

EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (EXEMPTIONS FROM FINANCIAL PROMOTION GENERAL REQUIREMENT) REGULATIONS 2023

2023 No. 966

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 The Financial Services and Markets Act 2023 (FSMA 2023) introduces a regulatory ‘gateway’ for the approval of financial promotions. The ‘gateway’ will require any authorised person wishing to approve financial promotions of an unauthorised person to first obtain permission from the Financial Conduct Authority (FCA), unless an exemption applies. This instrument legislates for the exemptions that the Government stated it would put in place following the public consultation on this policy.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of this instrument is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Section 21 of the Financial Services and Markets Act 2000 (FSMA 2000) provides that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity, or claims management activity, unless (i) they are an authorised person, (ii) the content of the communication is approved by an authorised person, or (iii) an exemption from the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (S.I. 2005/1529) (FPO) applies. This is known as the financial promotion restriction.
- 6.2 Under section 25 FSMA 2000 it is a criminal offence for an unauthorised person to communicate a financial promotion in breach of the financial promotion restriction.
- 6.3 FSMA 2023 inserts section 21(2A) into FSMA 2000, which provides that an authorised person can only approve a financial promotion within the scope of a permission granted by the FCA or within an exemption.

6.4 FSMA 2023 provides HM Treasury with a power to specify the relevant gateway exemptions. This instrument introduces the exemptions that are to be in force and available when the window for applications to the gateway opens.

7. Policy background

What is being done and why?

7.1 A financial promotion is a communication that contains an invitation or inducement to engage in a financial product or service. Such communications can take a wide variety of forms, including advertisements placed through print, broadcast or online media; marketing brochures; direct mail; or use of social media. Financial promotions are often consumers' first contact with an investment opportunity and so can have a significant influence over the financial decisions they make.

7.2 The financial promotions regulatory regime in the UK seeks to ensure that consumers are provided with clear and accurate information that enables them to make appropriate decisions for their individual circumstances. Financial promotions communicated by unauthorised persons (i.e. persons that are not authorised for the purposes of FSMA 2000) must be approved by persons that are authorised by the FCA or PRA, unless the promotion is otherwise subject to an exemption.

7.3 FSMA 2023 establishes a new regulatory 'gateway', which authorised persons must pass through before being able to approve the financial promotions of unauthorised persons. When the gateway is introduced, any authorised person wishing to approve the financial promotions of unauthorised persons will first need to obtain the permission of the FCA (unless an exemption to the gateway applies).

7.4 The gateway aims to improve the quality of financial promotions communicated by unauthorised persons, by allowing only those authorised persons that the FCA assesses as suitable and with sufficient and appropriate expertise to approve the promotions of unauthorised persons. It will also give the FCA greater oversight of the approval of financial promotions and reduce the number of authorised persons that are able to undertake such approvals.

7.5 FSMA 2023 provides HM Treasury with a power to create exemptions to the gateway requirement through secondary legislation. This instrument legislates to exempt authorised persons from the requirement to obtain permission through the new financial promotions gateway in the following circumstances:

- (a) Authorised persons approving the financial promotions that they prepare which are communicated by unauthorised persons;
- (b) Authorised persons approving financial promotions of unauthorised entities that are part of the same group; and
- (c) Authorised persons (as a principal) approving financial promotions of their appointed representatives, in relation to regulated activities comprised in the carrying on of the business for which the authorised persons have accepted responsibility.

(a) Authorised persons approving the financial promotions that they prepare which are communicated by unauthorised persons

7.6 This instrument is designed to ensure that authorised persons will not be required to obtain permission under the gateway for the purposes of approving their own promotions for communication by unauthorised persons. This is because authorised

persons have the expertise to approve promotions for their own products and services, and should also be able to approve promotions to be communicated by unauthorised persons on their behalf. The exemption will have the effect that, for example, authorised persons will not be required to obtain permission through the gateway in order to have an advertisement that they have prepared placed in a newspaper.

(b). Authorised persons approving financial promotions of unauthorised entities that are part of the same group

- 7.7 This instrument legislates to exempt from the gateway the activity of authorised persons approving the financial promotions of unauthorised persons within the same group. This exemption recognises the realities of intra-group business and the way in which those businesses are interconnected.

(c). Authorised persons (as a principal) approving financial promotions of their appointed representatives, in relation to regulated activities comprised in the carrying on of the business for which the authorised persons have accepted responsibility

- 7.8 An appointed representative (AR) is a (generally unauthorised) person who carries on regulated activities under the responsibility of an authorised person. The authorised person is known as the AR's principal. The exemption that allows ARs to carry on a regulated activity on behalf of a principal is set out in section 39 of FSMA 2000. An AR can only carry on those regulated activities for which the principal has expressly accepted responsibility.

- 7.9 This instrument legislates to exempt from the gateway, principals approving the financial promotions of ARs (as defined in section 39(2)(a) FSMA 2000), in relation to regulated activities for which the principal has expressly agreed to accept responsibility. This reflects the fact that there is a contract between the principal and AR, and that the principal is an authorised person that has accepted responsibility for the regulated activities that the AR carries on.

What did any law do before the changes to be made by this instrument?

- 7.10 Before the introduction of the financial promotions gateway, any authorised person would have been able to approve any financial promotion of an unauthorised person. Once the financial promotions gateway comes into force, authorised persons will be required to pass through the financial promotions gateway and be granted a permission by the FCA, before being able to approve the financial promotions of unauthorised persons. Were this instrument not to be made, a wider range of activity could be captured than the Government intends.

Why is it being changed?

- 7.11 This legislation is being introduced to ensure that the gateway achieves the intended policy effect of not requiring all authorised persons to go through the financial promotions gateway in every circumstance, where they wish to approve unauthorised persons' promotions. Without this instrument, a large number of authorised persons would be required to obtain permission through the gateway even where the financial promotion related to activity for which the authorised person had expressly taken responsibility, or where there is sufficient involvement of the authorised person. This instrument legislates for the exemptions that the Government stated it would put in place following the public consultation on the gateway policy.

What will it now do?

- 7.12 This instrument legislates to exempt authorised persons from the requirement to obtain permission through the financial promotions gateway in the circumstances outlined above, in line with the Government’s previous commitments.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 This legislation does not consolidate any other legislation.

10. Consultation outcome

- 10.1 HM Treasury issued a consultation paper¹ entitled “Regulatory Framework for Approval of Financial Promotions: consultation” on 20 July 2020. The consultation set out proposals to establish a regulatory gateway. The consultation period closed on 26th October 2020 and 26 responses were received. There was broad support for the Government’s favoured approach in introducing the regulatory gateway.
- 10.2 HM Treasury’s consultation response² entitled “Regulatory Framework for Approval of Financial Promotions: Consultation Response” was published on 21 June 2021 and confirmed the Government’s intention to make the exemptions detailed in this instrument.
- 10.3 The Government set out in the consultation that it did not intend for the financial promotions gateway to apply to authorised persons approving the financial promotions of an unauthorised person within the same group, or to the approval of promotions prepared by an authorised person for communication by unauthorised persons. The Government confirmed this position in the consultation response.
- 10.4 Following feedback from the consultation, the Government also stated its intention in the consultation response to exempt from the gateway principals approving financial promotions for their appointed representatives in relation to regulated activities, for which the principal has agreed to accept responsibility.
- 10.5 The Government introduced the financial promotions gateway as part of FSMA 2023, which received Royal Assent on 29 June 2023. The provisions in FSMA 2023 provided HM Treasury with the powers to create exemptions to the gateway. This instrument legislates for the exemptions that the Government stated it would put in place following the public consultation on this policy.

11. Guidance

- 11.1 The FCA will be publishing further guidance relating to the implementation of the overall policy.

¹
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902101/Financial_Promotions_Unauthorised_Firms_Consultation.pdf

²
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/995565/HMT_WR_113_Consultation_Response.pdf

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies as this instrument will preserve the pre-existing regulatory treatment in circumstances where: an authorised person approves a financial promotion, that it has prepared for onward communication by an unauthorised person; an authorised person is part of the same group as an unauthorised person that has prepared the financial promotion; the financial promotion is prepared by an appointed representative in relation to an activity for which its principal has accepted responsibility. The instrument does not introduce additional regulatory burdens on businesses.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument as the Government published an Impact Assessment³ for the overall policy as part of FSMA 2023. That Impact Assessment accounted for the exemptions in this instrument being in place at the time the gateway is opened.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that this instrument legislates to exempt authorised persons from the requirement to obtain permission through the financial promotions gateway in certain circumstances. Small businesses will be able to benefit from these exemptions, as will larger businesses.

14. Monitoring & review

- 14.1 The approach to monitoring this legislation is that HM Treasury will keep the overall regulatory framework for financial promotions under review.
- 14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Economic Secretary to the Treasury has made the following statement:
- “It would be disproportionate to include a statutory review clause in this legislation as it does not introduce additional regulatory burdens on businesses.”

15. Contact

- 15.1 Edwin Ferguson at HM Treasury Telephone: 07971556140 or email: Edwin.Ferguson@hmtreasury.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Anna Harvey, Deputy Director for Personal Finances and Funds, at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Andrew Griffith MP, the Economic Secretary to the Treasury at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.

³ <https://bills.parliament.uk/publications/49053/documents/2621>