

15 March 2022

Caitlin Campbell
HM Treasury
1 Horse Guards Road
London SW1A 2HQ

Dear Ms Campbell



Financial promotion rules for cryptoassets

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

The publication of HM Treasury's response to its 2020 Consultation on cryptoasset promotions (the "**HM Treasury Response**")¹ and the FCA's consultation on strengthening financial promotion rules for high-risk investments, including cryptoassets (the "**FCA Consultation**")² have brought to the Committee's attention several potential areas of legal uncertainty in relation to the regulation of cryptoassets and related activities in the U.K. The FMLC would value an opportunity to discuss the potential challenges it anticipates so as to support HM Treasury in the ongoing development of its work in this area. Some examples of legal uncertainty are set out below.

Issues of Legal Uncertainty

The proposed amendments to the financial promotion regime have brought to the forefront concerns about the somewhat-disjointed nature of cryptoasset regulation in the U.K. In particular, while the existing financial promotion regime works together with and complements the regulated activities regime established under the Financial Services and Markets Act 2000 ("**FSMA**"), there is little connection between the proposed regulation of cryptoasset promotions and the authorisation regime in FSMA, leading to the creation of a complex authorisation schema.

To take one example, even at this relatively early stage of defining requirements for financial promotion of cryptoassets, the FMLC is aware of confusion. For example, approval under section 21 of FSMA—which allows businesses to promote investment opportunities to potential investors who aren't certified as high-net-worth individuals or sophisticated investors—can only be given by persons already authorised under FSMA. Some commentators have, however, understood the ability to grant section 21 approval to extend to entities which do not have Part 4A permission, but are registered under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 or under the Electronic Money Regulations 2011. Furthermore, the proposed requirement that an authorised firm only be permitted to approve financial

¹ HM Treasury, *Cryptoasset promotions: Consultation response*, (January 2022), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1047232/Cryptoasset_Financial_Promotions_Response.pdf.

² FCA, *Consultation Paper: Strengthening our financial promotion rules for high-risk investments, including cryptoassets*, (January 2022), available at: <https://www.fca.org.uk/publication/consultation/cp22-2.pdf>.

Brian.gray@fmlc.org
Tel: +442045229190
Third Floor
North Wing
Guildhall
Basinghall Street
London EC2P 2EJ
www.fmlc.org

Registered Charity Number: 1164902.

"The FMLC" and "The Financial Markets Law Committee" are terms used to describe a committee appointed by Financial Markets Law Committee, a limited company ("FMLC" or "the Company").

Registered office: PO Box 270, Guildhall, London EC2P 2EJ. Registered in England and Wales. Company Registration Number: 8733443.

promotions for authorised persons if the FCA has assessed the firm as suitable and competent to do so may, in practice, prove to be a significant barrier to entry and inhibitor of innovation: relatively few authorised firms will have a track record that would enable them to establish their suitability and competence in relation to cryptoassets.

Another issue, which HM Treasury acknowledged in its January 2021 consultation paper, is the uncertainty regarding where the proposed regulatory regime addressing stablecoins will stop and the e-money regime start. This, in turn, has implications for cryptoasset promotions, as it is proposed that the financial promotion regime will apply to stablecoins but not to e-money. Stakeholders have highlighted to the FMLC further questions arising around which authorised firms, if any, will approve cryptoasset promotions should proposed FCA rules regarding the expertise of approving firms come into force. The potential effect of the proposals is heightened by the lack of tailored exemptions for cryptoassets. As a result, firms face onerous compliance requirements, uncertainty around what regulation applies, and possible regulatory overlap.

The FMLC would therefore recommend that authorities consider a coordinated approach to creating a bespoke regulatory regime for cryptoassets, which may be informed by existing regimes, but which tailors requirements to accommodate the novel aspects of the asset type so as to offer a single, coherent and appropriately calibrated regime just for cryptoassets. This would moderate the burden on firms and reduce the enforcement burden on authorities.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter, other potential areas for clarification or refinement, and alternative approaches to the regulation of cryptoassets. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,



Brian Gray
FMLC Chief Executive³

³ The FMLC is grateful to Emily Bradley (Slaughter and May), Diego Ballon Ossio (Clifford Chance LLP), Anne Bodley (Queen Mary University of London), Cat Dankos (Herbert Smith Freehills LLP), Rita Flakoll (Clifford Chance LLP), Matthew Nyman (CMS Cameron McKenna Nabarro Olswang LLP), Bradley Rice (Ashurst LLP), and Ferdisha Snagg (Cleary Gottlieb Steen & Hamilton LLP) for their help in drafting this response.