

31 JULY 2019

CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE

The applicability of the Financial Advisory and Intermediary Services Act to cryptocurrency assets

Recently, we have been approached by several people who wanted to know how and whether South African financial services legislation applies to persons who wish to provide advice to third parties who are interesting in investing in cryptocurrencies. Specifically, they want to know whether or not they need to be licensed as "financial services providers" in terms of the Financial Advisory and Intermediary Services Act, 2002 (FAIS).

The applicability of the Financial Advisory and Intermediary Services Act to cryptocurrency

FAIS is intended to regulate the providing of advice and rendering of intermediary services as respects financial products.

Recently, we have been approached by several people who wanted to know how and whether South African financial services legislation applies to persons who wish to provide advice to third parties who are interesting in investing in cryptocurrencies. Specifically, they want to know whether or not they need to be licensed as “financial services providers” in terms of the Financial Advisory and Intermediary Services Act, 2002 (FAIS).

FAIS is intended to regulate the providing of advice and rendering of intermediary services as respects financial products. FAIS defines ‘advice’, in sum, as a recommendation, guidance or proposal of a financial nature in respect of the purchase of any financial product or in respect of an investment in a financial product. People who wish to advise third parties interested in investing in cryptocurrencies are providing advice as commonly understood. What brings that advice within the definition of ‘advice’ in FAIS is whether those people are providing advice with respect to ‘financial products’ (also as defined in FAIS).

FAIS defines ‘financial products’ as including shares in a company, debentures, money-market instruments, participatory interests in one or more collective investment schemes, or foreign currency denominated investment instruments, among others. Do cryptocurrencies fall into any of the recognised categories of ‘financial products’ as defined in FAIS? To answer this, we need to determine what cryptocurrencies are.

Most of us have heard of cryptocurrency, or of examples like “Ethereum” or “Bitcoin”; but it can be difficult to explain what cryptocurrency is. Merriam-Webster’s Dictionary defines a ‘cryptocurrency’ as:

“any form of currency that only exists digitally, that usually has no central issuing or regulating authority but instead uses a decentralized system to record transactions and manage the issuance of new units, and that relies on cryptography to prevent counterfeiting and fraudulent transactions.”

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

The applicability of the Financial Advisory and Intermediary Services Act to cryptocurrency...*continued*

Cryptocurrency is not money as we commonly understand it, but it can be used as a means of exchange.

The South African Crypto Assets Regulatory Working Group (comprising of members from across the financial sector regulatory services at the South African Reserve Bank, National Treasury, Financial Intelligence Centre, Financial Sector Conduct Authority and South African Revenue Services) (IFWG) has proposed the following definition in its Consultation Paper on Policy Proposals for Crypto Assets, released earlier this year:

“Crypto assets are digital representations or tokens that are accessed, verified, transacted, and traded electronically by a community of users. Crypto assets are issued electronically by decentralised entities and have no legal tender status, and consequently are not considered as electronic money either. It therefore does not have statutory compensation arrangements. Crypto assets have the ability to be used for payments (exchange of such value) and for investment purposes by crypto asset users. Crypto assets have the ability to function as a medium of exchange, and/or unit of account and/or store of value within a community of crypto asset users.”

What is immediately apparent is that cryptocurrency is not issued by any state authority. There is no central body making sure that it is not fake. Therefore, cryptocurrency is not money as we

commonly understand it, but it can be used as a means of exchange. The IFWG describes cryptocurrency just as types of digital representations or tokens.

Cryptocurrencies do not fit neatly into any of the categories of ‘financial products’ defined in FAIS. Given this, it is arguable that cryptocurrencies are not “financial products” in terms of FAIS.

Accordingly, it is not certain whether a person providing advice regarding that cryptocurrency would need to be licensed as a financial services provider in terms of FAIS.

However, importantly, if a person provides ‘advice’ regarding a ‘financial product’ that referenced a cryptocurrency or in which cryptocurrency was the underlying asset (perhaps as an underlying asset in an exchange traded fund), that person would still be required to be licensed as a financial services provider in terms of FAIS. This is consistent with how cryptocurrencies are being treated in the United Kingdom and the USA.

It is not yet certain when specific regulation governing cryptocurrencies will be drafted which will give an indication as to whether cryptocurrencies are treated as ‘financial products’ for purposes of FAIS. In any event, we recommend that anyone seeking to provide any financial advice on cryptocurrencies get appropriate legal advice regarding FAIS first.

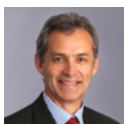
Wayne Murray

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



Willem Jacobs
National Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com



David Thompson
Regional Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com

Mmatiki Aphiri
Director
T +27 (0)11 562 1087
M +27 (0)83 497 3718
E mmatiki.aphiri@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

Emma Dempster
Projects & Energy
Director
T +27 (0)11 562 1194
M +27 (0)79 491 7683
E emma.dempster@cdhlegal.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@cdhlegal.com

John Gillmer
Director
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Sandra Gore
Director
T +27 (0)11 562 1433
M +27 (0)71 678 9990
E sandra.gore@cdhlegal.com

Jay Govender
Projects & Energy Sector Head
Director
T +27 (0)11 562 1387
M +27 (0)82 467 7981
E jay.govender@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@cdhlegal.com

Peter Hesselting
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesselting@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@cdhlegal.com

Kendall Keanly
Director
T +27 (0)21 481 6411
M +27 (0)83 645 5044
E kendall.keanly@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

Johan Latsky

Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Giada Masina

Director
T +27 (0)11 562 1221
M +27 (0)72 573 1909
E giada.masina@cdhlegal.com

Nkcubeko Mbambisa

Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu

Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo

Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley

Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley

Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman

Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

Jo Neser

Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@cdhlegal.com

Francis Newham

Director
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie

Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay

Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock

Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid

Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers

Oil & Gas Sector Head
Director
T +27 (0)21 481 6429
M +27 (0) 79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith

Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Ben Strauss

Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@cdhlegal.com

Tamarin Tosen

Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum

Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Deepa Vallabh

Head: Cross-border M&A,
Africa and Asia
Director
T +27 (0)11 562 1188
M +27 (0)82 571 0707
E deepa.vallabh@cdhlegal.com

Jurg van Dyk

Construction & Engineering Sector Head
Director
T +27 (0)11 562 1216
M +27 (0)82 826 2808
E jurg.vandyk@cdhlegal.com

Roux van der Merwe

Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Charl Williams

Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2019 8130/JULY

