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Guidance Consultation GC23/1 Guidance on cryptoasset financial promotions
Financial Conduct Authority
12 Endeavour Square
London
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Guidance Consultation GC23/1 Guidance on cryptoasset financial promotions (the "Consultation Paper")

Dear Sir or Madam,

CryptoUK ("**CUK",** "**we**") and its members welcome the opportunity to comment on the Consultation Paper regarding the guidance on cryptoasset financial promotions. CUK is the UK's self-regulatory trade association representing the cryptoasset sector. Our members comprise leading companies from across the sector.

In responding to the Consultation Paper (the "**Response**"), we set out the views of our members and others in the community. We seek to offer pragmatic and relevant suggestions as to how we believe the Financial Conduct Authority ("**FCA**") could implement guidance whilst still enabling the UK to remain competitive as a destination for the burgeoning cryptoasset market.

Although we consider the points below in our responses to each question, we have included a summary of our overall position as well as the specific points and recommendations that should be considered alongside our comments and answers throughout this Response.

Overall position

We support the FCA's guidance on financial promotions for cryptoassets and consider that the guidance will be a valuable resource for firms in this space. With the financial promotions regime applying for the first time to "qualifying cryptoassets", many firms will be new to this space and an understanding and steer on FCA expectations is a much needed resource. However we consider that the guidance requires development to reflect the nature of the cryptoasset market, and as such, we have set out our specific recommendations and comments below:

- Limited guidance – the guidance is limited in nature and does not take into account the specific nuances related to qualifying cryptoassets and how these products are marketed through different channels. We consider the guidance should be expanded and provide more detailed examples that set out FCA's expectations along with how it applies to the cryptoasset market. We also consider topics such as territorial scope and ESG which

warrant further guidance in order to benefit not only cryptoasset firms but the wider financial services market.

- Examples needed – specific examples should be provided by the FCA, for example, through a diagrammatic form, to help firms understand use cases and how the guidance applies in practice.

- Changing market and evolution of cryptoasset space – the guidance will need to stay under review and scrutiny as the cryptoasset market develops and new products are brought to the market. It will also need to stay up to date as legislative developments take place, and firms must have the opportunity to consult on any changes before they are made.

General Consultation Questions

1. **Do you agree with our proposed guidance on the context of the cryptoasset financial promotions regime? Please explain your answer, highlighting any other issues that would be useful to consider.**

While there is general agreement with the broad guidance on the regime, we believe that more specific clarity to determine exactly what is covered is required. The financial promotions regime is applying for the first time to "qualifying cryptoassets" with the same expectations applying to firms within this space as those which already apply within the traditional investment and financial services space. The new regime will also be subject to full prudential FCA regulation and as such expectations will be even higher. However, as new entrants, navigating the breadth and depth of the financial promotions regime will be complex, costly and take a significant amount of time (as the FCA note in Policy Statement ("**PS**") 23/6). New entrants will need clarity on FCA expectations, and an understanding of how the FCA intends to apply the financial promotions regime to this new asset class would be invaluable for cryptoasset firms.

Furthermore, our concern is that the terminology around "qualifying cryptoassets" is open to interpretation. Paragraph 15 states that "certain" investment activities involving cryptoassets would be in scope while paragraph 16 states that not all investments involving cryptoassets are in scope. We call for clarity on exactly which "qualifying cryptoassets and cryptoasset investment services/products" are in scope. For example, while arranging deals in relation to qualifying cryptoassets is within the scope of the financial promotion, providing custody in relation to the same qualifying cryptoassets is not. The use of diagrams to help with the clarification of these points should be considered as well as providing examples of types of "qualifying cryptoassets" falling within the remit of the financial promotions regime, perhaps linking back to FCA guidance on cryptoassets in PS 19/22. It would also be helpful to understand which types of qualifying cryptoassets are not intended to fall within scope. We believe, for example, that cryptoassets which are not intended to serve as investment products, e.g. certain types of utility tokens and fan tokens will not fall within the scope of the regime.

Whilst covered in more detail later in this Response, we would also look to highlight the potential unenforceability of agreements entered into as a result of unlawful financial promotions. In the "other arrangements" segment in paragraph 16, we advise that this should also reference financial instruments under MiFID.

The guidance does not currently include anything on the territorial scope of the financial promotions regime. We are aware of the general financial promotions territorial scope guidance in PERG 8.3. However, as stated above, firms that are impacted by these changes will be impacted by the financial promotions regime for the first time and a number of firms currently offer services into the UK on a cross-border basis. With this in mind, we believe the industry would welcome specific guidance on the territorial scope of the financial promotions regime.

Furthermore, with reference to paragraph 27 of the FCA's Guidance Consultation ("**GC**") 23/2 published on 17 July 2023, we ask for confirmation that the sentence **"**a financial promotion communicated by the non-UK entity that can be viewed by UK consumers must comply with all relevant UK requirements" is simply a supplementary clarification to the sentence above it ("firms operating social media profiles that are shared between UK and unauthorised non-UK entities should be aware that the financial promotions restriction is applicable to all communications capable of having an effect in the UK") and not a separate obligation in and of itself.

Our understanding of the existing applicable territorial scope is that the concept of "having an effect in the UK" also contemplates the ability for the audience to enter into an agreement with the financial service provider or otherwise take an action as a result of the financial promotion. We would be grateful for clarification as to whether the mere possibility of viewing a communication - even where there are warnings as well as proper systems and procedures in place to prevent UK investors from entering into an investment contract - is not sufficient, in and of itself, to give it the capacity of having effect in the UK. We appreciate that this is a point to raise in our response to GC 23/2, however, given the implications of this sentence if read literally, we believe it is also necessary to clarify this point in this Response.

2. **Do you agree with our proposed guidance on ensuring that cryptoasset financial promotions are fair, clear and not misleading? Please explain your answer, highlighting any other issues that would be useful to consider.**

We are in agreement that the 'fair, clear and not misleading' rule applies across all sectors and it follows that this should also apply to cryptoassets. However, we call on the FCA to provide more guidance in the form of examples to illustrate positive and negative promotion, as is the case for other guidance provided by the regulator (for example, the comprehensive non-Handbook guidance published on the Consumer Duty rules). This should take into account the specific nuances of the cryptoasset industry and cryptoassets (for example the use of decentralisation, blockchain, minting and mining and how these factors could impact what is fair, clear and not misleading). The provision of practical examples (as was the case with the social media financial promotions guidance (Finalised Guidance ("**FG**") 15/4) would prove beneficial to ensure cryptoasset promotions are being advertised in a compliant manner.

One primary concern identified is the heavy burden currently being placed on firms to substantially disclose risks, which goes against the "balanced view" terminology being used and goes beyond the principle of proportionality which is generally applied within the financial promotions space. Further guidance on this point would be particularly helpful to the industry.

Similarly, we believe it would be helpful to have further guidance on what "appropriate and proportionate" compliance means and when this is or is not adhered to.

The provision of clear guidance would particularly assist with a proactive approach to compliance (as was the case with the guidance provided on best practices for consumer credit), which would promote a preventative approach to consumer harm and mitigate risk exposure for customers (particularly retail customers). This should then of course alleviate supervisory and enforcement burdens on the FCA in the future, especially given the speed at which the cryptoasset market evolves.

We ask that this response is read in conjunction with our response to question 7 where we provide more information on due diligence.

3. **Do you agree with our proposed guidance for financial promotions of cryptoassets that claim a form of stability, or which claim their value is linked to a fiat currency? Please explain your answer, highlighting any other issues that would be useful to consider.**

We have some concerns on whether this approach will allow the regulation to grow and develop alongside the sector, and that the proposed guidance may not be futureproof. As an immediate example, the introduction of many CBDCs would fall within the remit of this guidance and be subject to the financial promotions regime, although they are government issued. We do not consider that this is the intention behind the guidance and clarity is needed on what types of cryptoassets are within or out of scope.

Our belief is that the UK Government, as part of its undertaking set out in the recent consultation and call for evidence on a future financial services regulatory regime for cryptoassets from His Majesty's Treasury ("**HM Treasury**") ("**HMT Consultation**"), should set out clear expectations for firms with regards to disclosures related to cryptoassets that claim a form of stability or that are linked to a fiat currency to reference their value, including the rationale behind such disclosures and guidance on compliance and execution. Consequently, our response to this question and the guidance referenced by it is that the FCA should keep any guidance for stablecoins under review until such time as HM Treasury and the UK Government have issued a comprehensive regime for payment stablecoin market participants, including issuers, and should not pre-empt any guidance that may be released as a result of that work.

In lieu of our suggestion above, and with regard to the specific points discussed in the draft guidance provided, there is a reliance, to a large degree. on disclosure even where there is already a requirement for an appropriateness test in place - this appears disproportionate and burdensome. Therefore, we call for more clarity on the expectations imposed on firms in relation to the due diligence required (and how this is evidenced) along with how this applies and relates to other requirements on firms.

Specifically, we would appreciate clarity and elaboration on what "stand-alone compliance" (in paragraph 38) means, and a clear identification of the parameters a firm may use to determine what may be put into hyperlinks and what must be declared upfront and in the financial promotion itself. This would enable firms to understand and implement compliance proactively, especially with regards to other "upfront" disclosure requirements (such as the stability explanation requirements per paragraph 37) and the technical and design limitations of many marketing mediums, including social media platforms (as identified by the FCA in 2015).

We are concerned that more disclosure may not lead to good customer outcomes and may in fact make it harder for customers to weigh up the pros and cons of the product. While we appreciate that the right level of disclosure is difficult to achieve, the level of disclosure required, especially when firms are relying on third party issuers for this information, will practicably be difficult to obtain. As such, we consider that the requirement for disclosure must be proportionate.

4. **Do you agree with our proposed guidance for financial promotions of cryptoassets that claim to be backed by a commodity or an asset? Please explain your answer, highlighting any other issues that would be useful to consider.**

Whilst there is agreement in principle to the guidance, we call for additional clarity on the expectations on firms in relation to disclosures, and recommend that any standards applied are aligned with current practice. We also suggest that any firm utilising commodity-based backing should provide information on the performance of the commodity over time.

5. **Do you agree with our proposed guidance for financial promotions of complex yield models or arrangements? Please explain your answer, highlighting any other issues that would be useful to consider.**

We agree in principle on the provision of information that is fair, non-guaranteed, and reflective of any underlying charges, however the ability to apply this in practice is a concern.

For example, we are concerned with the application of the “past and future performance” to financial promotions of complex yield models and/or arrangements. It should be considered that many of the models being used for cryptoassets are new, and constantly evolving, meaning there is likely to be insufficient data to give any meaningful value to past performance indicators. We also propose that the provision of evidence in these scenarios could also include appropriate modelling of performance as a means of being able to demonstrate how potential returns could be achieved, for example, the use and disclosure of simulated performance data, as is typically used in the traditional investment space when a new fund is being launched.

We also propose that the expectations set out in paragraph 38 relating to stand-alone compliance should be repeated specifically for such models or arrangements, given that they already apply to these financial promotions. Further elaboration for these models specifically would be helpful as we recognise that the promotion of complex investments might require a high volume of supporting information and/or disclosures to ensure they are fair, clear, and not misleading.

Finally this guidance is drafted on the premise that there is an industry and regulatory agreement on what complex yield model arrangements are, and what they consist of, however this is clearly not the case. One point we are keen to stress is that the approach to staking should not be a one size fits all approach. Not all types of staking will be deemed to be a controlled activity and not all staking will fall within the scope of the financial promotions regime. Whether or not staking is considered to be a controlled activity (potentially by way of qualifying as a “collective investment scheme”) is still an open question with HM Treasury, and we will be submitting a separate response to HM Treasury on this point shortly. As such, FCA guidance must evolve and develop once an industry wide consensus has been achieved regarding staking more generally.

6. **Do you agree with our proposed guidance for financial promotions on social media? Please explain your answer, highlighting any other issues that would be useful to consider.**

We note the FCA's reference to FG 15/4 and agree on its application to this guidance. We assume that these references will be updated following the social media guidance consultation that was published on 17 July 2023 (GC 23/2).

Furthermore, social media channels have advanced significantly, for example “real time communications” can include platforms such as Tik Tok and Instagram Live, as well as crypto specific channels such as Discord. As such the existing guidance should be updated to reflect these new channels.

Furthermore, we consider that financial promotions that have been made before 8 October 2023 and that are not currently communicated or not considered to be “live” would not fall within the financial promotions regime. It would be helpful to have FCA guidance and clarity on this point.

Finally, it would be useful to receive further clarity on how the FCA expects firms to communicate disclosure requirements (as per question 2 and 3) on social media given social media promotions are typically much more limited in information. For example, would providing a hyperlink which then refers the user to the website which contains the level of detail expected by the FCA be permitted? We note that this is set out in the social media guidance consultation, although specific reference to cryptoassets would be of assistance to the industry.

7. **Do you agree with our proposed guidance on due diligence before a financial promotion is communicated? Please explain your answer, highlighting any other issues that would be useful to consider.**

The area of due diligence seems to raise many questions in terms of the trigger points and appropriate measures needed to evidence this for the purpose of compliance.

The requirements regarding due diligence were covered extensively in the HM Treasury Consultation and have not yet been resolved or set out as confirmed legislation or regulations. As such it appears disproportionate to apply such disclosure obligations on firms at present, given the legal and regulatory considerations are still unresolved. Any obligations that are applied to firms must continue to be appropriate and proportionate to the current regulatory environment and the rules that apply at that date.

Furthermore, we would appreciate an explicit confirmation on whether the financial promotions regime requirements would also apply to the listing of tokens on the website of an exchange, and therefore carry the same requirement for due diligence as set out in the HMT Consultation - even if this is not explicitly part of a financial promotions communication. We would welcome clarity on this and whether this is in fact the FCA’s intentions, and if so it should be confirmed in the guidance. If this is the case we would also welcome further clarity on how such requirements would apply.

Additionally, given there is not a current process or precedent for a number of the indicated due diligence requirements – specifically in the validation of ESG credentials and the technology credentials (coding audits etc), we ask for the opportunity to consult further with the FCA on both cost benefit analysis and also examples of how and where this should be applied. We would also welcome clarity on the expectations for validating this due diligence – for example, will every due diligence require legal validation and where will the associated costs for this sit (this is a particular issue for smaller organisations for example)?

In addition to the above, we recommend that the wording of the guidance is amended to reflect the above comments. For example, replacing the wording "ensuring on the areas of financial crimes and background checks on issuers" to instead read "ensuring all reasonable steps have been taken to ensure".

Finally, firms require further guidance on the following points regarding due diligence:

- The validity of due diligence and how long it lasts.
- The obligations that apply, for example, a best endeavours approach should be applied rather than a more stringent approach especially when information may not be readily available for certain tokens / tokens that are already in the public domain.
- What legal and compliance checks are required, for example does the FCA expect a token opinion prior to listing any token to an exchange - this is costly, time consuming and impracticable given the changing nature of tokens.
- Whether the FCA expects such due diligence on a continual basis and if so, how firms should do this. We consider that this is impracticable given that the same obligations do not apply to traditional investments.
- We would appreciate if the FCA could provide practical examples of what they expect and how this should be applied in practice. A Q&A approach, similar to the guidance provided across various aspects of PERG would be valuable.
- We would appreciate if the FCA could confirm that relying on information and analysis properly prepared by independent professional advisers is only one way of understanding the risks associated with cryptoassets. Other ways can include internal assessments by experts within the firm.

8. **Do you agree with our proposed guidance on disclosing legal and beneficial ownership of cryptoassets? Please explain your answer, highlighting any other issues that would be useful to consider.**

   We support the principle of disclosing legal and beneficial ownership of cryptoassets.

   It would be useful if the FCA could confirm that inclusion within the appropriateness assessment (as set out by COBS 10 Annex 3G (2)) would generally be sufficient to satisfy the FCA's expectation in paragraph 2.34 of GC 23/1 to "clearly and prominently disclose the legal and beneficial ownership of a cryptoasset".

9. **Do you agree with our proposed guidance on disclosing the firm's regulated status? Please explain your answer, highlighting any other issues that would be useful to consider.**

We agree with the guidance on disclosure in relation to regulatory status which aligns with the broader financial regime, however we think it would be valuable for the FCA to develop prescribed wording for firms to include, similar to that already in place for authorised firms (dual or single), appointed representatives, agents and distributors.

This would help:

- ensure consistency across terms and conditions and websites;
- make it clear to the user the regulatory position of a firm;
- ensure that there is no room for ambiguity; and
- allow users to compare across markets.

We also consider that any prescribed wording or regulatory disclosure should be kept under continual review and look to the future possibility of additional sentences being added (aligned to those in paragraph 41 relating to the future developments with stablecoins) to this guidance to ensure disclosures remain fit for purpose as technology and requirements adapt.

10. Are there any other topics you believe our guidance should cover?

We consider additional guidance should cover the following:

- Territorial scope and how this applies in practice. The current guidance in PERG 8 is very broad and does not provide the level of detail that is required. For example, does the FCA consider that a website offered from a place of business outside of the UK which is not directly marketing or targeting UK customers, and does not have a UK IP address, falls within scope? This would mean that every website in the world accessible to UK customers would be within scope which, if this is the intention, should be clearly stated by the FCA.

- Whether the FCA will apply equivalence measures, for example, it would be prudent to allow firms who have their financial promotions drafted in a manner that is compliant with rules of equivalent jurisdictions, to market these to UK customers without any further obligations on that firm (especially if the firm is overseas / does not have a place of business in the UK). This would be particularly valuable given the UK wishes to remain a competitive market post Brexit, and position itself on par with European jurisdictions, who benefit from MiCA and passporting.

- Further guidance on the trigger points for direct offer financial promotions.

- A more concrete “review clause” on the proposed guidance, and when and how often the FCA intends to review the guidance.

- Whether the independence of user feedback, personal or third party reviews are permitted marketing tools.

- Member feedback has indicated various pressure points with regards to complying with the new rules. Whilst members acknowledge that the rules have been extended to the cryptoasset industry to minimise consumer detriment, the FCA should keep in mind that certain aspects of the rules (such as incentive bans) may make it challenging for firms to be commercial and competitive and may cause the unintended consequence of forcing firms to move their operations out of the UK.

- Once the approval gateway has been formally established, it would be helpful for the FCA to provide a list of section 21 approvers.

Complex yield models / arrangements questions

1. **What are the benefits and opportunities of cryptoasset borrowing, lending and staking models/arrangements for consumers?**

   We consider that the position regarding borrowing, lending and staking models/ arrangements needs to be considered at a more holistic level, with the involvement of the UK Government and HM Treasury. As such we intend to submit a more detailed response to questions 1 – 4 at a later date, as part of a separate working paper that we will submit to both HM Treasury and the FCA on cryptoasset borrowing, lending and staking models.

2. **Which type of cryptoasset borrowing, lending and staking models/arrangements provide the greatest benefit to consumers?**

   Please see our comments at 1 above.

3. **What are the risks associated with cryptoasset borrowing, lending and staking models/arrangements for consumers?**

   Please see our comments at 1 above.

4. **Which types of cryptoasset borrowing, lending and staking models/arrangements present the greatest risks to consumers?**

   Please see our comments at 1 above.

5. **If you are a firm that provides cryptoasset borrowing, lending or staking models/arrangements to retail investors please provide information on:**

   a. **The different types of cryptoasset borrowing, lending and staking models/arrangements you offer to consumers and the form of related financial promotions.**

   b. **What data your firm collects to calculate advertised rates of return?**

   c. **What modelling your firm undertakes to calculate advertised rates of return?**

   d. **What steps your firm takes to assess and mitigate the risks to consumers associated with these models/arrangements?**

   No further comments on this question.

6. **Please provide any data, including details of the source and time period for the data, you have or are aware of related to:**

a. **The number of UK consumers who invest in cryptoasset borrowing, lending and staking models/arrangements and the average amount invested.**

b. **The number of firms who provide cryptoasset borrowing, lending and staking models/ arrangements to UK consumers.**

c. **Gains or losses experienced by UK consumers in relation to cryptoasset borrowing, lending and staking models/arrangements.**

No further comments on this question.

7. **Are there any other issues we should take account of when considering our approach when developing regulatory requirements for cryptoasset borrowing, lending and staking models/arrangements?**

No further comments on this question.