
STATUTORY INSTRUMENTS

2005 No. 1529

The Financial Services and Markets Act
2000 (Financial Promotion) Order 2005

PART IV

Exempt Communications: All Controlled Activities

Communications to overseas recipients

12.—(1) Subject to paragraphs (2) and (7), the financial promotion restriction does not apply to any communication—

- (a) which is made (whether from inside or outside the United Kingdom) to a person who receives the communication outside the United Kingdom; or
 - (b) which is directed (whether from inside or outside the United Kingdom) only at persons outside the United Kingdom.
- (2) Paragraph (1) does not apply to an unsolicited real time communication unless—
- (a) it is made from a place outside the United Kingdom; and
 - (b) it is made for the purposes of a business which is carried on outside the United Kingdom and which is not carried on in the United Kingdom.
- (3) For the purposes of paragraph (1)(b)—
- (a) if the conditions set out in paragraph (4)(a), (b), (c) and (d) are met, a communication directed from a place inside the United Kingdom is to be regarded as directed only at persons outside the United Kingdom;
 - (b) if the conditions set out in paragraph (4)(c) and (d) are met, a communication directed from a place outside the United Kingdom is to be regarded as directed only at persons outside the United Kingdom;
 - (c) in any other case where one or more of the conditions in paragraph (4)(a) to (e) are met, that fact is to be taken into account in determining whether or not a communication is to be regarded as directed only at persons outside the United Kingdom (but a communication may still be regarded as directed only at persons outside the United Kingdom even if none of the conditions in paragraph (4) is met).
- (4) The conditions are that—
- (a) the communication is accompanied by an indication that it is directed only at persons outside the United Kingdom;
 - (b) the communication is accompanied by an indication that it must not be acted upon by persons in the United Kingdom;
 - (c) the communication is not referred to in, or directly accessible from, any other communication made to a person or directed at persons in the United Kingdom by the person directing the communication;

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- (d) there are in place proper systems and procedures to prevent recipients in the United Kingdom (other than those to whom the communication might otherwise lawfully have been made by the person directing it or a member of the same group) engaging in the investment activity to which the communication relates with the person directing the communication, a close relative of his or a member of the same group;
 - (e) the communication is included in—
 - (i) a web site, newspaper, journal, magazine or periodical publication which is principally accessed in or intended for a market outside the United Kingdom;
 - (ii) a radio or television broadcast or teletext service transmitted principally for reception outside the United Kingdom.
- (5) For the purpose of paragraph (1)(b), a communication may be treated as directed only at persons outside the United Kingdom even if—
- (a) it is also directed, for the purposes of article 19(1)(b), at investment professionals falling within article 19(5) (but disregarding paragraph (6) of that article for this purpose);
 - (b) it is also directed, for the purposes of article 49(1)(b), at high net worth persons to whom article 49 applies (but disregarding paragraph (2)(e) of that article for this purpose) and it relates to a controlled activity to which article 49 applies;
 - (c) it is a communication to which article 31 applies.
- (6) Where a communication falls within paragraph (5)(a) or (b)—
- (a) the condition in paragraph (4)(a) is to be construed as requiring an indication that the communication is directed only at persons outside the United Kingdom or persons having professional experience in matters relating to investments or high net worth persons (as the case may be);
 - (b) the condition in paragraph (4)(b) is to be construed as requiring an indication that the communication must not be acted upon by persons in the United Kingdom except by persons who have professional experience in matters relating to investments or who are not high net worth persons (as the case may be);
 - (c) the condition in paragraph (4)(c) will not apply where the other communication referred to in that paragraph is made to a person or directed at a person in the United Kingdom to whom paragraph (5) applies.
- (7) Paragraph (1) does not apply to an outgoing electronic commerce communication.

Communications from customers and potential customers

13.—(1) The financial promotion restriction does not apply to any communication made by or on behalf of a person (“customer”) to one other person (“supplier”)—

- (a) in order to obtain information about a controlled investment available from or a controlled service provided by the supplier; or
- (b) in order that the customer can acquire a controlled investment from that supplier or be supplied with a controlled service by that supplier.

(2) For the purposes of paragraph (1), a controlled service is a service the provision of which constitutes engaging in a controlled activity by the supplier.

Follow up non-real time communications and solicited real time communications

14.—(1) Where a person makes or directs a communication (“the first communication”) which is exempt from the financial promotion restriction because, in compliance with the requirements of another provision of this Order, it is accompanied by certain indications or contains

certain information, then the financial promotion restriction does not apply to any subsequent communication which complies with the requirements of paragraph (2).

- (2) The requirements of this paragraph are that the subsequent communication—
 - (a) is a non-real time communication or a solicited real time communication;
 - (b) is made by, or on behalf of, the same person who made the first communication;
 - (c) is made to a recipient of the first communication;
 - (d) relates to the same controlled activity and the same controlled investment as the first communication; and
 - (e) is made within 12 months of the recipient receiving the first communication.
- (3) The provisions of this article only apply in the case of a person who makes or directs a communication on behalf of another where the first communication is made by that other person.
- (4) Where a person makes or directs a communication on behalf of another person in reliance on the exemption contained in this article the person on whose behalf the communication was made or directed remains responsible for the content of that communication.
- (5) A communication made or directed before this article comes into force is to be treated as a first communication falling within paragraph (1) if it would have fallen within that paragraph had it been made or directed after this article comes into force.

Introductions

- 15.—**(1) If the requirements of paragraph (2) are met, the financial promotion restriction does not apply to any communication which is made with a view to or for the purposes of introducing the recipient to—
- (a) an authorised person who carries on the controlled activity to which the communication relates; or
 - (b) an exempt person where the communication relates to a controlled activity which is also a regulated activity in relation to which he is an exempt person.
- (2) The requirements of this paragraph are that—
- (a) the maker of the communication (“A”) is not a close relative of, nor a member of the same group as, the person to whom the introduction is, or is to be, made;
 - (b) A does not receive from any person other than the recipient any pecuniary reward or other advantage arising out of his making the introduction; and
 - (c) it is clear in all the circumstances that the recipient, in his capacity as an investor, is not seeking and has not sought advice from A as to the merits of the recipient engaging in investment activity (or, if the client has sought such advice, A has declined to give it, but has recommended that the recipient seek such advice from an authorised person).

Exempt persons

- 16.—**(1) The financial promotion restriction does not apply to any communication which—
- (a) is a non-real time communication or a solicited real time communication;
 - (b) is made or directed by an exempt person; and
 - (c) is for the purposes of that exempt person's business of carrying on a controlled activity which is also a regulated activity in relation to which he is an exempt person.
- (2) The financial promotion restriction does not apply to any unsolicited real time communication made by a person (“AR”) who is an appointed representative (within the meaning of section 39(2) of the Act) where—

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- (a) the communication is made by AR in carrying on the business—
 - (i) for which his principal (“P”) has accepted responsibility for the purposes of section 39 of the Act; and
 - (ii) in relation to which AR is exempt from the general prohibition by virtue of that section; and
- (b) the communication is one which, if it were made by P, would comply with any rules made by the Authority under section 145 of the Act (financial promotion rules) which are relevant to a communication of that kind.

Generic promotions

17. The financial promotion restriction does not apply to any communication which—
- (a) does not identify (directly or indirectly) a person who provides the controlled investment to which the communication relates; and
 - (b) does not identify (directly or indirectly) any person as a person who carries on a controlled activity in relation to that investment.

Communications caused to be made or directed by unauthorised persons

17A.—(1) If a condition in paragraph (2) is met, the financial promotion restriction does not apply to a communication caused to be made or directed by an unauthorised person which is made or directed by an authorised person.

- (2) The conditions in this paragraph are that—
- (a) the authorised person prepared the content of the communication; or
 - (b) it is a real-time communication.

Mere conduits

18.—(1) Subject to paragraph (4), the financial promotion restriction does not apply to any communication which is made or directed by a person who acts as a mere conduit for it.

- (2) A person acts as a mere conduit for a communication if—
- (a) he communicates it in the course of an activity carried on by him, the principal purpose of which is transmitting or receiving material provided to him by others;
 - (b) the content of the communication is wholly devised by another person; and
 - (c) the nature of the service provided by him in relation to the communication is such that he does not select, modify or otherwise exercise control over its content prior to its transmission or receipt.
- (3) For the purposes of paragraph (2)(c) a person does not select, modify or otherwise exercise control over the content of a communication merely by removing or having the power to remove material—
- (a) which is, or is alleged to be, illegal, defamatory or in breach of copyright;
 - (b) in response to a request to a body which is empowered by or under any enactment to make such a request; or
 - (c) when otherwise required to do so by law.
- (4) Nothing in paragraph (1) prevents the application of the financial promotion restriction in so far as it relates to the person who has caused the communication to be made or directed.
- (5) This article does not apply to an electronic commerce communication.

Electronic commerce communications: mere conduits, caching and hosting

18A. The financial promotion restriction does not apply to an electronic commerce communication in circumstances where—

- (a) the making of the communication constitutes the provision of an information society service of a kind falling within paragraph 1 of Article 12, 13 or 14 of the electronic commerce directive (“mere conduit”, “caching” and “hosting”); and
- (b) the conditions mentioned in the paragraph in question, to the extent that they are applicable at the time of, or prior to, the making of the communication, are or have been met at that time.

Investment professionals

19.—(1) The financial promotion restriction does not apply to any communication which—

- (a) is made only to recipients whom the person making the communication believes on reasonable grounds to be investment professionals; or
- (b) may reasonably be regarded as directed only at such recipients.

(2) For the purposes of paragraph (1)(b), if all the conditions set out in paragraph (4)(a) to (c) are met in relation to the communication, it is to be regarded as directed only at investment professionals.

(3) In any other case in which one or more of the conditions set out in paragraph (4)(a) to (c) are met, that fact is to be taken into account in determining whether the communication is directed only at investment professionals (but a communication may still be regarded as so directed even if none of the conditions in paragraph (4) is met).

(4) The conditions are that—

- (a) the communication is accompanied by an indication that it is directed at persons having professional experience in matters relating to investments and that any investment or investment activity to which it relates is available only to such persons or will be engaged in only with such persons;
- (b) the communication is accompanied by an indication that persons who do not have professional experience in matters relating to investments should not rely on it;
- (c) there are in place proper systems and procedures to prevent recipients other than investment professionals engaging in the investment activity to which the communication relates with the person directing the communication, a close relative of his or a member of the same group.

(5) “Investment professionals” means—

- (a) an authorised person;
- (b) an exempt person where the communication relates to a controlled activity which is a regulated activity in relation to which the person is exempt;
- (c) any other person—
 - (i) whose ordinary activities involve him in carrying on the controlled activity to which the communication relates for the purpose of a business carried on by him; or
 - (ii) who it is reasonable to expect will carry on such activity for the purposes of a business carried on by him;
- (d) a government, local authority (whether in the United Kingdom or elsewhere) or an international organisation;
- (e) a person (“A”) who is a director, officer or employee of a person (“B”) falling within any of sub-paragraphs (a) to (d) where the communication is made to A in that capacity and

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where A's responsibilities when acting in that capacity involve him in the carrying on by B of controlled activities.

(6) For the purposes of paragraph (1), a communication may be treated as made only to or directed only at investment professionals even if it is also made to or directed at other persons to whom it may lawfully be communicated.

Communications by journalists

20.—(1) Subject to paragraph (2), the financial promotion restriction does not apply to any non-real time communication if—

- (a) the content of the communication is devised by a person acting in the capacity of a journalist;
 - (b) the communication is contained in a qualifying publication; and
 - (c) in the case of a communication requiring disclosure, one of the conditions in paragraph (2) is met.
- (2) The conditions in this paragraph are that—
- (a) the communication is accompanied by an indication explaining the nature of the author's financial interest or that of a member of his family (as the case may be);
 - (b) the authors are subject to proper systems and procedures which prevent the publication of communications requiring disclosure without the explanation referred to in sub-paragraph (a); or
 - (c) the qualifying publication in which the communication appears falls within the remit of—
 - (i) the Code of Practice issued by the Press Complaints Commission;
 - (ii) the OFCOM Broadcasting Code; or
 - (iii) the Producers' Guidelines issued by the British Broadcasting Corporation.
- (3) For the purposes of this article, a communication requires disclosure if—
- (a) an author of the communication or a member of his family is likely to obtain a financial benefit or avoid a financial loss if people act in accordance with the invitation or inducement contained in the communication;
 - (b) the communication relates to a controlled investment of a kind falling within paragraph (4); and
 - (c) the communication identifies directly a person who issues or provides the controlled investment to which the communication relates.
- (4) A controlled investment falls within this paragraph if it is—
- (a) an investment falling within paragraph 14 of Schedule 1 (shares or stock in share capital);
 - (b) an investment falling within paragraph 21 of that Schedule (options) to acquire or dispose of an investment falling within sub-paragraph (a);
 - (c) an investment falling within paragraph 22 of that Schedule (futures) being rights under a contract for the sale of an investment falling within sub-paragraph (a); or
 - (d) an investment falling within paragraph 23 of that Schedule (contracts for differences etc.) being rights under a contract relating to, or to fluctuations in, the value or price of an investment falling within sub-paragraph (a).
- (5) For the purposes of this article—
- (a) the authors of the communication are the person who devises the content of the communication and the person who is responsible for deciding to include the communication in the qualifying publication;

- (b) a “qualifying publication” is a publication or service of the kind mentioned in paragraph (1) or (2) of article 54 of the Regulated Activities Order and which is of the nature described in that article, and for the purposes of this article, a certificate given under paragraph (3) of article 54 of that Order and not revoked is conclusive evidence of the matters certified;
- (c) the members of a person's family are his spouse [^{F1}or civil partner] and any children of his under the age of 18 years.

Textual Amendments

- F1** Words in art. 20(5)(c) inserted (21.12.2005) by [The Financial Services and Markets Act 2000 \(Financial Promotion\) \(Amendment\) Order 2005 \(S.I. 2005/3392\)](#), arts. 1, **2(3)**

Promotion broadcast by company director etc.

20A.—(1) The financial promotion restriction does not apply to a communication which is communicated as part of a qualifying service by a person (“D”) who is a director or employee of an undertaking (“U”) where—

- (a) the communication invites or induces the recipient to acquire—
 - (i) a controlled investment of the kind falling within article 20(4) which is issued by U (or by an undertaking in the same group as U); or
 - (ii) a controlled investment issued or provided by an authorised person in the same group as U;
 - (b) the communication—
 - (i) comprises words which are spoken by D and not broadcast, transmitted or displayed in writing; or
 - (ii) is displayed in writing only because it forms part of an interactive dialogue to which D is a party and in the course of which D is expected to respond immediately to questions put by a recipient of the communication;
 - (c) the communication is not part of an organised marketing campaign; and
 - (d) the communication is accompanied by an indication that D is a director or employee (as the case may be) of U.
- (2) For the purposes of this article, a “qualifying service” is a service—
- (a) which is broadcast or transmitted in the form of television or radio programmes; or
 - (b) displayed on a web site (or similar system for the electronic display of information) comprising regularly updated news and information,

provided that the principal purpose of the service, taken as a whole and including any advertisements and other promotional material contained in it, is neither of the purposes described in article 54(1) (a) or (b) of the Regulated Activities Order.

(3) For the purposes of paragraph (2), a certificate given under article 54(3) of the Regulated Activities Order and not revoked is conclusive evidence of the matters certified.

Incoming electronic commerce communications

20B.—(1) The financial promotion restriction does not apply to an incoming electronic commerce communication.

- (2) Paragraph (1) does not apply to—

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- (a) a communication which constitutes an advertisement by the operator of a UCITS directive scheme of units in that scheme;
- (b) a communication consisting of an invitation or inducement to enter into a contract of insurance, where—
 - (i) the communication is made by an undertaking which has received official authorisation in accordance with Article 4 of the life assurance consolidation directive or the first non-life insurance directive, and
 - (ii) the insurance falls within the scope of any of the insurance directives; or
- (c) an unsolicited communication made by electronic mail.

(3) In this article, “UCITS directive scheme” means an undertaking for collective investment in transferable securities which is subject to Directive [85/611/EEC](#) of the Council of the European Communities of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ^{M1}, and has been authorised in accordance with Article 4 of that Directive.

(4) For the purposes of this article, a communication by electronic mail is to be regarded as unsolicited, unless it is made in response to an express request from the recipient of the communication.

Marginal Citations

M1 OJ L 375, 31.12.85, p. 3.

Status:

Point in time view as at 13/04/2010.

Changes to legislation:

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