared to lose all the money you invest. This is a high-risk investment, and you should not expect to be protected if something goes wrong. Take 2 mins to learn more.

(b) Banning incentives to invest

Under the existing rules in COBS 4.12.A, financial promotions for RMMIs are banned from offering any monetary or non-monetary benefits that incentivise investment activity, such as ‘refer a friend’ or ‘new joiner’ bonuses. These rules will apply to financial promotions of qualifying cryptoassets, without the current carve-out for ‘shareholder benefits’ from this ban (i.e., products and services produced or provided by the issuer of, or borrower under, the relevant investment).

(c) Direct offer financial promotions (DOFP)

Cooling off period rules: The FCA will apply the cooling-off period rules in COBS 4.12A to DOFPs³ of qualifying cryptoassets to retail clients. As such, there will be a minimum 24-hour cooling-off period for first-time investors with a firm. A retail client will not be able to receive a DOFP relating to a qualifying cryptoasset unless they have reconfirmed their request to proceed after waiting at least 24 hours.

However, the cooling-off period does not apply to each individual transaction in a qualifying cryptoasset, so that the rule only applies to first-time investors with a specific firm i.e., where a consumer has not previously received a DOFP from that firm.

³ A DOFP here means a financial promotion that contains:

- (a) an offer by the firm or another person to enter into a controlled agreement with any person who responds to the communication; or
- (b) an invitation to any person who responds to the communication to make an offer to the firm or another person to enter into a controlled agreement and which specifies the manner of response or includes a form by which any response may be made.

Risk warnings pop-ups: The personalised risk warning rules in COBS 4 will now apply to DOFPs of qualifying cryptoassets. As such, before a DOFP can be communicated in a digital medium, the following wording must be communicated to the potential investor:

[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.

Client categorisation: The FCA will restrict DOFPs of qualifying cryptoassets to "restricted investors,"⁴ "high net worth investors"⁵ and "certified sophisticated investors."⁶

Before a DOFP can be made in relation to a qualifying cryptoasset, the investor must be categorised as falling into one of these categories, and requiring the investor to sign a declaration stating that they meet the relevant criteria. The investor declarations are only valid for a 12-month period.

Appropriateness assessments: The FCA will proceed with applying the appropriateness assessment requirements in COBS 4.12A to DOFPs of qualifying cryptoassets.

As such, before an application or order for a cryptoasset can be processed in response to a DOFP, the firm must assess the specific cryptoasset as appropriate for the consumer. This requires the firm to assess that the consumer has the necessary experience and knowledge to understand the risks involved in relation to the specific product or service offered or demanded.

(d) Record keeping requirements

The record-keeping requirements in COBS 4 relating to client categorisation and appropriateness assessments will apply to financial promotions relating to qualifying cryptoassets.

4. GC 23/1

GC 23/1 sets out draft FCA guidance regarding the following qualifying cryptoasset financial promotion scenarios:

- (i) Guidance on ensuring that qualifying cryptoasset financial promotions are fair, clear, and not misleading in a way which is appropriate and proportionate.
- (ii) For stablecoins and other cryptoassets whose value is linked to fiat currency, guidance on how a firm can show that it has undertaken due diligence that claims regarding stability or links to a fiat currency are capable of being fair, clear, and not misleading and genuine.
- (iii) For cryptoassets that are backed by a commodity or an asset, guidance on how a firm can show that any claim of commodity or asset backing is capable of being fair, clear, and not misleading, including information on the particular model/arrangement the cryptoasset uses, proof of ownership of the underlying commodity/asset, evidence of the custodian (if any) and any further reasonably foreseeable dependencies that may significantly impact the value or volatility of the underlying asset.
- (iv) For complex yield cryptoasset models or arrangements (e.g., borrowing, lending, and staking), guidance on how the advertised rates of return can be achieved, clear and prominent disclosure of any fees, default rates, commissions, or other charges, and clear and prominent disclosure of the legal and beneficial ownership of a consumer's cryptoassets once they enter an arrangement.

4 This term means, in summary, a person who has signed a statement set out in COBS 4 that they are not willing to invest more than 10 percent of their net assets in RMMIs.

5 This term means a person who meets the requirements set out in article 21 of the Promotion of Collective Investment Schemes Order, in article 48 of the FPO or in COBS 4.12B.38R.

6 This term means a person who meets the requirements set out in article 23 of the Promotion of Collective Investment Schemes Order, in article 50 of the FPO or in COBS 4.12B.39R.

GC 23/1 further emphasises that the financial promotion regime is “technologically neutral,” meaning that there is no derogation or carve out for financial promotions via social media and sets out the range of due diligence considerations a firm must consider before a financial promotion is communicated.

5. Firms registered under the MLRs

PS 23/6 also sets out which provisions of the FCA Handbook will apply to firms registered under the MLRs when communicating financial promotions in reliance on the new exemption in Article 73ZA of the FPO:

- (i) Principle 7 (Communications with clients);
- (ii) relevant parts of GEN (Statements about authorisation and regulation by the appropriate regulator);
- (iii) COBS 4 (Communicating with clients, including financial promotions; and
- (iv) COBS 10 (Assessing appropriateness).

Note that the FCA’s new “consumer duty”⁷ will not apply to firms registered under the MLRs but will apply to authorised firms communicating or approving qualifying cryptoasset financial promotions.

7 OnPoint is available [here](#).

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