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Crypto providers running out of time…

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and Hlonelwa Lutuli, Candidate Attorney

On 19 October 2022, the Financial Services Conduct Authority ("**FSCA**") published the Declaration of a Crypto Asset as a Financial Product under the Financial Advisory and Intermediary Services Act 37 of 2002 ("**FAIS Act**") (the "**Declaration**")[1] in terms of which crypto assets have been declared 'financial products' by the FSCA.

The Declaration defines a 'crypto asset' as a digital representation of value that –

1. is not issued by a central bank, but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility;
2. applies cryptographic techniques; and
3. uses distributed ledger technology.

This Declaration has several important consequences for persons who provide crypto asset services in terms of the FAIS Act.

Firstly, in terms of section 1 of the FAIS Act, any person who, as a regular feature of their business, gives advice or renders an intermediary service with the intention of selling or otherwise dealing in a financial product purchased by a client from a product supplier is a *'financial service provider'*.

Accordingly, a person that provides crypto assets to clients, or advises in or otherwise deals in crypto assets is now included in the definition of a 'financial services provider' (an "**FSP**").

Secondly, in terms of section 7(1) of the FAIS Act, a person may not act or offer to act as a FSP unless they have been issued with a license under section 8 of the FAIS Act or, if they are a representative, unless such person has been appointed as a representative of an authorised FSP.

Thirdly, by virtue of being categorised as a FSP, persons that offer financial services in relation to crypto assets will be required to comply with all of the requirements applicable to FSPs that are contained in the FAIS Act and its subordinate legislation.

The FSCA, in order to facilitate the transition for crypto asset service providers, provided a temporary exemption from the effects of the Declaration on the following conditions

- the crypto asset service provider must apply for a license under section 8 of the FAIS Act before **30 November 2023** and FSPs that are already licensed as FSPs may have to submit applications amending their license to reflect that the FSP is authorised to render financial services in respect of crypto assets;
- immediately comply with Chapter 2 of the Determination of Fit and Proper Requirements for Financial Service Providers and Section 2 of the General Code of Conduct for Authorised Financial Service Providers and Representatives (**General Code**) as if it is a licensed FSP;
- comply with the rest of the General Code by 1 December 2023; and
- provide the FSCA with any information the FSCA requests that is in the crypto asset service provider's possession, that is relevant to the financial services and/or similar activities rendered by such person.

Finally, it should be noted that contravention of the licensing requirement contained in section 7(1) of the FAIS Act constitutes an offence and a person found guilty thereof is liable to a fine not exceeding R10 million or imprisonment up to 10 years or both.[2]

Given the hefty consequences for non-compliance, the exemption is a lifeline for crypto asset service providers and with the deadline for application in order to meet the eligibility requirements of the exemption imminent, time is of the essence.

Footnotes

[1] General Notice 1350 of 2022 in Government Gazette No. 47334.

[2] Section 36(a) of the FAIS Act.

Aphindile Govuza

Director

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