
STATUTORY INSTRUMENTS

2001 No. 1335

The Financial Services and Markets Act
2000 (Financial Promotion) Order 2001

PART IV

EXEMPT COMMUNICATIONS: ALL CONTROLLED ACTIVITIES

Communications to overseas recipients

12.—(1) Subject to paragraph (2), 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 which is made to a person or directed at persons in the United Kingdom by or on behalf of the same person;

- (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) 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.
- (6) Where a communication falls within paragraph (5)—
- (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 or by persons who do not have professional experience in matters relating to investments or who are not high net worth persons (as the case may be).

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 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) 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 real time 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. 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.

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.

Mere conduits

18.—(1) 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 a business 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.

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 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; and
- (b) the communication is contained in a qualifying publication.

(2) Paragraph (1) does not apply to a communication requiring disclosure unless—

- (a) it is accompanied by an indication explaining the nature of the author’s financial interest or that of his close relative (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 publication in which the communication appears falls within the remit of the Code of Practice issued by the Press Complaints Commission.

(3) 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 communication requires disclosure if an author of the communication or a close relative of his 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;
- (c) 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 article 54(3) of the Regulated Activities Order and not revoked is conclusive evidence of the matters certified.