

C L I F F O R D

C H A N C E

**THE UK'S FINANCIAL PROMOTIONS REGIME:
BRINGING CRYPTOASSETS INTO THE FOLD**

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On 7 June 2023, the government published the final version of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023, which will bring qualifying cryptoassets within the scope of the existing financial promotion regime. The next day, the Financial Conduct Authority (FCA) published a **policy statement** setting out the conduct rules that the FCA intends to apply to in-scope cryptoasset financial promotions (the CAFP rules).

The new regime will apply from 8 October 2023 to all firms that market cryptoassets to UK consumers, regardless of whether the firm is based overseas or what technology is used to make the promotion. For direct offer financial promotions (DOFPs) which specify a means of response to the promotion, additional requirements will apply.

In this briefing, we explain these developments and the impact for UK and international cryptoasset firms, including addressing how the DOFP requirements can be complied with and incorporated into the customer journey.

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Existing regime

In the UK, it is a criminal offence to communicate a financial promotion unless it has been made or approved by a firm authorised under the UK Financial Services and Markets Act 2000 (FSMA) or it qualifies for an exemption. This does not include firms that are otherwise authorised by, or registered with, the FCA, such as registered cryptoasset service providers.

A financial promotion is any invitation or inducement to engage in an investment activity. An investment activity is defined as a controlled activity that is performed in respect of a controlled investment. This means that the regime not only covers promotions for the straightforward sale of a controlled investment, but also promotions in respect of certain activities in respect of controlled investments. Controlled investments include shares, bonds and derivatives. Controlled activities include dealing, providing portfolio management or providing investment advice. The UK regime covers all financial promotions that are capable of having an effect in the UK, including adverts from abroad that are targeted at UK investors.

The exemptions under the regime include:

- The investment professionals' exemption, which allows communications to persons reasonably believed to be investment professionals, including banks, investment firms and other persons whose ordinary business involves the activity to which the communication relates, or a government, local authority or international organisation.
- The high-net-worth individuals' exemption, which allows non-real time or solicited real time communications to persons who have self-certified that they meet the prescribed high-net-worth criteria provided that the communication is accompanied by a warning statement.
- The self-certified sophisticated investors' exemption, which allows communications to persons that have self-certified that they meet the prescribed investment experience criteria provided that the communication is accompanied by a warning statement.

New regime for qualifying cryptoassets

From 8 October 2023, qualifying cryptoassets will be controlled investments and, therefore, fall within the scope of the existing financial promotions regime. A qualifying cryptoasset is any cryptographically secured digital representation of value or contractual rights that can be transferred, stored or traded electronically, and uses technology supporting the recording or storage of data (which may include distributed ledger technology) that is both fungible and transferable. This would include many existing cryptoassets, including widely traded cryptocurrencies such as Bitcoin and Ether. There is a carve-out for digitally issued fiat currency, including central bank digital currencies, and cryptoassets that meet the definition of electronic money or existing controlled investments.

Authorised firms

FSMA-authorised firms, such as banks, investment firms or consumer credit firms, are generally permitted to communicate financial promotions both under the existing regime and the new regime in respect of qualifying cryptoassets. When communicating financial promotions, authorised firms need to comply with the applicable FCA conduct rules. With regard to financial promotions relating to qualifying cryptoassets, authorised firms will need to comply with the proposed CAFP rules.

Under the proposed CAFP rules, the general FCA conduct rules for financial promotions will apply, such as the requirement for financial promotions to be clear, fair and not misleading. In addition, specific requirements apply to cryptoasset promotions, such as the requirement for a prescribed-form risk warning and a ban on inducements to invest, such as a refer-a-friend bonus.

Additional requirements will apply to direct offer financial promotions or DOFPs, such as the introduction of a 24-hour cooling-off period for first-time investors with a firm, as well as personalised risk warnings, client categorisation requirements and appropriateness assessments. A DOFP is a subcategory of a financial promotion. It is distinguished from a standard financial promotion by having the additional element of specifying a means of response to the promotion, such as an application form.

The concept of DOFPs has existed for approximately 20 years and was historically designed to capture ways of promoting securities which would usually be marketed through financial intermediaries and, only in limited circumstances, directly without intermediaries, e.g., through “tear-off slips” on prospectuses (the original definition of ‘direct offer financial promotion’ in the FCA Handbook specifically referred to “tear-off slips”).

The use of this concept in the context of promoting cryptoassets via a website therefore causes some practical difficulties, including due to the fact that, typically, there are no financial intermediaries. However, in its Policy Statement PS23/6, which accompanies the CAFP rules, the FCA explained that the restrictions in respect of DOFPs are intended to ensure that extra protections apply before consumers are in a position (as a result of the DOFP) to take the crucial step towards placing their money in the investment. The FCA further commented that a manner of response can take many forms and that examples might include a promotion containing a ‘buy now’ button which enables the consumer to invest, or a form asking the consumer to provide their bank account details. The FCA acknowledged that an assessment of whether a particular financial promotion constitutes a DOFP will depend on the specific circumstance but stated that anything that promotes an investment and contains a mechanism which enables consumers to place their money in that investment is likely to constitute a DOFP.

In light of the FCA's comments, it is likely that many online advertisements will be caught. When assessing online advertisements in the form of buttons leading to other websites (such as ‘buy now’ or similar buttons) both the relevant advertisement and the website to which the advertisement leads will need to be assessed as a whole.

For example, we think that in most circumstances a button displaying ‘buy now’ will likely amount to a financial promotion (as it invites the relevant client to engage in the activity of buying or selling cryptoassets). If the button initiates a customer journey enabling the customer to invest or to enter into terms on which to invest, this is likely to constitute a DOFP. However, if the button merely initiates a customer onboarding questionnaire, the button and the website together are unlikely to be a DOFP and the button alone may either only constitute an ordinary financial promotion or potentially may not constitute a financial promotion at all.

The UK financial promotions regime applies to all promotions carried out during the course of business. In practice, this means that one interaction could include several financial promotions, some of which may be standard financial promotions and some of which may be DOFPs. For example, initial contact with a consumer may take the form of an advert promoting a crypto trading app and providing details to allow consumers to download the app. This promotion would likely be a standard financial promotion. However, the next interactions with the consumer inside the app, such as a ‘buy now’ button, will be at risk of constituting a DOFP. It is important to determine at what point in the consumer journey is a DOFP made, as this is the point at which the various protections must be implemented (see box “*Example consumer interaction including for DOFPs of cryptoassets*” on page 8). As many communications are made through websites that include links enabling direct investments, it is likely that the DOFP rules will apply in the majority of cases.

Registered providers

Registered cryptoasset service providers are cryptoasset exchange providers or custodian wallet providers that are registered under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692) (2017 Regulations). Under the existing regime, registered cryptoasset service providers are not allowed to communicate financial promotions unless an exemption applies, and only some of the exemptions will be available in respect of qualifying cryptoassets. For example, the exemption for investment professionals will be available, but not the exemptions for high-net-worth individuals or self-certified sophisticated investors.

To counteract the potentially stifling effect this could have for registered cryptoasset service providers, the new regime introduces a temporary bespoke exemption for registered cryptoasset service providers (the CASP exemption). Under the CASP exemption, registered cryptoasset service providers will be allowed to communicate their own cryptoasset financial promotions, provided that they comply with the CAFP rules.

Unregistered providers

Under the new regime, unregistered cryptoasset service providers, such as UK providers that are not registered under the 2017 Regulations or overseas crypto service providers with no UK presence, will no longer be able to communicate financial promotions to UK clients unless an exemption applies. As with registered cryptoasset service providers, only certain specific exemptions will apply to cryptoassets, the most relevant of which is likely to be the exemption for investment professionals.

Unregistered cryptoasset service providers will no longer be able to communicate financial promotions to retail clients in the UK. In this context, it should be noted that the UK financial promotions regime differs from solicitation-based regimes in other jurisdictions in two ways:

- A financial promotion may arise through the passive showing of information, for example if a communication or banner displayed on a website meets the characteristics of a financial promotion.
- A financial promotion may arise at any point in the customer relationship, even where initial contact was made by the customer; that is, there is no reverse solicitation exemption that allows the provision of financial promotions at the request of a potential customer.

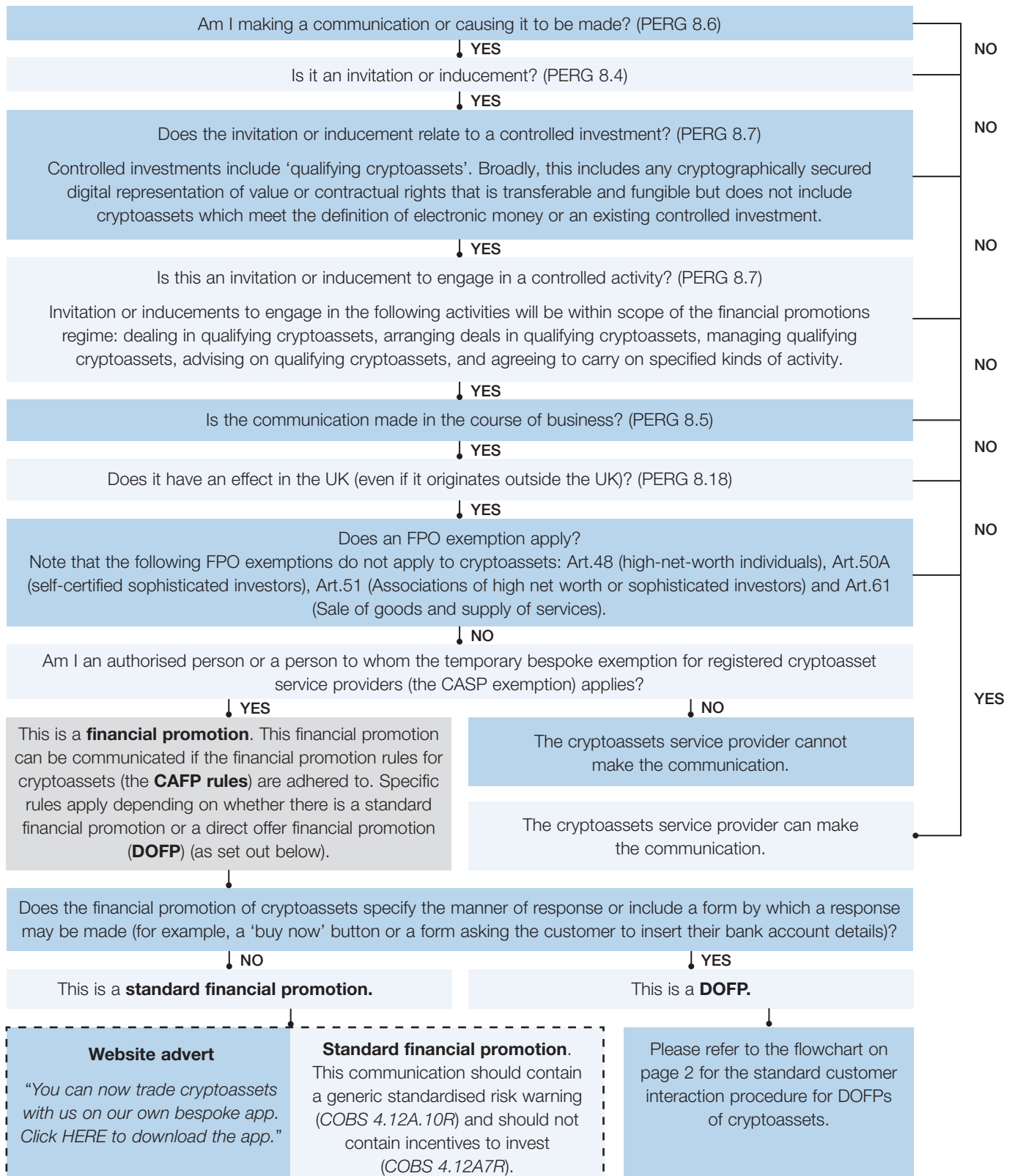
In practice, this means that unregistered cryptoasset service providers will need to assess the content of their website offering, to the extent that it could have an effect in the UK, and consider whether any information displayed there could amount to a financial promotion to retail clients.

Next steps

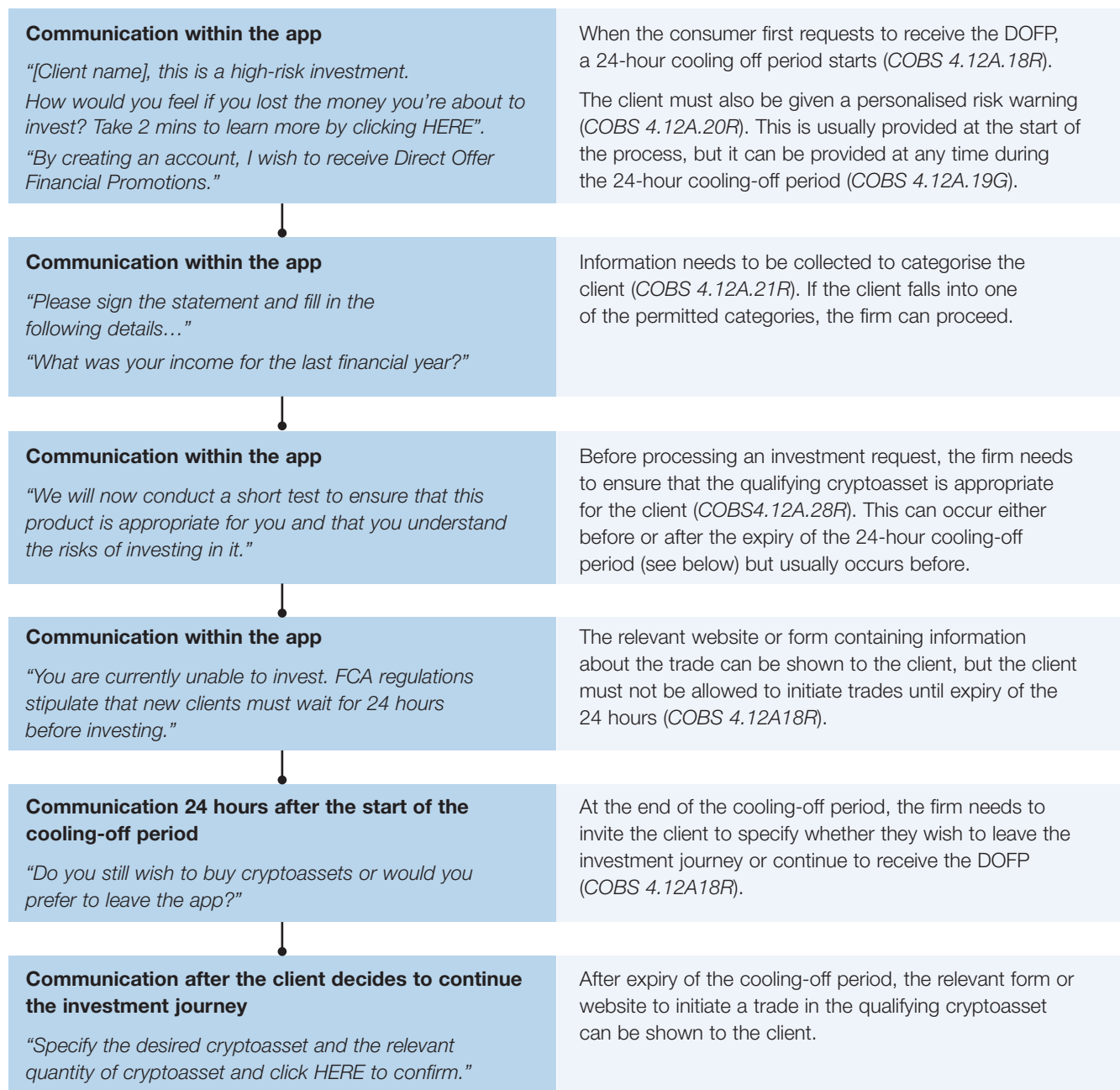
With a short transition period, firms only have until 8 October 2023 to rearrange their financial promotion strategies to comply with these onerous new regulatory requirements. Firms that are currently unregulated will need to consider if there is a way for their promotions to be approved by an authorised firm or to become authorised themselves or, in the short term, to register under the 2017 Regulations in order to benefit from the CASP exemption.

All cryptoasset service providers should start assessing the content of their websites, apps, social media accounts, marketing campaigns and any other public documents that could have an effect in the UK, and consider whether any information displayed could amount to a financial promotion.

Is my communication a financial promotion?



Example consumer interaction for DOFPs of cryptoassets



Health Warnings:

- Whether a communication constitutes a standard financial promotion or a DOFP will depend on all relevant circumstances, so the conclusions above should be read as illustrations only.
- The above customer interaction process is a suggested methodology. The specific steps will depend on the bespoke onboarding process of every firm.
- In relation to a DOFP of cryptoassets, the firm has the option to comply with the suitability assessment set out in COBS 9 as an alternative to the procedure set out in COBS 4. This flowchart assumes that the firm has not chosen to undertake a suitability assessment under COBS 9.

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