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FCA Financial Promotions Team
12 Endeavour Square,
London E20 1JN

23 March 2022

Dear sir/madam

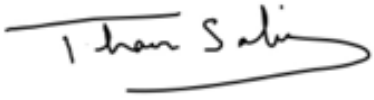
Re: Consultation on FCA strengthening its financial promotion rules for high risk investments, including cryptoassets (CP22/2)

We welcome the opportunity to provide input to the FCA consultation paper ("Consultation") on strengthening the FCA's financial promotion rules for high risk investments, including cryptoassets.

The EMA represents FinTech, BigTech and technology firms engaging in the provision of alternative digital payment services, including the issuance of e-money, e-money tokens, and cryptoassets. Our members include leading payments and e-commerce businesses providing online payments, card-based products, electronic marketplaces, and increasingly cryptocurrency exchanges and other cryptocurrency related products and services. The EMA has been operating for over 20 years, and has a wealth of experience regarding the regulatory framework for electronic money and payments. A list of current EMA members is provided at the end of this document. We have a monthly cryptoasset working group that meets to discuss issues of regulatory significance for the cryptoasset sector, and we have spent some time working through the FCA consultation paper and the impact on the sector.

We would be grateful for your consideration of our comments, which are set out below.

Yours faithfully



Dr Thaer Sabri
Chief Executive Officer
Electronic Money Association

EMA Response to Consultation:

General Comments:

1. We welcome the FCA's proposals to strengthen customer protection when investing in high risk investments such as certain qualifying cryptoasset product offerings. We do, however, have concerns about the proposed Section 21 approver process for qualifying cryptoasset firms, and how this would work in practice. The very limited number of firms that would be in a position to approve financial promotions for qualifying cryptoasset firms would most certainly lead to competition issues and artificially high prices for this service. In order to build a more efficient gateway and address concerns around competition, we urge the FCA (as well as HM Treasury) to consider expanding the scope of firms able to act as a Section 21 approver to include qualifying cryptoasset firms (registered with the FCA for AML purposes). This would allow firms offering qualifying cryptoassets to apply to the FCA for a permission to be able to approve their own and others' financial promotions.

2. The current proposals apply a one-size fits all approach to the consumer journey, and appear to be designed mainly to address risks associated with the use of cryptoassets as an investment, rather than other uses, such as a form of payment. The behavioural research underpinning the proposals equally focuses on cryptoassets as an investment rather than other uses. The EMA considers that the financial promotions rules should be designed and applied in a manner that is proportionate to the risk to consumers of each type of qualifying cryptoasset.

3. In contrast, the risk to consumers is much lower for qualifying cryptoassets that are used for payment transactions, and / or for very low value transactions, as well as those used largely for educational purposes rather than purely profit making investment. As such, the EMA suggests that the FCA takes a risk based approach, and adopts a lower standard of the proposed requirements for low risk or low value qualifying cryptoassets.

4. We note that a regulatory framework for stablecoins, which is aimed at mitigating related risks and protecting consumers, is currently under development. Para 1.4 of the HMT Consultation Response on Financial Promotions for cryptoassets states:

   "The government has adopted a staged and proportionate approach to cryptoassets regulation, which is sensitive to risks posed, and responsive to new developments in the market. This measure, to expand the scope of the Financial Promotion Order to capture certain cryptoassets, complements broader proposals on cryptoassets and stablecoins set out via the government's consultation on a regulatory framework for stablecoins

earlier this year. It also aligns with separate government proposals to strengthen the authorisation process for financial promotions."

5. In this context, lower risks supported by the incoming regulatory framework for stable coins should be reflected in a more risk-based approach to promotions since these regulatory measures are intended to be complementary and, accordingly, should be synchronised in terms of timing. At the least we consider a restrictive approach to promotions should be adjusted as soon as the pending prudential framework for stable coins comes into force.

6. Additionally, HMT's general regulatory approach acknowledges and is targeted at promoting the benefits of digitalisation of financial services. The Foreword of HMT's Consultation on the UK regulatory approach to cryptoassets and stablecoins states: *"So-called stablecoins could pave the way for faster, cheaper payments, making it easier for people to pay for things or store their money. There is also increasing evidence that DLT could have significant benefits for capital markets, potentially fundamentally changing the way they operate."* Pursuing an approach to promotions that is not sufficiently risk-based would risk stifling the innovative developments that the regulatory framework for stable coins is aimed at promoting.

Question 1: Should we rationalise our financial promotion rules in COBS 4 by introducing the concepts of 'Restricted Mass Market Investments' and 'Non-Mass Market Investments'?

7. Agree.

8. However we note that the addition of 'qualifying cryptoassets' to RMMI is an expansion of the Financial Promotions regime to include a new asset class, rather than a 'rationalisation' of existing financial promotions rules

Question 2: Should we introduce stronger risk warnings, as outlined in paragraphs 4.20 – 4.27, for all 'Restricted Mass Market Investments' and 'Non-Mass Market Investments'?

9. Disagree. A distinction should be made between qualifying cryptoassets that are:

    a) used for ongoing / higher value investments, which could reasonably result in consumer harm if the risks associated with such investment are not well understood or match the consumer's risk tolerance and, consequently, for which the strengthened risk warnings are welcomed; and

    b) qualifying cryptoassets being used for payment or for low value transactions, or as a low value investment, where the potential consumer risks and harms are low.

10. The EMA considers it disproportionate to apply the same risk warning standards to low risk/value qualifying cryptoassets. Such qualifying cryptoasssets should be subject to a proportionately lighter regime, with for example a risk warning that does not use such strong language as that used for investment-type products.

Question 3: Should we ban inducements to invest e.g. refer a friend bonuses, for all 'Restricted Mass Market Investments' and 'Non-Mass Market Investments'? Investments'?

11. Disagree. Please see our response to Q2.

12. We urge the FCA to make a distinction between different types of qualifying cryptoassets, and not apply an outright ban on inducements in relation to qualifying cryptoassets that present lower risks due to their nature (not investment based) or low value.

13. In addition, we would like to highlight that certain cryptoasset schemes that fall within the scope of banned inducements, such as a low value rewards that can be used towards the first cryptocurrency transaction, can provide valuable benefits to consumers, enabling them to engage with and learn about the market/product on a risk-free basis. The unintended consequence of an outright ban of such inducements is that these consumer benefits will be lost.

Question 4: Should we introduce a personalised risk warning pop up for first time investors in 'Restricted Mass Market Investments' and 'Non-Mass Market Investments'?

14. Disagree. Please see our response to Q2.

15. We urge the FCA to make a distinction between different types of qualifying cryptoassets to ensure proportionality and a risk-based approach to introducing friction in the customer journey. Personalised risk warnings for payment type cryptoassets, stablecoins and first-time investors are not needed and a standard risk warning should suffice to meet the FCA's objectives.

Question 5: Should we introduce a 24 hour cooling off period for first time investors in 'Restricted Mass Market Investments' and 'Non-Mass Market Investments'?

16. Disagree.

17. A distinction should be made between qualifying cryptoassets being used for payment, or for very low value transactions as opposed to qualifying cryptoassets as an investment asset. The proposed requirement for the 24 hour cooling off period is not proportionate for the former type of cryptoassets/cryptoasset transaction, as the risk to the consumer is much lower.

18. Further, the proposed rules impose disproportionate and unnecessary friction for those use cases where the consumer may wish to use a cryptoasset as a means of payment or to otherwise buy it at a price available at a specific point in time. Having to wait 24 hours before any such activity can be undertaken would limit consumer choice and potentially result in higher costs, as consumers would have to go to a provider they have used before rather than being able to 'shop around'.

Question 6: Should we change the investor declaration form for 'restricted', 'high net worth' and 'sophisticated' investors to introduce an 'evidence declaration' and simplify the declaration?

19. Neutral.

20. However in order to assist firms in implementing this change, we would welcome guidance from the FCA on:
    - clarification in the rules or supporting guidance on operationalizing the customer journey

- outlining the decision criteria to determine which of the forms the customer is required to fill and submit (corresponding to ‘restricted’, ‘high net worth’, and ‘sophisticated’ investors); and
- how the form should be used by firms targeting primarily restricted investors, and not make use of nay of the financial promotion exemptions.

Question 7: Should we make changes to our rules on appropriateness to ensure all investors in 'Restricted Mass Market Investments' must pass a robust assessment of their knowledge and experience?

21. Disagree.

22. We urge the FCA to make a distinction between different types of qualifying cryptoasset to ensure the rules are proportionate to the consumer risk, and do not unduly harm the customer journey. The risk to consumers from qualifying cryptoassets used for payment, or for very low value transactions is much lower than the risk from qualifying cryptoassets used as an investment asset. Accordingly, we would urge the FCA to reconsider whether an appropriateness test is necessary for lower risk qualifying cryptoassets, especially where other positive frictions are already applied.

23. In particular, we suggest that the FCA establish de minimis thresholds on crypto assets purchased, below which the customer categorization, appropriateness tests, and any form of cooling off period are not required. This value could lie below the average holding value that was used as a benchmark in the FCA's research (£300) at for example £150 to £250 cumulative crypto asset purchases over a period of 12 months. Once the threshold is reached, the customer could then be required to complete the categorisation and appropriateness assessment.

24. In such a case, the underlying consumer protection risks that the FCA aims to mitigate would still be addressed by greater customer education, risk warnings, and the threshold on crypto asset purchases. At the same time, this approach would remove some of the disproportionate friction that will result in many individuals being excluded from holding crypto assets. Without such a proportionate approach there is a risk that customers wishing to make a modest purchase or transact in cryptocurrency will instead go to offshore exhanges that are not UK regulated.

Question 8: Should we introduce record keeping requirements for firms to monitor the outcome of the consumer journey for 'Restricted Mass Market Investments' and 'Non-Mass Market Investments'?

25. Agree

26. However we urge the FCA to allow for a sufficiently long implementation timeline in order to allow firms to build all the required controls & record-keeping capabilities.

Question 9: Do you agree with our proposed approach to implementation of our consumer journey proposals for investments already subject to our financial promotion rules?

27. Agree.

Question 10: Do you have any suggestions for how we can monitor the impact of our consumer journey proposals?

28. Neutral.

Question 11: Do you agree with our proposed approach to implementation of our consumer journey proposals for cryptoassets?

29. Disagree.

30. In relation to the substance of the proposals, please see our response to Questions 2, 3, 4, 5 and 7; we suggest the FCA should consider applying a proportionate regime to qualifying cryptoassets that pose a lower risk to consumers.

31. In relation to the proposed timescales for implementation, we consider that, if s21 approvers remain limited to authorised persons only, and the FCA's additional proposed requirememts on s21 approvers are adopted, it is very unlikely that a sufficient number of s21 approvers will have entered the FCA's gateway in time to allow the regime to be implemented without significant disruption to existing firms' businesses and marketing strategies. Instead, we consider that a 12-18 month transition period will be necessary to enable implementation of all the changes required asset out in the Cost Benefit Analysis. A longer period for implementation will inevitably reduce the cost of implementation.

Question 12: Do you agree with our proposed changes to COBS 4.5 to clarify the obligation regarding the name of the s21 approver?

32. We strongly disagree with the proposed principle that only FMSA authorised firms would be able to approve financial promotions relating to qualifying cryptoasset.

33. The lack of authorised qualifying cryptoasset firms, as well as authorised firms with competence and expertise in qualifying cryptoassets, means that the pool of firms that may be interested in and/or sufficiently qualified to apply to the FCA to be an s21 approver is likely to be severely limited. It will be difficult for the FCA to introduce the regime without addressing the competition issues that will arise as a result of the lack of choice in s.21 approvers. Not only could this could also lead to high costs for qualifying cryptoasset firms, but given the complex and varied nature of qualifying cryptoassets, a firm with an s.21 approver permission would likely be in a position of approving the financial promotions for a potential competitor.

34. Instead the EMA suggests a more sustainable and sensible solution would be for qualifying cryptoasset firms to be able to approve their own financial promotions. This could be achieved by adding the approval of financial promotions to the list of regulated activities so that registered cryptoasset firms (for the purposes of AML), as well as authorised EMIs and PIs, can also apply for the permission to be able to approve their own and others' financial promotions. As well as crypto asset providers being able to approve promotions, EMIs and PIs should also be allowed to seek permission to approve financial promotions. This would mitigate the significant competition issues likely to arise if the list of s21 approvers remains limited to FSMA authorised persons.

Question 13: Do you agree with our proposal for s21 approvers to ensure that approved promotions include the date of approval in the financial promotion?

35. Agree.

Question 14: Do you agree with the introduction of a competence and expertise rule to apply to all authorised firms when approving or communicating financial promotions?

36. We agree that financial promotion approvers should have the relevant competence and expertise.

37. However, under the FCA and HMT's current proposed approach to limit s21 approvers to authorised persons, the C&E rule would likely exacerbate the issues raised earlier. There is likely to be a very limited pool of authorised firms with appropriate in-house skills, knowledge and experience to be able to approve such promotions, thus creating a vacuum in the market. Firms with the most extensive knowledge and expertise are likely to be registered cryptoasset firms (under the AML/CTF regime), EMIs, and PIs who offer cryptoasset services, and therefore it would be appropriate for such firms to be able to approve financial promotions relating to cryptoassets.

Question 15: Do you agree with the proposed approach to firms assessing competence and expertise?

38. Please see our response to Questions 12 and 13.

Question 16: Do you agree with our guidance to firms on the competence and expertise requirement (see Annex 4)

39. Please see our responses to Questions 12 and 13

Question 17: Do you agree with our proposal for a new ongoing monitoring requirement for s21 approvers?

40. Disagree

41. In the case that S21 approvers remain limited to FSMA Authorised persons, we consider this requirement to be overly onerous for the S21 approver; it will result in a reduction in the number of (already extremely low) authorised persons willing to take on the role of a S21 approver for cryptoasset providers.

42. If the S21 approvers can be extended to include cryptoasset firms that are Registered VASPs, or authorised Electronic Money Institutions or Payment Institutions, the proposals may be more proportionate and acceptable, as they would form part of the firms' ongoing compliance obligations with financial promotions requirements.

Question 18 : Do you agree with our guidance on ongoing monitoring for s21 approvers?

43. Disagreed.

44. Without addressing the fundamental issue of limiting s.21 approvers to authorised persons only, the increased regulatory burden for ongoing monitoring requirements for section 21 approvers is likely to further limit the pool of authorised firms who are willing to take on the responsibility of approving financial promotions for cryptoasset firms, thus distorting the competition.

45. Please see our responses to Questions 12 and 13

Question 19: Do you agree with our proposal to require s21 approvers to obtain attestations of no material change from clients?

46. Disagree

47. If the financial promotion rules are changed to allow for self-certification for qualifying cryptoasset firms, then the attestations will not be necessary.

Question 20: Do you agree with our proposal to extend conflicts of interest requirements to s21 approvers?

48. Disagree.

49. We note there are significant conflicts of interest likely to arise with the current proposition that s21 approvers be able to approve the financial promotions of unregulated cryptoasset firms. If EMIs, PIs and Registered VASPs are able to obtain a permission to approve the financial promotions related to their own cryptoasset services, the need to address such a conflict of interest would be eliminated.

Question 21: Do you agree that s21 approvers of Restricted Mass Market Investments should take reasonable steps to ensure that the relevant processes for appropriateness tests comply with our rules on an ongoing basis?

50. Agree.

51. However, as set out earlier, we consider that appropriateness tests are unnecessary, and indeed disproportionate, in some cases, and urge the FCA to disapply this requirement in those cases.

Question 22: Do you agree with our expectations of firms when complying with the appropriateness test?

52. Agree.

53. However, as set out earlier, we consider that appropriateness tests are unnecessary, and indeed disproportionate, in some cases, and urge the FCA to disapply this requirement in those cases.

Question 25: Do you agree with our proposal to apply the financial promotion regime to cryptoassets and classify them as 'Restricted Mass Market Investments'?

54. Agree.

55. We agree that in comparison to the other two categories, cryptoassets do appear to largely fall within the RMMIs. Nevertheless, please see our response to Question 11 as to the varying types of qualifying cryptoassets which require a risk-based approach for the financial promotion regime.

56. In the absence of a threshold value below which some of the more onerous requirements woud not apply, the increased cost of customer acquisition resulting from the application of these rules will likely drive up the minimum value of the crypto asset that can be purchased. This may result in financial exclusion, and will impact consumers' ability to transact in crypto currency.

Question 26: Do you agree with our proposed approach to exemptions for cryptoassets?

57. Neutral.

List of EMA members as of March 2022:

AAVE LIMITED
Account Technologies
Airbnb Inc
Airwallex (UK) Limited
Allegro Group
American Express
ArcaPay Ltd
Azimo Limited
Bitpanda Payments GmbH
Bitstamp
BlaBla Connect UK Ltd
Blackhawk Network Ltd
Boku Inc
CashFlows
Circle
Citadel Commerce UK Ltd
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