
STATUTORY INSTRUMENTS

2001 No. 1060

The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001

PART III

OTHER EXEMPTIONS

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

11.—(1) Where an authorised person makes or directs a communication (“the first communication”) which is exempt from the scheme 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 scheme 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 unregulated scheme 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 Order 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 Order comes into force.

Introductions

12.—(1) If the requirements of paragraph (2) are met, the scheme 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 one or more relevant scheme activities in relation to units in unregulated schemes; or
- (b) a person who is exempt, as a result of an exemption order made under section 38(1) of the Act, in relation to one or more relevant scheme activities.

(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 carry on business in relevant scheme activities in relation to units in unregulated schemes;
- (c) 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

- (d) 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 participating in an unregulated scheme (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 specialising in that kind of investment).

Generic promotions

- 13. The scheme promotion restriction does not apply to any communication which—
 - (a) does not relate to units of a particular unregulated scheme identified (directly or indirectly) in the communication; and
 - (b) does not identify (directly or indirectly) any person who operates a collective investment scheme or sells units.

Investment professionals

- 14.—(1) The scheme 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 shall 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 of participating in unregulated schemes and that the units to which the communication relates are available only to such persons;
 - (b) the communication is accompanied by an indication that persons who do not have professional experience in participating in unregulated schemes should not rely on it;
 - (c) there are in place proper systems and procedures to prevent recipients other than investment professionals from acquiring from the person directing the communication, a close relative of his or a company in the same group, units in the scheme to which the communication relates.
- (5) “Investment professionals” means—
 - (a) an authorised person;
 - (b) a person who is exempt, as a result of an exemption order made under section 38(1) of the Act, in relation to one or more relevant scheme activities;
 - (c) any other person—
 - (i) whose ordinary activities involve him in participating in unregulated schemes for the purposes of a business carried on by him; or
 - (ii) who it is reasonable to expect will so participate 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), when the communication is made to A in that capacity and where A’s responsibilities when acting in that capacity involve him in B’s participation in unregulated schemes.

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

(7) In this article—

“government” means the government of the United Kingdom, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly, the National Assembly for Wales and any government of any country or territory outside the United Kingdom;

“international organisation” means any body the members of which comprise—

- (a) states including the United Kingdom or another EEA State; or
- (b) bodies whose members comprise states including the United Kingdom or another EEA State.

One off non-real time communications and solicited real time communications

15.—(1) The scheme promotion restriction does not apply to a one off communication which is either a non-real time communication or a solicited real time communication.

(2) If both the conditions set out in paragraph (3) are met in relation to a communication it is to be regarded as a one off communication. In any other case in which either of those conditions is met, that fact is to be taken into account in determining whether the communication is a one off communication (but a communication may still be regarded as a one off communication even if neither of the conditions in paragraph (3) is met).

(3) The conditions are that—

- (a) the communication is made only to one recipient or only to one group of recipients in the expectation that they would engage in any investment activity jointly;
- (b) the communication is not part of an organised marketing campaign.

Communications required or authorised by enactments

16. The scheme promotion restriction does not apply to any communication which is required or authorised to be communicated by or under any enactment other than the Act.

Persons in the business of placing promotional material

17. The scheme promotion restriction does not apply to any communication which is made to a person whose business it is to place, or arrange for the placing of, promotional material provided that it is communicated so that he can place or arrange for placing it.

Existing participants in an unregulated scheme

18. The scheme promotion restriction does not apply to any communication which is—

- (a) a non-real time communication or a solicited real time communication;
- (b) communicated by the operator of an unregulated scheme; and
- (c) communicated to persons whom the person making the communication believes on reasonable grounds to be persons who are entitled to units in that scheme.

Group companies

19. The scheme promotion restriction does not apply to any communication made by one body corporate in a group to another body corporate in the same group.

Persons in the business of disseminating information

20.—(1) The scheme promotion restriction does not apply to any communication which is made only to recipients whom the person making the communication believes on reasonable grounds to be persons to whom paragraph (2) applies.

(2) This paragraph applies to—

- (a) a person who receives the communication in the course of a business which involves the dissemination through a publication of information concerning investments;
- (b) a person whilst acting in the capacity of director, officer or employee of a person falling within sub-paragraph (a) being a person whose responsibilities when acting in that capacity involve him in the business referred to in that sub-paragraph;
- (c) any person to whom the communication may otherwise lawfully be made.

Certified high net worth individuals

21.—(1) If the requirements of paragraphs (4) and (5) are met, the scheme 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 to a certified high net-worth individual;
- (c) relates only to units falling within paragraph (6);
- (d) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment.

(2) “Certified high net-worth individual” means any individual—

- (a) who has a current certificate of high net worth; and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions of units in unregulated collective investment schemes where such promotions are exempt from the restriction in section 238 of the Financial Services and Markets Act 2000. The exemption relates to certified high net worth individuals and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on this kind of investment”.

(3) For the purposes of paragraph (2)(a) a certificate of high net worth—

- (a) must be in writing or other legible form;
- (b) is current if it is signed and dated within the period of twelve months ending with the day on which the communication is made;
- (c) must state that in the opinion of the person signing the certificate, the person to whom the certificate relates either—
 - (i) had, during the financial year immediately preceding the date on which the certificate is signed, an annual income of not less than £100,000; or

- (ii) held, throughout the financial year immediately preceding the date on which the certificate is signed, net assets to the value of not less than £250,000;
- (d) must be signed by the recipient's accountant or by the recipient's employer.
- (4) The requirements of this paragraph are that the communication is accompanied by an indication—
 - (a) that it is exempt from the restriction on the promotion of unregulated schemes (in section 238 of the Financial Services and Markets Act 2000) on the grounds that the communication is made to a certified high net worth individual;
 - (b) of the requirements that must be met for a person to qualify as a certified high net worth individual;
 - (c) that buying the units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;
 - (d) that any person who is in any doubt about the units to which the communication relates should consult an authorised person specialising in advising on participation in unregulated schemes.
- (5) In determining an individual's "net assets", no account is to be taken of—
 - (a) the property which is his primary residence or of any loan secured on that residence;
 - (b) any rights of his under a qualifying contract of insurance; or
 - (c) any benefits (in the form of pensions or otherwise) which are payable on the termination of his service or on his death or retirement and to which he is (or his dependents are), or may be, entitled.
- (6) A unit falls within this paragraph if it is in an unregulated scheme—
 - (a) which is not operated by the person who has signed the certificate of high net worth referred to in paragraph (2)(a); and
 - (b) which invests wholly or predominantly in the shares in or debentures of an unlisted company.
- (7) "Unlisted company" has the meaning given in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001(1).

High net worth companies, unincorporated associations etc.

- 22.**—(1) The scheme 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 persons to whom paragraph (2) applies; or
 - (b) may reasonably be regarded as directed only at persons to whom paragraph (2) applies.
- (2) This paragraph applies to—
- (a) any body corporate which has a called-up share capital or net assets of—
 - (i) in the case of a body corporate which has more than 20 members or which is a subsidiary undertaking of a parent undertaking which has more than 20 members, not less than £500,000;
 - (ii) in the case of any other body corporate, not less than £5 million;
 - (b) any unincorporated association or partnership which has net assets of not less than £5 million;

- (c) the trustee of a high value trust;
 - (d) any person (“A”) whilst acting in the capacity of director, officer or employee of a person (“B”) falling within any of sub-paragraphs (a) to (c), where A’s responsibilities, when acting in that capacity, involve him in B’s participation in unregulated schemes;
 - (e) any person to whom the communication might otherwise lawfully be made.
- (3) For the purposes of paragraph (1)(b)—
- (a) 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 at persons to whom paragraph (2) applies;
 - (b) in any other case in which one or more of those conditions are met, that fact is to be taken into account in determining whether the communication is directed at persons to whom paragraph (2) applies (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 includes an indication of the description of persons to whom it is directed and an indication of the fact that the units to which it relates are available only to such persons;
 - (b) the communication includes an indication that persons of any other description should not rely upon it;
 - (c) there are in place proper systems and procedures to prevent recipients other than persons to whom paragraph (2) applies from acquiring from the person directing the communication, a close relative of his or a company in the same group, units in the scheme to which the communication relates.
- (5) In this article—
- “called-up share capital” has the meaning given in the Companies Act 1985(2) or in the Companies (Northern Ireland) Order 1986(3);
- “high value trust” means a trust where the aggregate value of the cash and investments which form part of the trust’s assets (before deducing the amount of its liabilities)—
- (a) is £10 million or more; or
 - (b) has been £10 million or more at any time during the year immediately preceding the date on which communication in question was first made or directed;
- “net assets” has the meaning given in section 264 of the Companies Act 1985 or the equivalent provision of the Companies (Northern Ireland) Order 1986.

Sophisticated investors

- 23.—**(1) “Certified sophisticated investor” means a person—
- (a) who has a current certificate in writing or other legible form signed by an authorised person to the effect that he is sufficiently knowledgeable to understand the risks associated with participating in unregulated schemes; and
 - (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I can receive promotions which are exempt from the restriction on promotion of unregulated schemes in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I

(2) 1985 c. 6.

(3) S.I. 1986/1032 (N.I. 6).

declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on this kind of investment”.

(2) If the requirements of paragraph (3) are met, the scheme promotion restriction does not apply to any communication which—

- (a) is made to a certified sophisticated investor; and
- (b) does not invite or induce the recipient to participate in an unregulated scheme operated by the person who has signed the certificate referred to in paragraph (1)(a) or to acquire units from that person.

(3) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the scheme promotion restriction (in section 238 of the Financial Services and Markets Act 2000) on the communication of invitations or inducements to participate in unregulated schemes on the ground that it is made to a certified sophisticated investor;
- (b) of the requirements that must be met for a person to qualify as a certified sophisticated investor;
- (c) that buying the units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;
- (d) that any individual who is in any doubt about the investment to which the invitation or inducement relates should consult an authorised person specialising in advising on investments of the kind in question.

(4) For the purposes of paragraph (1)(a), a certificate is current if it is signed and dated not more than three years before the date on which the communication is made.

Associations of high net worth or sophisticated investors

24. The scheme promotion restriction does not apply to any non-real time communication or solicited real time communication which—

- (a) is made to an association the membership of which the person making the communication believes on reasonable grounds comprises wholly or predominantly persons who are—
 - (i) certified high net worth individuals within the meaning of article 21;
 - (ii) high net worth persons falling within article 22(2)(a) to (d);
 - (iii) certified sophisticated investors within the meaning of article 23; and
- (b) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment.

Settlers, trustees and personal representatives

25. The scheme promotion restriction does not apply to any communication which is made—

- (a) by an authorised person when acting as a settlor or grantor of a trust, a trustee or a personal representative;
- (b) to a trustee of the trust, a fellow trustee or a fellow personal representative (as the case may be),

if the communication is made for the purposes of the trust or estate.

Beneficiaries of trust, will or intestacy

26. The scheme promotion restriction does not apply to any communication which is made—
- (a) by an authorised person when acting as a settlor of a trust, trustee or personal representative to a beneficiary under the trust, will or intestacy; or
 - (b) by an authorised person who is a beneficiary under a trust, will or intestacy to another beneficiary under the same trust, will or intestacy,

if the communication relates to the management or distribution of that trust fund or estate.

Remedy following report by Parliamentary Commissioner for Administration

27. The scheme promotion restriction does not apply to any communication made or directed by a person for the purpose of enabling any injustice, stated by the Parliamentary Commissioner for Administration in a report under section 10 of the Parliamentary Commissioner Act 1967(4) to have occurred, to be remedied with respect to the recipient.

Persons placing promotional material in particular publications

28. The scheme promotion restriction does not apply to any communication received by a person who receives the publication in which the communication is contained because he has himself placed an advertisement in that publication.

(4) 1967 c. 13. This Act has been amended by the Parliamentary Commissioner Act 1994 (c. 14).