

# CIS Issue Brief on regulating Crypto-asset advertising in India

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# 1. The need for crypto-specific advertising regulation

Over the past decade, crypto-assets have established themselves within the digital global zeitgeist. Crypto-asset (alternatively referred to as cryptocurrency) trading and investments continue to skyrocket, with centralised crypto exchanges seeing upwards of USD 14 trillion (or around INR 1086 trillion) in trading volume.<sup>1</sup>

One of the key elements behind this exponential growth and embedding of crypto-assets into the global cultural consciousness has been the marketing and advertising efforts of crypto-asset providers and crypto-asset-related service providers. In India alone, crypto-exchange advertisements have permeated into all forms of media and seem to be increasing as the market continues to mature. At the same time, however, financial regulators such as the RBI have consistently pointed out concerns associated with crypto-assets, even going so far as to warn consumers and investors of the dangers that may arise from investing in crypto-assets through a multitude of circulars.<sup>2</sup>

In light of this, we analyse the regulations governing crypto-assets in India by examining the potential and actual limitations posed by them. We then compare them with the regulations governing the advertising of another financial instrument, mutual funds. Finally, we perform a comparative analysis of crypto-asset advertising regulations in four jurisdictions - The EU, Singapore, Spain and the United Kingdom- and identify clear and actionable recommendations that policymakers can implement to ensure the safety and fairness of crypto-asset advertising in India.

## 2. Indian crypto-advertising regulation

Crypto-asset advertising regulations in India are subject to both, formal legislative and regulatory rules as well as a set of informal self-governing guidelines. The formal legislation

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<sup>1</sup> Lawrence Wintermeyer, "Crypto Trading Will Grow in 2022 as DFMI Matures and Drives Efficiencies", *Forbes*, 25 March 2022, <https://www.forbes.com/sites/lawrencewintermeyer/2022/03/25/crypto-trading-will-grow-in-2022-as-dfmi-matures-and-drives-efficiencies/?sh=12bf74587953>.

<sup>2</sup> Ajit Prasad, 'RBI Cautions Users of Virtual Currencies against Risks', 24 December 2013, [https://www.rbi.org.in/Scripts/BS\\_PressReleaseDisplay.aspx?prid=30247](https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=30247).  
Jose Kattoor, 'RBI Cautions Users of Virtual Currencies', 1 February 2017, [https://www.rbi.org.in/Scripts/BS\\_PressReleaseDisplay.aspx?prid=39435](https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=39435).  
Jose Kattoor, 'Reserve Bank Cautions Regarding Risk of Virtual Currencies Including Bitcoins', 5 December 2017, <https://www.rbi.org.in/commonman/English/Scripts/PressReleases.aspx?Id=2474>.

governing crypto-asset advertising is the Consumer Protection Act 2019, while the self-governing guidelines have been developed by the Advertising Standards Council of India.

## 2.1 Advertising Standards Council of India (ASCI) guidelines

The Advertising Standards Council of India (ASCI) introduced the “Guidelines for Advertising of Virtual Digital Assets and Linked Services” to address the lack of regulatory advertising standards in the sector. The guidelines are a set of voluntary self-governing rules that members of the ASCI and the wider crypto community are encouraged to adopt and are purportedly the result of “several rounds of discussion with the government, finance sector regulators, and industry stakeholders”.<sup>3</sup>

The guidelines are to be applied to all ads relating to virtual digital asset (VDA) products and exchanges or featuring a virtual digital asset. The definition of a VDA was outlined by the 2022 Finance Bill as:<sup>4</sup>

- “Any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account including its use in any financial transaction or investment, but not limited to investment scheme; and can be transferred, stored or traded electronically;
- A non-fungible token or any other token of similar nature, by whatever name called;
- Any other digital asset, as the Central Government may, by notification in the Official Gazette specify.”

The guidelines centre around the introduction of a disclaimer which must be easily identifiable and understandable, and which must meet certain medium-specific specifications (such as specifications for television, print media and digital

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<sup>3</sup> Dinesh Unnikrishnan, “RBI’s Concerns Reflect in Latest ASCI Curbs on Crypto Advertisements”, *Moneycontrol*, 23 February 2022, <https://www.moneycontrol.com/news/business/analysis-rbis-concerns-reflect-in-latest-asci-curbs-on-crypto-advertisements-8155381.html>.

<sup>4</sup> “The Finance Bill, 2022”, No. 18 of 2022, (n.d.), [https://www.indiabudget.gov.in/doc/Finance\\_Bill.pdf](https://www.indiabudget.gov.in/doc/Finance_Bill.pdf).

advertisements).<sup>5</sup> This disclaimer should warn potential investors or consumers of the inherent risks associated with VDAs and the unregulated nature of the VDA market. The guidelines also stress that advertisements must be upfront about possible fluctuations in VDA value and must not market them as a source of guaranteed profit or as a definitively appreciating asset based on past performance. They must also not market crypto-assets as being so easy to understand that consumers need not “think twice” before investing. Furthermore, they must not compare them to any other asset class that is regulated.<sup>6</sup> There are also limitations placed on advertisers regarding the use of certain words (for example, currencies) within such ads, as well as prohibitions on the involvement of minors in such advertisements.

## 2.2 Consumer Protection Act, 2019

Due to the lack of any crypto-specific regulations, the Consumer Protection Act, 2019, is the only source of legislatively enforceable advertising standards applicable to actors within the crypto ecosystem.

The act protects consumers from misleading advertisements, such as an ad that:

- “Falsely describes such product or service; or
- gives a false guarantee to, or is likely to mislead the consumers as to the nature, substance, quantity or quality of such product or service; or
- conveys an express or implied representation which, if made by the manufacturer or seller or service provider thereof, would constitute an unfair trade practice; or
- deliberately conceals important information;”<sup>7</sup>

Additionally, the Consumer Protection (E-Commerce) Rules, 2020, which include the sale of digital products within their ambit, impose certain additional obligations on inventory e-commerce entities to ensure that the advertisements are consistent with the actual characteristics of the products being sold. Marketplace e-commerce entities are required to procure an undertaking from their sellers that ensures that descriptions, images, and other content pertaining to the products on their platform

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<sup>5</sup>“Guidelines for Advertising of Virtual Digital Assets and Linked Services”, Advertising Standards Council of India, 23 February 2022, <https://ascionline.in/images/pdf/vda-guidelines-23.02.22.pdf>.

<sup>6</sup> *Ibid.*

<sup>7</sup> “The Consumer Protection Act, 2019”, Pub. L. No. No. 35 of 2019 (2019), Ministry of Law and Justice, Government of India, <https://egazette.nic.in/WriteReadData/2019/210422.pdf>.

are accurate and correspond directly with the appearance, nature, quality, purpose, and other general features of the product.

#### *Celebrity Endorsements*

Section 21 of the Consumer Protection Act, 2019 empowers the Central Authority under the Act to order discontinuation/modification of a misleading/false advertisement which is prejudicial to the interest of the consumer or in contravention with the consumer rights. The Authority may also impose a penalty on the endorser of upto ten lakh rupees and up to fifty lakh rupees for every subsequent contravention. It may also prohibit the such endorser from endorsing any product or service for a period which may extend to one year and up to three years for every subsequent contravention. However, a safe harbour provision has been provided to endorsers if they have exercised due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by them.

## **3. Limitations of Indian guidelines**

While there have undoubtedly been advances in attempts to regulate crypto-asset advertising in India, the current regime is not without limitations and gaps.

### **3.1 Lack of enforceability**

While the ASCI guidelines represent a welcome step in creating set advertising standards, they are fundamentally limited as long as they are self-regulated and self-governing standards that are non-enforceable by a regulatory authority. Presently, the ASCI can only exert influence upon those entities that voluntarily bind themselves to the outlined guidelines.

While consumer protection act has mandated the establishment of a central consumer protection authority to identify and protect consumers against misleading advertisements, the scope of the term “misleading” within the act may not be sufficient to account for the nuances of crypto-advertising. Moreover, as the consumer protection authority is not a sector-specific body, it is unlikely to possess the technical expertise required to adequately regulate the nuances associated with crypto-assets and their advertising.

### **3.2 Definition of a virtual digital asset**

The definition of a virtual digital asset, referenced and utilised by the advertising guidelines, has seemingly been left intentionally wide to ensure that future technological developments in the space are also covered under its purview. However, in doing so, the definition has found itself to be applicable far beyond just crypto-assets. It is evident that this definition would also include tradable digital representations of value that do not make use of any form of distributed ledger or blockchain technology. For example, a piece of digital art that is sold online would theoretically fall under the definition of a VDA, irrespective of its use of blockchain or distributed ledger technology. Similarly, such a definition may also apply to a video game's in-game currency system.

This is important insofar as there are significant differences between crypto-assets such as NFTs and other forms of digital assets. In the context of advertising, the need for this distinction is clear as it applies advertising standards to both crypto-assets and non-blockchain or DLT-based digital assets.

Moreover, the definition also makes no distinction in the form, nature, or purpose of various crypto-assets – all of which should influence the advertising standards placed upon the issuing or advertising entity. There are a multitude of crypto-assets such as coins, payment tokens, NFTs, securities tokens, stablecoins, etc.<sup>8</sup> All of these entities function within their own niche in the ecosystem, are targeted at different consumers, vary in technical difficulty and ease of understanding, and carry different levels of risk. For this reason, a blanket set of advertising rules may not prove sufficient to capture the complexities of these various crypto-assets.

## 4. Comparison with other financial instruments (mutual funds)

The investment instruments that are most often advertised to the public in India using traditional mass media platforms are mutual funds. Unlike shares in listed companies, mutual funds were marketed to the public as a good investment option; therefore, the market regulator SEBI (Securities and Exchange Board of India) felt the need to regulate the content of the advertisements for mutual funds and subsequently issued detailed guidelines in Schedule VI of the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996. The following is a comparison of the requirements of these regulations with those pertaining to VDAs in the ASCI Code.

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<sup>8</sup> Aman Nair, Vipul Kharbanda, and Aryan Gupta, 'CIS Report on Regulation of Private Crypto-Assets in India' (Centre for Internet and Society, 15 December 2021), <https://cis-india.org/internet-governance/cis-report-on-regulation-of-private-crypto-assets-in-india>.

**Table 1: Comparison of mutual fund regulations and ASCI code<sup>9</sup>**

S. No.	Mutual Funds Regulations	ASCI Code	Comment
1.	Advertisements should contain the following disclaimer: “Mutual fund investments are subject to market risks, read all scheme-related documents carefully.”	Advertisements should contain the following disclaimer: “Crypto products and NFTs are unregulated and can be highly risky. There may be no regulatory recourse for any loss from such transactions.”	The mutual fund regulations only provide that, in audio-visual media, the disclaimer should be clear and understandable. E.g., the voice-over and visual display of the disclaimer must run for at least five seconds. However, the requirements relating to the display of the disclaimer in various media are much more detailed in the ASCI code.
2.	Advertisements should be true, fair, complete, unambiguous, and concise (Clause a).	Advertisements that provide information on the cost or profitability of VDA products shall contain clear, accurate, sufficient, and updated information (Clause 4).	The requirement that the advertisement should be true and complete is limited to only the cost and profitability of VDA products rather than the entire advertisement. However, there is a general requirement that advertisements must be truthful under Clause 1.1 of the ASCI’s Code For Self-Regulation of Advertising content in India.
3.	Advertisements should not contain false, misleading, biased, or deceptive statements based on assumptions or projections; and shall not contain any testimonials or rankings based on any criteria (Clause b).	Information on past performance shall not be provided in any partial or biased manner. Returns for periods of less than 12 months shall not be included (Clause 5).	There is no general restriction that advertisements must not contain false, misleading, biased, or deceptive statements. There is a requirement that information on past performance shall not be

<sup>9</sup> Authors analysis, 2022

			provided in any partial or biased manner. However, there is a general requirement that advertisements shall neither distort facts nor mislead the consumer by means of implications or omissions in Clause 1.4 of the ASCI's Self-Regulation Code.
4.	No celebrities shall form part of the advertisement.	Since this is a risky category, celebrities or prominent personalities who appear in VDA advertisements must take special care to ensure that they have done their due diligence regarding the statements and claims made in the advertisement so as not to mislead consumers (Clause 12).	The mutual fund regulations impose a ban on using celebrities as part of the advertisements, whereas the ASCI allows celebrity endorsement only after the celebrities have done their due diligence regarding the statements and claims made in the advertisements.

Apart from the issues mentioned in Table 1, there are multiple requirements in the mutual fund regulations that are not contained in the ASCI Code for VDAs, such as a requirement to ensure that the advertisements are made in a manner that is not misleading to investors, that there are prohibitions on (i) exaggerated slogans, (ii) extensive use of complicated terminology, or (iii) discrediting other advertisements or making unnecessary comparisons. However, Clauses 1.4, 1.5, and 4.1(e) of the ASCI's Self-Regulation Code deal with the issues of exaggeration and discrediting other advertisements, respectively.

## 5. International perspectives

Having identified the regulatory structure in India, we now turn our attention to similar advertising standards in foreign jurisdictions to better contextualise how India's rules compare to the global best practices.



## 5.1 European Union

The European Union is currently in the process of passing union-wide crypto-specific regulation in the form of the markets in the crypto-asset regulation proposal.<sup>10</sup> The proposal outlines legislation that forms the basis of the regulatory regime that covers all matters related to certain specified categories of crypto-assets. One of the areas covered by this proposal is the marketing of the three crypto-asset classes: asset-referenced tokens, e-money tokens, and all other crypto-assets.<sup>11</sup>

Crypto-asset issuers (excluding those who are exempt under specific conditions laid down in the law) must, prior to formally launching their asset to the public, publicly publish a whitepaper containing all the information required of them by the proposed law.<sup>12</sup> The whitepaper must contain details such as information related to the issuer, information about the characteristics of the issued asset, information about the underlying technology used, information about the rights and obligations associated with the asset, etc. It will also contain a number of disclaimers related to the risks associated with crypto-assets. The law also outlines several specifications, including that the whitepaper must be written in either English or a language of an EU member state, must be written in a clear and simple to understand manner and that must indicate that the crypto-asset issuer is wholly responsible for all the information provided in the whitepaper.

Following the publishing of the whitepaper and launching of the crypto-asset, all marketing information must be clearly identifiable.<sup>13</sup> All information in any marketing or advertisement must be fair, not misleading, and in line with the published whitepaper. It must also be made expressly clear whether any redemption right is provided to holders or not. All marketing communications must also expressly point to the fact that a whitepaper containing all details of the asset has been drawn up and provide consumers with a clear and simple means of accessing this whitepaper.

## 5.2 Singapore

Singapore has adopted a far stricter approach to crypto-asset advertising than many other jurisdictions. The Monetary Authority of Singapore (MAS) issued its binding guidelines on the provision of digital payment service tokens to the public, which

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<sup>10</sup> “Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets, and Amending Directive (EU) 2019/1937”, European Commission, 24 September 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0593>.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

regulates the manner in which crypto-asset providers can market their products and services. The guidelines apply to all “digital payment token” (DPT)<sup>14</sup> providers, including banks, payment institutions, financial institutions, and any entity applicable under the Payment Services Act, 2019.<sup>15</sup>

The guidelines prevent DPT service providers from advertising DPTs in public spaces or through any form of media that is directed at the general public.<sup>16</sup> These guidelines extend the “public sphere” online by limiting DPT service providers from advertising through third parties on social media platforms and third-party websites.<sup>17</sup>

However, DPT service providers are allowed to advertise through their own corporate websites and social media handles – while still being required to not trivialise the risks associated with DPTs and ensure compliance with the requirement under the Payment Services Act, 2019 – to provide customers with a clear risk warning statement that outlines the risks associated with trading DPTs.<sup>18</sup> DPT service providers are prohibited from providing customers with access to DPTs through public ATMs.

The guidelines also place limitations on the ability of DPT service providers to advertise payment token derivatives (derivatives with a DPT as the underlying asset).<sup>19</sup>

## 5.3 Spain

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<sup>14</sup> “A digital payment token under the payment services act is any “digital representation of value (other than an excluded digital representation of value) that —(a) is expressed as a unit; (b) is not denominated in any currency, and is not pegged by its issuer to any currency; (c) is, or is intended to be, a medium of exchange accepted by the public, or a section of the public, as payment for goods or services or for the discharge of a debt; (d) can be transferred, stored or traded electronically; and (e) satisfies such other characteristics as the Authority may prescribe.”

“Payment Services Act 2019”, Pub. L. No. 2 of 2019 (2019), Singapore Parliament, <https://sso.agc.gov.sg:5443/Acts-Supp/2-2019/Published/20190220?DocDate=20190220>.

<sup>15</sup> “Guidelines on Provision of Digital Payment Token Services to the Public [PS-G02]”, Monetary Authority of Singapore, 17 January 2022, <https://www.asa.org.uk/advice-online/cryptoassets.html>.<https://www.asa.org.uk/advice-online/cryptoassets.html>.

<sup>16</sup> “Guidelines on Provision of Digital Payment Token Services to the Public”, Monetary Authority of Singapore, 17 January 2022, <https://ascionline.in/images/pdf/vda-guidelines-23.02.22.pdf>.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

The Spanish National Securities Market Commission (CNMV) issued guidelines relating to the advertising of crypto-assets on 10 January 2022 through Circular number 1/2022.<sup>20</sup> The circular applies to any attempts at advertising crypto-assets to Spanish investors, even those instances wherein the advertising entity is not based in Spain.

The circular defines a crypto-asset as a “digital representation of value, a right, or an asset that can be transferred or stored electronically, using distributed ledger technologies or other similar technology”.<sup>21</sup> However, despite providing a holistic definition of crypto-assets, the guidelines are only applicable to the advertising of a specific subset of crypto-assets, i.e., crypto-assets that are a means of investment.<sup>22</sup>

The circular specifically calls out the following crypto-assets as being exempt:

- Crypto-assets that are defined as financial instruments under the Spanish Securities Market Act, 2018.
- Crypto-assets that are used for the sole purpose of providing digital access to a product or service and that are accepted only by the issuer.<sup>23</sup>
- The advertising of unique or non-fungible crypto-assets when they are not meant to be used as a means of investment.
- Any other crypto-asset that possesses characteristics that make it unsuitable as a means of investment.

The circular imposes a few obligations that crypto-asset service providers must comply with in their advertising efforts:<sup>24</sup>

- All advertising must include a clear warning of the risks associated with investing in crypto-assets, as well as a link or reference to where consumers can get more information.
- The circular entrusts the CNMV with supervisory capacity, enabling it to request termination or amendment of any advertising activity that it deems to be non-compliant with the guidelines.
- All entities to whom this circular applies must ensure that they maintain a registry of all general and specific information relating to any crypto-asset advertising campaign conducted over the past two years. This registry will

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<sup>20</sup> “Circular 1/2022”, Spanish National Securities Market Commission, 10 January 2022, [https://cnmv.es/DocPortal/Legislacion/Circulares/Circular\\_1\\_2022\\_EN.pdf](https://cnmv.es/DocPortal/Legislacion/Circulares/Circular_1_2022_EN.pdf).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> This provision is followed with the caveat that there must be “no expectations of gain and the volume offered and conditions of the offer are in accordance with the actual rights that the crypto-asset would offer”.

“Circular 1/2022”, Spanish National Securities Market Commission, 10 January 2022, [https://cnmv.es/DocPortal/Legislacion/Circulares/Circular\\_1\\_2022\\_EN.pdf](https://cnmv.es/DocPortal/Legislacion/Circulares/Circular_1_2022_EN.pdf).

<sup>24</sup> “Circular 1/2022”, Spanish National Securities Market Commission, 10 January 2022, [https://cnmv.es/DocPortal/Legislacion/Circulares/Circular\\_1\\_2022\\_EN.pdf](https://cnmv.es/DocPortal/Legislacion/Circulares/Circular_1_2022_EN.pdf).

be maintained in order to comply with any request for information from the CNMV.

- Any advertiser seeking to undertake a “mass advertising campaign”<sup>25</sup> must provide the CNMV with appropriate documentation 10 days prior to the launch of the campaign. The CNMV will have 10 days to communicate any concerns, rectifications, or stoppages to the advertising entity. If the advertiser does not hear from the CNMV within these 10 days, then it will be assumed that the CNMV has provided its consent for the campaign to proceed.

## 5.4 The United Kingdom

Much like in India, the United Kingdom has a two-tier set of advertising guidelines, consisting of legally enforceable guidelines determined by statutes as well as a set of voluntary guidelines introduced by a non-statutory self-governing entity known as the Advertising Standards Authority (ASA).

### Advertising Standards Authority guidelines

The Advertising Standards Authority, despite not being a statutory body, has produced a set of guidelines that are to be generally adopted by entities marketing crypto-assets in the UK. The guidelines issued by the ASA are as follows:<sup>26</sup>

- Clearly informing consumers that crypto-assets are unregulated and not protected by financial protection schemes.
- Making such a disclaimer in a manner that is clear and prominent.
- Marketing must be made in a way that is easy for consumers to understand, keeping in mind the medium and audience that is being marketed to. Therefore, an advertisement in a national newspaper would have to use less technical jargon when compared to an advertisement in a computer science journal.
- The ads must not trivialise or downplay the seriousness of the investment, nor must it market itself as an essential purchase to prevent consumers from “missing out” or exploit consumers’ fear or lack of knowledge in any other way, such as not explaining that capital gains tax would have to be paid on crypto-asset profits.

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<sup>25</sup> The circular defines a mass advertising campaign as advertising campaigns aimed at over 10,000 people measured through medium-specific criteria.

“Circular 1/2022”, Spanish National Securities Market Commission, 10 January 2022, [https://cnmv.es/DocPortal/Legislacion/Circulares/Circular\\_1\\_2022\\_EN.pdf](https://cnmv.es/DocPortal/Legislacion/Circulares/Circular_1_2022_EN.pdf).

<sup>26</sup>“Cryptoassets”, Committee of Advertising, Advertising Standards Authority, accessed 21 April 2022, <https://www.asa.org.uk/advice-online/cryptoassets.html>.

- Crypto-asset ads are to include all relevant material information related to the product.
- Make clear that the value of the asset can fluctuate, leading to both profits and losses.
- State the basis for any projections used in an advert.
- Clarify that past performance is not a sufficient indicator for future returns.

### Existing and upcoming legislation

At present, only certain types of crypto-assets are regulated under specific pieces of legislation in the United Kingdom. Securities tokens fall under the umbrella of the 'The Financial Services and Markets Act 2000 (Financial Promotion) Order, 2005' and the 'The Financial Services and Markets Act 2000 (Regulated Activities) Order, 2001'.<sup>27</sup> As a result, only entities that have been authorised by the UK's Financial Conduct Authority (FCA) can carry out promotions related to securities tokens.<sup>28</sup> Alternatively, unauthorised individuals or entities must have their promotions or advertisements approved by an authorised entity prior to their publication.<sup>29</sup> Similarly, rules regarding the advertising of e-money tokens are laid down in the Electronic Money Regulations of 2011.<sup>30</sup>

These existing regulations, however, do not adequately cover the crypto-asset landscape, with major crypto-assets such as Bitcoin and Ether falling outside of the purview of these rules. In an attempt to solve this problem, the UK introduced a proposal to bring crypto-asset regulation under the scope of the financial promotions order; thereby requiring crypto-asset advertisers to seek proper authorisation in order to publish their promotions or advertisements.<sup>31</sup>

The new regulations will introduce the concept of a "qualifying crypto-asset" which would be classified as a new form of controlled investment, thereby bringing it within

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<sup>27</sup> "Cryptoasset Promotions: Consultation Response" (HM Treasury, January 2022), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1047232/Cryptoasset\\_Financial\\_Promotions\\_Response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1047232/Cryptoasset_Financial_Promotions_Response.pdf).

<sup>28</sup> "Cryptoasset Promotions Consultation" (HM Treasury, July 2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/902891/Cryptoasset\\_promotions\\_consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902891/Cryptoasset_promotions_consultation.pdf).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

Claire Harrop and Christopher Chan, "Extension of UK Financial Promotion Regime: The End of Bitcoin Ads on Buses?", *Lexology*, 24 January 2022, <https://www.lexology.com/library/detail.aspx?g=541bf18d-23f4-472f-8d00-09662c270f29>.

<sup>31</sup> *Ibid.*

the scope of the financial promotions order. The government’s proposal defines a qualifying crypto-asset as:

“any cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and which — (a) is fungible; (b) is transferable or confers transferable rights, or is promoted as being transferable or as conferring transferable rights; (c) is not any other controlled investment as described in this Part; (d) is not electronic money within the meaning given in the Electronic Money Regulations 2011; and (e) is not currency issued by a central bank or other public authority.”<sup>32</sup>

What is particularly interesting about the approach adopted by the UK is that there is a specific written requirement of fungibility for a crypto-asset to be deemed as a qualifying crypto-asset. This, therefore, entails that NFTs would exist outside of the purview of financial promotions regulations.

## 6. Recommendations

Keeping in mind the limitations of crypto-asset advertising standards in India, and drawing from the insights gleaned from foreign jurisdictions, we propose the following recommendations aimed at applying a consistent and comprehensive advertising framework around crypto-assets.

### 6.1 Treating crypto-assets as financial instruments

Crypto-assets, both in their envisioning and actual functioning, behave similarly to a multitude of financial instruments such as currencies, securities, and speculative assets. As with any other financial instrument, crypto-assets carry a high degree of financial risk to the consumer, something that has been noted repeatedly by the RBI.<sup>33</sup> As a result, crypto-assets must be held to a higher standard of regulatory oversight than other commodities or services.

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<sup>32</sup> “Cryptoasset Promotions Consultation” (HM Treasury, July 2020), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/902891/Cryptoasset\\_promotions\\_consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902891/Cryptoasset_promotions_consultation.pdf).

“Cryptoasset Promotions: Consultation Response” (HM Treasury, January 2022), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1047232/Cryptoasset\\_Financial\\_Promotions\\_Response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1047232/Cryptoasset_Financial_Promotions_Response.pdf).

<sup>33</sup> T Rabi Sankar, “Reserve Bank of India – Speeches”, 14 February 2022, [https://rbi.org.in/Scripts/BS\\_SpeechesView.aspx?Id=1196](https://rbi.org.in/Scripts/BS_SpeechesView.aspx?Id=1196).

## **6.2 Bringing crypto-assets under the purview of an existing regulatory authority and ensuring advertising guidelines are legally enforceable**

The Advertising Standards Council of India remains a non-governmental, voluntary, self-governing entity. Being a non-statutory body, at present, the ASCI's jurisdiction is limited to fielding complaints in an attempt at self-regulation, but is unable to adjudicate on disputes or award damages.<sup>34</sup> While this may be acceptable in the context of regular goods and services, financial instruments such as crypto-assets carry with them an additional risk, and their advertising must therefore be placed under the purview of a regulatory body whose guidelines are not simply voluntary but are legally binding and enforceable.

In the interim period, wherein a dedicated crypto-asset bill is being debated, an existing financial regulator such as SEBI or the RBI would be able to use its ad hoc power to bring crypto-asset regulation including their advertisements under its purview.

## **6.3 Classifying crypto-assets separately**

At present, the definition of VDAs adopted by the Indian government and the ASCI is not only too broad but also fails to account for the nuances associated with the various types of crypto-assets. Crypto-assets can function as a multitude of financial instruments and are utilised for different purposes. As such, different crypto-assets carry differing levels of associated risks.

Keeping this in mind, we propose that any attempt at applying regulatory standards to crypto-assets must take this difference into consideration. We suggest that advertising regulations also follow these distinctions. Taking lessons from the UK, one potential distinction that can be brought into advertising guidelines is along the grounds of fungibility, i.e., essentially creating a separation between crypto-assets that function closer to financial instruments and NFTs that serve a purpose closer to art.

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<sup>34</sup> Diganth Raj Sehgal, "What is the Advertisement Standards Council of India (ASCI) and What Does it Do", *IPleaders*, 7 April 2021, <https://blog.ipleaders.in/advertisement-standards-council-india-asci/>.