

Broadcast restriction of ads for qualifying cryptoassets

Broadcast Committee of Advertising Practice consultation on a rule amendment to explicitly restrict ads for certain types of cryptoasset products to specialised financial channels, stations and programming

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1. Executive summary

The Broadcast Committee of Advertising Practice (BCAP), author of the UK Code of Broadcast Advertising (BCAP Code) are consulting on an amendment to their rule restricting ads for certain types of financial products to specialised financial channels, stations and programming.

The BCAP Code has long included a rule that restricts ads for certain types of complex financial products to specialised financial channels, stations and programming, meaning that such ads cannot be broadcast on mainstream TV or radio to a general audience. The restriction was put in place by the Independent Television Commission (ITC), the predecessor of Ofcom, because of concerns about the relative unsuitability of TV and radio as media for promotion of complex financial products, with their attendant risks for investors.

In October 2023, the Financial Conduct Authority (FCA) took over the regulation of advertising for ‘qualifying cryptoassets’ – broadly, cryptoassets that are transferable and fungible. The category will hereafter be referred to as ‘cryptoassets’ for simplicity. It includes cryptocurrencies and utility (fan) tokens. The products themselves remain largely unregulated.

Cryptoassets have been classified as ‘Restricted Mass Market Investments’, meaning that they can be mass marketed to UK consumers subject to certain restrictions, in addition to the overarching requirement that financial promotions must be fair, clear and not misleading. The restrictions include: requirements to include clear risk warnings; risk summaries and a ban on incentives to invest such as refer-a-friend bonuses and new joiner bonuses.

The consultation proposes amending BCAP Code rule 14.5 to explicitly restrict ads for cryptoassets, the ads for which are now regulated by the FCA, to specialised financial channels and programmes. In practice, ads for these products have already been restricted from mainstream broadcast media, as a result of being unregulated by the FCA. Following the FCA’s publication of new rules for the regulation of these ads to account for the potential risks of the products to investors, BCAP proposes introducing a new sub-rule to explicitly name this category of ads as one that should be limited to specialised audiences, as is the case for other types of complex financial products. This would result in greater clarity for advertisers and broadcasters and ensure that ads for high-risk financial investments are not shown to general broadcast audiences.

The consultation will close at 5pm on 16 May 2024. For more information on how to respond, please see section 7.

2. Introduction to UK advertising regulation

2.1 The Broadcast Committee of Advertising Practice (BCAP)

BCAP is the regulatory body responsible for maintaining the UK Code of Broadcast Advertising (the BCAP Code) under agreement with the Office of Communications (Ofcom). Ofcom has a statutory duty, under the Communications Act 2003, to maintain standards in TV and radio advertisements. In 2004, Ofcom entrusted BCAP and the broadcast arm of the ASA with the regulation of broadcast advertisements in recognition of CAP and the ASA's successful regulation of non-broadcast marketing for over 40 years, and in line with better regulation principles.

The BCAP Code regulates all advertisements on television channels and radio stations licensed by Ofcom and all advertisements on Sianel Pedwar Cymru (S4C) and S4C digital, including teleshopping channels and any additional television service (including television text services and interactive television services). The BCAP Code is enforced against Ofcom-licensed broadcasters, Sianel Pedwar Cymru (S4C) and S4C digital. Broadcasters are required by the terms of their Ofcom licence, and, for S4C, by statute, to adhere to the standards set out in the BCAP Code.

BCAP members include broadcasters and trade associations representing advertisers, broadcasters and agencies. BCAP must seek advice on proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). Under Section 324 of the Communications Act 2003, BCAP must consult on proposed Code changes. BCAP strives to ensure that its rule-making is transparent, accountable, proportionate, consistent and targeted where action is needed, in accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them.

Further information about BCAP and the AAC is available at www.cap.org.uk.

2.2 The Advertising Standards Authority (ASA)

The ASA is the independent body responsible for administering the CAP and BCAP Codes and ensuring that the self-regulatory system works in the public interest. The Codes require that all advertising is legal, decent, honest and truthful.

The ASA assesses complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's rulings are published on the ASA's website and made available to the media. If the ASA Council upholds a complaint about an ad, it must be withdrawn or amended.

An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case. CAP conducts compliance, monitoring and research to help enforce the ASA Council's decisions. Information about the ASA is available at www.asa.org.uk.

2.3 Funding

The entire system is funded by a levy on the cost of advertising space, administered by the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof). Both finance boards operate independently of the ASA to ensure there is no question of funding affecting the ASA's decision-making.

Information about Asbof and Basbof is available at www.asbof.co.uk and www.basbof.co.uk.

3. Regulatory framework of the BCAP Code

3.1 Communications Act 2003

The [Communications Act 2003](#) (the Act) sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objective to this consultation is:

[319\(2\)\(h\)](#) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

The Act requires Ofcom to set and, from time to time, review and revise, a Code containing standards for the content of broadcast advertisements carried by TV and radio services licensed under the Broadcasting Acts [1990](#) and [1996](#). Ofcom has contracted out the setting of advertising standards to BCAP under the [Contracting Out \(Functions Relating to Broadcast Advertising\) and Specification of Relevant Functions Order 2004](#). That function is exercised in consultation with and agreement of Ofcom.

3.2 Existing rule

The following rule from the BCAP Code Financial products, services and investments section is under consideration:

14.5

These categories of advertisement may be broadcast on specialised financial channels, stations or programming only:

14.5.1

advertisements for the acquisition or disposal of derivatives, warrants or other transferable securities (such as shares) that are not on the Official List of the FCA or admitted to trading on a Regulated Market in the UK or other EEA State (as defined by the Markets in Financial Instruments Directive)

14.5.2

advertisements for spread betting, as an investment only. Spread betting advertisements may be advertised on interactive or additional TV services (including text services). They must comply with the gambling rules (see Section 17: Gambling). The advertised products or services should be available only to clients who have demonstrated through a pre-vetting procedure compliant with the FCA's appropriateness test that they have relevant financial trading experience

14.5.3

advertisements for contracts for differences (except spread betting), provided the products are available only to clients who have demonstrated through an

appropriate pre-vetting procedure that they have relevant financial trading experience.

14.5.4

advertisements for investments not regulated or permitted under FSMA. An advertisement that implies, for example, that a collectors' item or other unregulated product or service could have investment potential (in the colloquial sense) would normally be unacceptable.

4. Proposals

BCAP are proposing a new sub-rule to BCAP Code rule 14.5 that would name ads for 'qualifying cryptoassets' (as defined by the FCA) as one of the categories of ads that may be broadcast on specialised financial channels, stations or programming only.

In practice, ads for these products have already been subject to such a restriction under rule 14.5.4, which refers to ads for investments not regulated or permitted by the Financial Services and Markets Act 2000 (FSMA). The ads for certain types of cryptoasset investments are now regulated by the FCA, and subject to a range of regulations reflecting the risk they pose to investors' finances. BCAP considers that adding this category explicitly to the existing rule will maintain their restriction to appropriate specialised broadcast audiences. At the same time, it will add more precision to the rule to acknowledge this broad and widespread category of investments that did not exist at the time of the rule's creation, and remind broadcasters of the statutory restrictions that apply to advertising for them.

While the proposed addition will not cover ads for all types of cryptoasset investments, those ads for products that lie outside of the 'qualifying cryptoasset' definition, such as non-fungible tokens (NFTs), will continue to be restricted to specialised financial channels, stations and programming under rule 14.5.4, as will ads for other types of investments not regulated or permitted by FSMA.

Proposed new sub-rule:

14.5.5 advertisements for cryptoassets that are transferable and fungible. See [FCA guidance on qualifying cryptoassets](#) for more information. The advertised products or services should be available only to clients who have demonstrated through a pre-vetting procedure compliant with the FCA's appropriateness test that they have relevant financial trading experience.

5. Background

Regulation of financial promotions in broadcast media

Unlike in the non-broadcast Code, where the ASA has responsibility only for regulating non-technical aspects of ads for FCA-regulated financial products (with the FCA regulating technical aspects), the ASA is responsible for complaints about ads for financial products when it comes to broadcast media, including when it comes to technical aspects. This is a requirement of the Communications Act 2003. Most rules in the financial section of the broadcast Code draw attention to statutory regulation, and the ASA may seek the input of the FCA on the interpretation of those rules when investigating cases.

Existing restriction on ads for complex financial products

The rule restricting certain types of financial products to specialised financial channels and programming does not derive from FCA regulation, but was put in place by the ITC, the predecessor of Ofcom. The introduction to the financial rules section of the BCAP Code states that selecting the most relevant financial products or services normally requires consumers to consider many factors; short-form television and radio advertisements are not well-suited to communicating large amounts of detail. They are not, therefore, suitable formats for advertising especially high-risk or specialist investments or any financial products or services that are not regulated or permitted in the UK under the FSMA.

A specialised financial channel or station is defined as an Ofcom-licensed channel or station whose programmes, with few exceptions, are likely to be of particular interest only to business people or finance professionals

In proposing this rule amendment, BCAP has regard to the high-risk nature of cryptoasset investments and their categorisation and treatment by the FCA.

Ads for cryptoassets have heretofore been restricted to specialised financial channels, stations and programming, prior to the extension of FCA regulation to ads for cryptoassets, on the basis that most cryptoassets were (and continue to be) unregulated financial products.

Cryptoassets: definition and market development

Cryptoassets are defined by the FCA as cryptographically secured digital representations of value or contractual rights that use some type of distributed ledger technology (DLT) and can be transferred, stored or traded electronically. They encompass a number of different types of products.

Cryptoassets have become more popular and widespread in the UK in recent years, and as the market has grown, so has evidence of the risks to consumers. Research conducted in 2022 found that 10% of UK adults hold or had held a cryptoasset, with cryptocurrencies being the most commonly held cryptoasset (79%), followed by utility tokens (20%)¹. Since the pandemic, there has been a significant rise in young people (18-34) who hold investments. Younger investors tend to have a higher risk appetite, with a higher proportion holding cryptoassets than the general population². Cryptoassets are highly volatile and risky

¹ <https://www.gov.uk/government/publications/individuals-holding-cryptoassets-uptake-and-understanding>

² <https://www.fca.org.uk/publications/financial-lives/financial-lives-survey-2022-key-findings>

products, and there is a potential for harm where consumers buy cryptoasset products without appropriate awareness of the risks involved³. Online options have made different types of self-directed investing more accessible and FCA consumer research found that there is an increased mismatch between consumers' investment decisions and their stated level of risk tolerance⁴.

In particular, cryptoasset investments can expose consumers to risks from sudden, large and unexpected losses due to volatility, firm failure, comingling of funds, cyber-attacks and financial crime. Misleading promotions and business practices by firms can exacerbate these risks and lead to consumers buying cryptoassets that are not aligned to their risk tolerance and do not meet their needs. Over the past few years, a series of exchange collapses and insolvencies have resulted in significant losses for retail investors, underlining the instability of these assets⁵.

FCA regulation of financial promotions for cryptoassets

In 2023, Government legislated to bring promotions for certain types of cryptoassets under the regulatory regime of the FCA. The legislation applies to any cryptoasset that is transferable and fungible, but does not include cryptoassets which meet the definition of electronic money or an existing controlled investment – referred to as 'qualifying cryptoassets'⁶. The products themselves are largely unregulated by the FCA.

There are four routes to legally promoting cryptoassets to consumers:

- i. The promotion is communicated by an authorised person.
- ii. The promotion is made by an unauthorised person but approved by an authorised person.
- iii. The promotion is communicated by (or on behalf of) a cryptoasset business registered with the FCA under the Money Laundering Regulations (MLRs) in reliance on the exemption in Article 73ZA of the Financial Promotion Order (FPO).
- iv. The promotion is otherwise communicated in compliance with the conditions of an exemption in the FPO

The FCA's new regime on financial promotions for qualifying cryptoassets, published in June 2023 and implemented from October 2023, classifies cryptoassets as 'Restricted Mass Market Investments'. This allows them to be mass marketed to UK consumers subject to certain restrictions, akin to those that apply to other investments within this category. That is in addition to the overarching requirement that financial promotions must be fair, clear and not misleading. The restrictions include:

- clear risk warnings
- banning incentives to invest, including 'refer-a-friend' and new joiner bonuses
- personalised risk warnings and a 24-hour cooling-off period for first-time investors
- client categorisation requirements and appropriateness assessments to assess that the consumer has the necessary experience and knowledge to understand the risks

³ <https://www.fca.org.uk/publications/policy-statements/ps23-6-financial-promotion-rules-cryptoassets>

⁴ <https://www.fca.org.uk/publication/research/understanding-self-directed-investors.pdf>

⁵ <https://www.fca.org.uk/publications/policy-statements/ps23-6-financial-promotion-rules-cryptoassets>

⁶ <https://www.fca.org.uk/publications/policy-statements/ps23-6-financial-promotion-rules-cryptoassets>

involved in relation to the specific product or service offered or demanded. In practice this requirement is often met through an interactive set of questions put to the consumer online.

The FCA's policy document states that consumers should only invest in cryptoassets if they understand the risks involved and are prepared to lose all their money. As the products are largely unregulated by the FCA, consumers should not expect protection from the Financial Service Compensation Scheme (FSCS) or Financial Ombudsman Service (the ombudsman service) if something goes wrong⁷.

Rationale for rule amendment

BCAP Code rule 14.5 includes restrictions on ads for several specific types of investments, as below:

- acquisition or disposal of derivatives, warrants or other transferable securities (such as shares) that are not on the Official List of the FCA or admitted to trading on a Regulated Market in the UK or other EEA State (as defined by the Markets in Financial Instruments Directive)
- spread betting, as an investment only
- contracts for differences (except spread betting)

The investments within these categories, some of which are restricted mass market investments (RMMIs), are subject to similar restrictions as have now been placed on qualifying cryptoassets. Furthermore, unlike with other types of RMMIs, the FCA do not accept self-certified investors as appropriate for the direct offer of a financial promotion (DOFP) for a cryptoasset, placing them under an even higher restriction in that regard⁸.

Therefore, BCAP considers it is suitable to bring the category of qualifying cryptoassets explicitly under the list of high-risk financial products that must be limited to specialised financial channels, stations and programming only.

As with sub-rules 14.5.2 and 14.5.3, the draft sub-rule refers to the fact that qualifying cryptoasset products must only be available to clients who have undergone pre-vetting compliant with the FCA's appropriateness tests.

In practice, this amounts to a simple technical amendment. As outlined above, ads for cryptoassets have already been subject to the restriction due to their unregulated status. However, BCAP considers that the addition of an explicit sub-rule will make unambiguously clear to advertisers and broadcasters that ads for these increasingly widespread products are not to be broadcast to general audiences, and point to the statutory restrictions to which they are subject.

Other considerations

The introduction of a specific sub-rule restricting ads for qualifying cryptoassets does not mean that other types of cryptoassets lying outside that definition are not subject to restriction. Those products are not regulated under FSMA and are therefore caught by the existing rule 14.5.4.

⁷ <https://www.fca.org.uk/publications/policy-statements/ps23-6-financial-promotion-rules-cryptoassets>

⁸ <https://www.fca.org.uk/publications/policy-statements/ps23-6-financial-promotion-rules-cryptoassets>

6. Consultation question

Proposed new sub-rule:

14.5.5 advertisements for cryptoassets that are transferable and fungible. See [FCA guidance on qualifying cryptoassets](#) for more information. The advertised products or services should be available only to clients who have demonstrated through a pre-vetting procedure compliant with the FCA's appropriateness test that they have relevant financial trading experience.

Question: Do you agree with BCAP's proposed new sub-rule to rule 14.5? Please set out your arguments for supporting or disagreeing with the proposal.

7. How to respond and next steps

CAP and BCAP are committed to considering all responses carefully and with an open mind. CAP and BCAP would particularly welcome responses from stakeholders with an interest or expertise in games, apps, and digital purchasing.

The following summarises the consultation process and subsequent stages of CAP's consideration of the proposed changes to the Code:

- the consultation will run for four weeks, closing at 5pm on 16 May 2024;
- CAP will consider each response carefully and evaluate all significant points explaining the reasons behind the decisions they make; and
- the evaluation will be published on the CAP website when the outcome of the consultation is announced.

How to respond

CAP and BCAP invite written comments and supporting information on the proposals contained in this document by 5pm on 16 May 2024.

Responses via email with attachments in Microsoft Word format are preferred to assist in their processing.

Please send responses to: AdPolicy@cap.org.uk

If you are unable to respond by email you may submit your response by post to: Regulatory Policy Team, Committee of Advertising Practice, Castle House, 37-45 Paul Street, London EC2A 4LS.

Confidentiality

CAP and BCAP considers that everyone who is interested in the consultation should see the consultation responses. In its evaluation document, CAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation and copies of original consultation responses will be published with the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by email or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet. If part of a response is confidential, please put that in a separate annex so that nonconfidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

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