

Beware the FCA's new financial promotion rules

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1. Introduction

Earlier this year we reported that HM Treasury and the Financial Conduct Authority (FCA) had decided to overhaul aspects of the UK's financial promotion regime in [CP22/2 - Strengthening our financial promotion rules for high risk investments, including cryptoassets](#) (see our previous article [here](#)).

In August, the FCA responded to the feedback it had received on CP22/2 in its Policy Statement ([PS22/10](#)) – *Strengthening our financial promotion rules for high-risk investments and firms approving financial promotions*. The new final rules for authorised firms set out in PS22/10 seek to prevent harm to consumers by ensuring that firms communicating and approving financial promotions do so at a high standard, and consumers receive high-quality financial promotions that enable them to make effective, well-informed investment decisions.

Changes to the financial promotion regime are being made to ensure consumers only receive promotions of high-risk investments where they understand the risks involved. The FCA's own consumer research shows that too many consumers are investing in high-risk products not aligned with their risk tolerance, and that those consumers may face unexpected and significant losses which could undermine confidence in investing more widely, making it harder for firms to raise capital.

The FCA is particularly concerned that the current high inflationary environment makes high-risk investments more attractive as a means of getting higher returns. This is worrying during a time when the increased cost of living means consumers are less able to absorb losses from those investments. There have been some targeted changes to the FCA's proposals in CP22/2, and the key changes being made relate to:

- a) classifying high risk investments – for example, while the FCA's categorisation sets an overall framework for Restricted Mass Market Investments (RMMI), it has introduced appropriate differentiation in some of the specific requirements;
- b) the consumer journey into high-risk investments – for example, the FCA has reviewed the wording of the standard risk warning for high-risk investments; and
- c) strengthening the role of firms approving and communicating promotions – the FCA will be mostly proceeding as consulted in CP22/2 with minor clarifications and a slight extension to the implementation period.

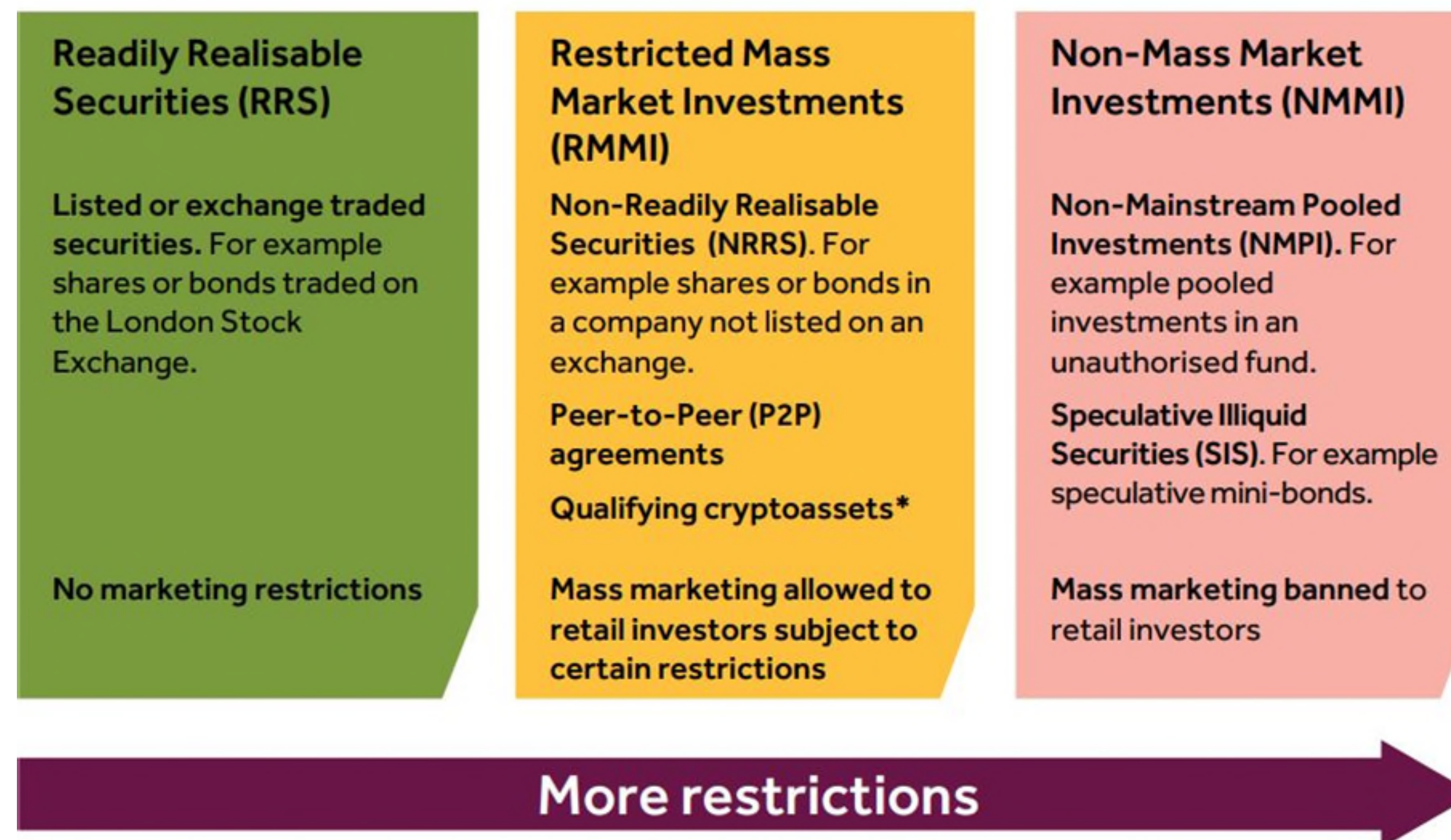
We examine the relevant changes and the practical implications for affected firms below.



2. Classification

The FCA rules now distinguish between Readily Realisable Securities (**RRS**), Restricted Mass Market Investments (**RMMI**) and Non-Mass Market Investments (**NMMI**).

As set out below, the FCA has introduced a package of measures for authorised firms to strengthen the customer journey before investing in high-risk investments, with additional restrictions applying to RMMI and the greatest restrictions to NMMI.



*Categorisation of qualifying cryptoassets as proposed in CP22/2. Final categorisation is subject to parliamentary approval of the relevant statutory instrument and to the FCA's final rules for cryptoassets.

**Source: PS22/10: Strengthening our financial promotion rules for high-risk investments, including cryptoassets.

3. Changes to the consumer journey

There are significant changes to the consumer journey as a result of the new rules, including standard and personalised risk warnings, the introduction of a 24-hour cooling off period for first time investors and how clients will be categorised. We set out below key elements of these changes, together with some practical steps that firms should be considering.

3.1 Standard risk warning

A general risk warning in a prescribed form must accompany promotions of high-risk investments from 1 December 2022. These risk warnings are in addition to the personalised risk warning pop-up for first time investors with a firm, which is discussed below.

There are prominence requirements that apply to the risk warnings. The risk warning must be:

- a) prominent;
- b) unless it cannot be provided in writing, it must be legible and contained in its own border, with the right bold/underlined text; and
- c) without a design feature that reduces visibility / prominence.



There are additional prominence requirements for risk warnings on websites and mobile applications. The risk warning must be:

- a) visible and statically fixed at the top of the screen, below anything else that also stays static, even when the client scrolls up/down the page; and
- b) on every linked page from the promotion that relates to the investment.

	Main risk warning when promoting high-risk investments	Risk warning for promotion of P2P agreements / portfolios
Long form wording	Don't invest unless you're prepared to lose all the money you invest. This is a high-risk investment and you are unlikely to be protected if something goes wrong.* Take 2 mins to learn more.**	Don't invest unless you're prepared to lose money. This is a high-risk investment. You may not be able to access your money easily and are unlikely to be protected if something goes wrong.* Take 2 mins to learn more.**
Short form wording to be used when there are character limits imposed by a third-party marketing provider	Don't invest unless you're prepared to lose all the money you invest.	Don't invest unless you're prepared to lose money.

* The words "and you are unlikely to be protected if something goes wrong" must be omitted where the financial promotion is issued by an authorised firm or appointed representative and could give rise to a claim under the FSCS.

**Where a risk warning is communicated by website, mobile application or other digital medium, the risk warnings must also include a link that reads "Take 2 mins to learn more" which, when activated, delivers an appropriate risk summary in a pop-up box (or equivalent) relating to the type of financial investment that is subject to the financial promotion. The risk summaries will be in prescribed form set out in COBS 4 Annex 1R, as explained below.



3.2 Accompanying risk summary

The FCA has specified risk summary templates (which differ depending on the financial product) to be provided to retail investors in relation to high-risk investments. The risk summary templates will be contained in COBS 4 Annex 1.

Where a promotion is made through a digital medium, the risk summary must be hyperlinked to from the words “*Take 2 mins to learn more*” in the general risk warning (unless that wording is excluded due to character limits imposed by third party marketing providers – in that case, the risk summary must be linked to from the risk warning text instead). If the digital medium does not allow text to be linked, the risk summary does not need to be given.

Where a promotion is given in a non-digital way, the risk summary has to be provided in a durable medium unless that is not possible (eg, because the promotion is being given on TV or radio) in which case, the risk summary does not need to be provided.

As with the general risk warning, there are prominence requirements that apply to the risk summary.

Firms will be allowed to tailor the risk summary to their investment offering and diverge from their prescribed summary if they have a valid reason for doing so, such as if a certain bit of text would be irrelevant or misleading, or if there is another risk that firms think should be included. Firms must record their rationale for each change. The firm’s amended risk summary must still summarise the key risks of the investment in a consumer-friendly way and take around two minutes to read.

3.3 Restrictions relating to direct offer financial promotions

A direct offer financial promotion (**DOFP**) arises where the financial promotion specifies the manner of response or includes a form by which any response may be made. A “manner of response” could include, for example: (i) a promotion containing a “buy now” button, enabling a consumer to invest, or (ii) a form asking the consumer to include their bank account details. Essentially, 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.

RMMIs cannot be accessed through a DOFP by mass-retail investors, but can be accessed by certified High Net Worth Individuals (**HNWI**), self-certified sophisticated investors or certified restricted investors with a personalised risk warning, 24-hour cooling off period, investor assessment and declaration forms and appropriateness testing.

Financial promotions in respect of NMMIs can only be made to retail investors who are certified HNWIs or self-certified sophisticated investors, and before access they must be provided with a personalised risk warning (on the first occasion), a 24-hour cooling off period applies, investor assessment and declaration forms, as well as a preliminary suitability assessment.



3.4 24 hour cooling off period for first time investors

The FCA is introducing a 24-hour cooling-off period for first time investors with a firm (though this would not, as proposed, apply to promotions of interests in a Long-Term Asset Fund (LTAF)).

The cooling off period means that consumers could not receive the financial promotion (in the case of NMMIs) or the DOFP (in the case of RMMIs) unless they have reconfirmed their request to proceed after waiting at least 24 hours.

Firms may proceed with other parts of the client on boarding process while the cooling off period is in effect. For example, performing KYC/AML checks, showing the personalised risk warning, investor assessment and declaration, and the appropriateness assessment or preliminary suitability assessment.

3.5 Personalised risk warning pop-up for first time investors with a firm

FCA consumer testing showed that personalised messages and prominent directions for further information were the most effective intervention in getting consumers to click on the risk summary. As such, the final rules require a personalised risk warning pop-up for first time investors with a firm.

The prescribed risk summary is below. Firms are allowed to tailor this if they have a valid reason to do so. For example, if the information would be misleading or is irrelevant, or if an additional risk should be included. If changes are made to the prescribed wording, firms will need to record the rationale for those changes.

[Client name], this is a high-risk investment. How would you feel if you lost the money you're about to invest? Take 2 mins to learn more.

For RMMIs, the personalised risk warning would appear before a DOFP could be communicated. For NMMIs, it would appear before the financial promotion could be communicated.

The “Take 2 mins to learn more” wording will link to the product-specific risk summary as in the main risk warning. This wording does not need to be included if the risk warning is given in a non-digital manner, but the risk summary does need to be provided in a durable medium.

There are no specific prominence requirements where the personalised risk warning is given in a non-digital medium. However, where the personalised risk warning is given via a digital medium, it must be:

- prominently brought to the client’s attention;
- legible and contained in its own border, with the right bold / underlined text;
- statically fixed in the middle of the screen; and
- the focus of the screen; and without a design feature that reduces visibility / prominence.

In relation to the risk summary, the risk summary prominence requirements as set out above apply.

When the personalised risk warning has been given, the client must specify whether they wish to leave, or continue with, the investment journey (if via a digital medium) or the retail client must be invited to specify whether they wish to leave, or continue with, the investment journey (if via a non-digital medium).

For the moment, the FCA has decided to exempt chapter 15 listed shares in investment companies from these risk warning requirements. In its view, the risk warning and NMPI risk summary may be misleading for those investments. The FCA will review the categorisation of chapter 15 listed shares in investment companies in the second phase of its work intended for next year.



3.6 Client categorisation

Under the new rules, there will be an evidence component to investor categorisation which requires consumers to state why they believe they meet the relevant criteria when signing the declaration. For example, to state their income (to the nearest £10,000 / £100,000) if they sign the HNWI investor declaration, or to state which company they are a director of if they sign the self-certified sophisticated investor declaration.

Firms will be required to check the evidence stated by the consumer does in fact meet the criteria. For example, that the income / net asset amount is above the requisite threshold and the company does in fact exist. However, firms will not need to ask consumers for documents to support their statements, so there would be no need for a firm to request bank statements (for example) to verify income, or to check the director information of the company with Companies House.

The FCA will be including the LTAF within the scope of these changes.

HM Treasury has consulted on reforming the investor status exemptions, including a proposal that would require a firm to come to a reasonable belief that investors met the conditions of the exemptions. We await further developments on this from HM Treasury and potential future legislative changes.

3.7 Appropriateness test

Under the new rules, investors must pass appropriateness testing before they invest in RMMIs. The aim of the appropriateness test is centred around whether the client has sufficient knowledge and experience to understand the risks of the investment.

Should an investor fail the appropriateness test, they can retake the test. However, the FCA is introducing a rule that firms must wait before assessing the appropriateness of an investment if an investor has failed the appropriateness test twice. From the second time, the firm cannot re-assess the appropriateness of that investment for the same client for at least 24 hours. The FCA acknowledged that a failure first time around may happen because investors skim through it in irritation, do not take it seriously, or allow overconfidence to influence their behaviour, and that consumers may also make minor mistakes during their first attempt.

3.8 Preliminary suitability assessment

In the case of NMMIs, self-certified sophisticated investors and self-certified HNWIs requesting to see a financial promotion are subject to a preliminary assessment of suitability. The aim of the suitability test goes further than that of the appropriateness test: in addition to ensuring that the investor has the knowledge and experience to understand the risks associated with the investment, it requires the firm to understand the client's personal circumstances, so that they can assess whether the investment is likely to meet the client's needs and objectives.

3.9 Record-keeping for the consumer journey

In CP22/2, the FCA proposed that firms should record various metrics throughout the consumer journey to help the FCA monitor the effect of its proposals. This included, amongst others:

- the number of users who are presented with the risk warning for RMMI, and the number of users that click on the “Take 2 mins to learn more” within the risk warning;
- the number of consumers who do not proceed with the consumer journey after the personalised risk warning;
- the number of consumers subject to a 24-hour cooling-off period, and who do not proceed with the consumer journey after it;
- the outcome of client categorisation (number of consumers categorised as HNWI, sophisticated and restricted and the reason they believe they meet those criteria);
- the number of consumers who do not proceed with the consumer journey at client categorisation (ie, who do not get categorised);
- the outcome of the appropriateness assessment (ie, the final outcome of the appropriateness assessment for each consumer and the number of times they were subject to the assessment for the same investment, the number of assessments that determined the investment to be appropriate and inappropriate, and the total number of assessments undertaken).

In its final rules, the FCA has decided to only require firms to record metrics relating to client categorisation and the appropriateness assessment. The regulator says that firms should already be recording this data, so it not an additional regulatory burden.

Although firms do not need to report on all the metrics initially proposed in CP22/2, the FCA says the other metrics could still be useful for firms to collect to monitor their own obligations under the Consumer Duty (monitoring the impact of communications throughout the consumer journey). If firms do collect that additional data, the FCA encourages firms to share it with the FCA so it can better monitor the effectiveness of its proposals. It is also an area the FCA says it might revisit.



4. Rules applying to authorised firms approving promotions

The FCA believes that authorised firms who communicate or approve financial promotions for unauthorised firms in accordance with s 21 FSMA play a significant role in enabling such unauthorised firms to issue financial promotions relating to high-risk investments to consumers. In past, the FCA believes that too many poor quality promotions have been approved, which posed risks for consumers.

In order to better protect consumers the FCA is implementing a robust regime to hold such authorised firms that approve the financial promotions to high standards.

New requirements for authorised firms communicating or approving financial promotions include (among others):

- ensuring that approved financial promotions disclose:
 - the name of the approving firm; and
 - the date of the approval.

If the promotion is via a digital medium and space is limited by a third-party marketing provider, the firm issuing the promotion can just include the firm reference number of the approving firm in the format: “Approver FRN xxxxxx”. This text must be clickable and open a page where the firm’s full name and data of approval will be displayed,

Authorised firms communicating or approving financial promotions for other will also have to:

- self-assess and self-certify that they have the necessary competence and expertise in an investment product or service before approving a financial promotion (but firms do not have to have the experience in the specific commercial sector that the underlying investment(s) relate to),
- ensuring the promotion remains compliant through the life of the promotion (not just when it is approved), and
- taking reasonable steps to monitor the compliance of the approved financial promotion and obtaining an attestation of “no material change” from clients with approved promotions every three months.

As we noted in our previous [article](#), HM Treasury has confirmed that the government intends to legislate to introduce a new regulatory gateway for firms approving promotions for unauthorised persons (s21 gateway) when parliamentary time allows. The new approval regime summarised above is intended to complement the proposed s21 gateway when introduced and help ensure all authorised firms communicating and approving financial promotions for unauthorised persons are operating to the same high standards.



5. Practical considerations for firms

When will the rules apply?

The rules relating to risk warnings (except personalised risk warnings) for financial promotions of high-risk investments take effect from 1 December 2022. All other rules will take effect from 1 February 2023.

The final non-Handbook guidance on approving financial promotions will be published on the FCA's website on 1 February 2023.

What should firms be doing now?

Firms that promote high-risk investments

Firms that promote high-risk investments need to familiarise themselves with the FCA's final rules. There are a number of work streams before the two implementation dates, including, for example:

<ul style="list-style-type: none"> Identifying and classifying the high-risk investments they promote (RMMI / NMMI). 	<ul style="list-style-type: none"> Ensuring high-risk investments are accompanied with the general risk warnings in time for 1 December implementation date.
<ul style="list-style-type: none"> Where appropriate, liaising with third-party marketing providers to change promotional content so it is compliant with the new rules. 	<ul style="list-style-type: none"> Updating consumer journeys in line with the rules (including formalising appropriateness test questions re RMMIs).
<ul style="list-style-type: none"> Training consumer-facing staff. 	<ul style="list-style-type: none"> Putting in place appropriate systems to record metrics relating to client categorisation and the appropriateness assessment.

Firms that approve financial promotions

Firms that approve financial promotions (not just promotions of high-risk investments) will need to ensure they change their systems, controls, and internal processes to adapt to the new rules.

They will need to ensure, among other things, that their name and date of approval accompanies a promotion (or, where there is limited space, their FRN with a link to those details); self-assess whether they have the necessary competence and expertise in an investment product before approving or communicating a financial promotion; and obtain necessary attestations at the requisite intervals that there is no material change from the clients for whom they approve promotions.



6. Conclusion and future developments

PS 22/10 confirms the FCA's decision to materially strengthen consumer protection for retail investors, and it is an example of how the Consumer Duty will apply across the handbook. It is also clear that PS22/10 is only one part of the forthcoming changes to the regulation of financial promotions.

The FCA has already flagged that there will be further changes to regulation in this area. The new rules in PS22/10 relate to high-risk investments that are already subject to marketing restrictions. The FCA has stated that it will review the categorisation of high-risk investments under the new rules in the second phase of its work in 2023.

The FCA is also consulting on broadening retail access to the LTAF, by classifying units in LTAFs as RMMIs. See our updated article on the LTAF proposals [here](#).

The FCA rule changes set out in the Policy Statement, are only part of the overhaul the UK's financial promotion regime. In our previous [article](#) we gave an overview of HM Treasury's proposals for reform. These include:

- changing the financial thresholds in the HNWI certifications,
- changing the criteria for self-certified sophisticated investors, and
- introducing a new regulatory gateway for authorised firms that approve promotions for other unauthorised firms.

It is also intended that cryptoassets will be brought into the scope of the financial promotion regime. Cryptoasset promotions currently sit outside of the FCA's regulatory remit. In January, HM Treasury confirmed its intention to legislate to bring cryptoassets into the scope of the financial promotion regime. That legislation has not yet been made. When it is, the FCA will make its final rules for cryptoasset promotions and the FCA expects it will take a consistent approach to cryptoassets to that taken for other high-risk investments.

The new Financial Services and Markets Bill includes the regulatory gateway for authorised firms that approve promotions for other unauthorised firms, but the Bill is yet to pass through Parliament. We await developments on any changes to the high-net worth individual certification thresholds and changes to the criteria for self-certified sophisticated investors.

Firms also need to look out for developments from the Government in relation to changing thresholds for the certification of high-net worth individuals, changing the criteria for self-certifying sophisticated investors, the introduction of the regulatory gateway, and developments regarding cryptoassets.

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