

Insights

FCA BANS SALE OF CRYPTOASSET INVESTMENT PRODUCTS TO RETAIL CUSTOMERS

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Introduction

Since July 2019, the UK Financial Conduct Authority (“FCA”) has been consulting on proposals to bring the promotion of certain types of cryptoassets within the scope of financial promotions regulation. One of the more controversial proposals was to prohibit the sale of cryptoasset investment products to retail customers. Despite 97% of consultation respondents calling for such sales to remain permitted, this has been apparently ignored by the FCA and the ban introduced last week.

The FCA's decision

On 6 October 2020, the FCA published its decision confirming the absolute prohibition of the sale of derivatives and exchange traded notes referencing certain types of cryptoassets to retail clients. The ban does not apply to security tokens that qualify as specified investments (as these already fall within the FCA's regulatory remit). The prohibition will be implemented through changes to the product intervention rules in Chapter 22 of the Conduct of Business sourcebook.

The FCA's primary justifications for its decision are that:

- such products would be “ill-suited for retail clients due to the harm they pose”;
- the presence of market abuse and financial crime in the secondary market for cryptoassets creates a high level of risk; and
- the “extreme volatility” of these products which could lead to unexpected losses.

In particular, the FCA highlighted their view that derivative products of cryptoassets lack “intrinsic value” and are “opaque, complex and unreliable as reference assets for investments for retail consumers”.

The decision has received mixed responses, with some praising this level of safeguarding, especially given the fact that the complexity of these products puts them beyond the scope of FSCS

protection. Others, however, see the decision as a way of the FCA pushing UK retail investors to less regulated offshore providers, thereby absolving the FCA of any responsibility but not actually protecting the exposed consumers.

How will this affect firms?

The deadline for FCA regulated firms to cease marketing, distribution or selling activities in, or from, the UK of these products to retail clients, is 6 January 2021. Retail clients with existing holdings can remain invested following the prohibition, until they choose to disinvest. There is no time limit on this and the FCA does not require or expect firms to close out retail clients' positions unless consumers ask for this.

The FCA have stated that they will keep the prohibition under review, and consider whether there is a need to review it in the light of any evidence indicating that the cryptoasset market has substantially changed in the areas identified above which make it high risk. In the meantime, firms should take notice that the FCA will be alert to any attempts to circumvent the ban by moving clients to related non-UK based companies or reclassifying retail clients as professional clients.

The changing perception of cryptoassets

It is remarkable to consider how far English law has come in dealing with cryptocurrencies and blockchain technologies in the past decade. While the new technology used to be feared or sometimes dismissed as merely a criminal conduit for evading regulatory measures, we have now reached a place where we can point to tangible examples of a modernised English legal system embracing innovation.

For instance, although there is no agreed definition of a “cryptoasset”, the Legal Statement on Cryptoassets and Smart Contracts (the “Legal Statement”)¹ launched by Sir Geoffrey Vos, Chancellor of the High Court on 18 November 2019 made clear that cryptoassets should be treated as property under English law. This position has since been corroborated by two High Court judgments (*Robertson v Persons Unknown* in July 2019 and *AA v Persons Unknown* in December 2019), both of which confirmed the treatment of bitcoin as legal property. These events of 2019 were considerable stepping stones for getting English law up to speed and even ahead of the game, in relation to blockchain technologies.

The FCA itself regularly reiterates its respect for innovation, which it balances against the need to protect consumers. In the FCA's latest [Perimeter Report](#), published in September 2020, it stresses that it seeks to encourage not stifle innovation, and admits that the best outcomes can sometimes be achieved by removing regulatory barriers to innovation. The same sentiment was echoed in the [policy statement](#) introducing this prohibition.

The next regulatory steps

On this basis, the hope remains that we will see useful and proactive regulation coming through in the cryptoasset sphere in the near future. Indeed, the FCA's Perimeter Report states that it will continue to work closely with HM Treasury and the Bank of England, as part of the Cryptoasset Taskforce. To that end, we may see a manifestation of HM Treasury's policy proposals in its [Consultation Paper on Cryptoasset Promotions](#), published in July 2020. These proposals include:

- extending the Financial Promotion Order restriction to the majority of stablecoins (which are currently unregulated) by the end of 2020; and
- expanding the perimeter of the financial promotions regime to meet the broader challenges of cryptoasset regulation.

Again, this rhetoric suggests continued development of our regulatory framework to accommodate rather than exclude emerging blockchain technologies, so we will be awaiting evidence of this from the relevant regulatory bodies.

[1] The Legal Statement was the result of the Law Tech Delivery Panel's ("LTDP") consultation into cryptoassets. The LTDP was established by a consortium of the UK Government, the Judiciary and the Law Society of England and Wales.

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