

**EXPLANATORY MEMORANDUM TO  
THE FINANCIAL SERVICES AND MARKETS ACT 2000 (FINANCIAL  
PROMOTION)(AMENDMENT) ORDER**

**2010 No. 905**

1. This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 The Order provides exemptions from the restriction on financial promotions contained in section 21(1) of the Financial Services and Markets Act 2000 (“FSMA”). These relate to promotions to employees concerning certain types of pensions, work related insurance and staff mortgages.

**3. Matters of special interest to the Joint Committee on Statutory Instruments on Statutory Instruments**

3.1 None.

**4. Legislative Context**

4.1 Section 21 of FSMA prohibits all persons, in the course of business, making financial promotions unless they are authorised, the content of the communication is approved by an authorised person, or they are exempt. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (S.I. 2005/1529) (“the 2005 Order”) sets out the activities and products to which the restriction applies and provides exemptions from it. This Order amends the 2005 Order by inserting new exemptions and making consequential amendments to article 72 of that Order (the exemption for pension products offered by employers).

**5. Territorial Extent and Application**

5.1 This instrument applies to all of the United Kingdom.

**6. European Convention on Human Rights**

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

**7. Policy background**

• *What is being done and why*

7.1 Employers who offer pensions, insurance products and mortgages to their staff, including advice and information about such products, must comply with the FSMA financial promotions regime. This regime prohibits them from making financial promotions, unless they are themselves authorised by the Financial Services Authority (“FSA”), or the promotion is approved by an FSA-authorised person, or they fall within the current exemption for communications about pension products. Obtaining approval from an FSA authorised person can be expensive. In some cases,

it can be unclear to employers when a communication amounts to a financial promotion which is subject to the regime and this makes employers cautious about providing information to staff.

7.2 The policy objective is to exempt employer promotions in relation to a greater range of products offered to staff, and to exempt promotions by third parties acting on behalf of employers. This is intended to facilitate improved communication between employers/contracted third parties and employees and enable employees to make better informed decisions about work-related financial matters. The exemptions build on the relationship of trust between employers and staff, which means that there is less need for the full safeguards of the FSMA financial promotions regime to apply. However the new exemptions are subject to certain conditions where appropriate.

- **Consolidation**

7.3 At present there are no plans to consolidate amendments to the 2005 Order.

## **8. Consultation outcome**

8.1 The March 2006 consultation document, “Extending employers’ freedoms: A consultation on facilitating financial promotions in the workplace” invited views on:

- extending the existing exemption for the promotion by employers of staff pensions to cover promotions by third party pensions administrators, because the administration of a number of company pension schemes is outsourced;
- extending the employers’ exemption to cover the promotion of work-related insurance products;
- whether the existing exemptions relating to share saver scheme and share incentive plans needed amending.

8.2 There were 24 responses to the consultation. The majority of respondents supported the first two proposals and agreed no changes were needed to the share saver scheme and share incentive plan exemptions. A summary of the responses is available at:

[http://www.hm-treasury.gov.uk/media/9/E/consult\\_facilitating\\_promotions090908.pdf](http://www.hm-treasury.gov.uk/media/9/E/consult_facilitating_promotions090908.pdf) and the Treasury’s conclusions were set out in the September 2008 publication “Second consultation on FSMA 2000 (Financial Promotion) (Amendment) Order 2008” which is also available on the Treasury’s website: [http://www.hm-treasury.gov.uk/d/consult\\_financial\\_promotion.pdf](http://www.hm-treasury.gov.uk/d/consult_financial_promotion.pdf).

8.3 The September 2008 consultation document invited views on three additional matters raised by respondents to the 2006 consultation:

- in relation to the safeguards proposed in connection with the exemption for the promotion of employee pensions, it should not matter whether it is the employer or the third party administrator who notifies the employee of the amount of the employer's contribution;
- the financial promotion restriction should not apply to communications made by employers or third party administrators in relation to staff mortgages;
- the financial promotion exemption should be extended to cover communications made by third party administrators in relation to work-related insurance products.

8.4 There were three responses to this further consultation. There were no objections to the proposals, and certain comments have been taken on board:

- the definition of “work-related insurance” has been clarified;
- the definition of “staff mortgages” has been clarified and covers mortgages provided by the employer or an undertaking in the same group as the employer;
- the requirement that an employer does not receive any financial benefit from the mortgage has been removed in relation to mortgages provided by the employer itself.

We have also made certain minor drafting changes.

## **9. Guidance**

9.1 No guidance is being issued specifically in relation to this instrument, but the FSA will be updating its existing guidance on financial promotions.

## **10. Impact**

10.1 These changes are deregulatory and do not generate new or additional regulatory costs for business, charities or voluntary bodies, because their purpose is to clarify and simplify the boundary of financial services regulation, thereby reducing uncertainties and reducing the perceived need for certain financial promotions to be approved or issued by persons authorised by the FSA. If the new exemptions are used by employers or contracted third parties there may be resource implications in terms of the staff time and resources taken to provide employees with information about company pension schemes, work-related insurance products and staff mortgages. Employees may also have to devote time to considering the additional information they receive.

10.2 The impact on the public sector is the same as for the business, charity and voluntary sectors.

10.3 An Impact Assessment is attached to this memorandum.

## **11. Regulating small business**

The legislation applies to small businesses and is deregulatory in effect. Small businesses were included in the consultation on this legislation.

Firms are not obliged to make use of the exemptions set out in the Order. However, clarifying the boundary of regulation and reducing uncertainties in this way may benefit smaller firms relatively more, as they are less likely to have compliance specialists.

## **12. Monitoring & review**

12.1 The 2005 Order is subject to a process of continuous review by the Treasury.

## **13. Contact**

John Sparrow (Tel: 020-7270-5312) or email: [john.sparrow@hmtreasury.x.gsi.gov.uk](mailto:john.sparrow@hmtreasury.x.gsi.gov.uk) can answer any queries regarding the instrument.

## Summary: Intervention & Options

Department /Agency: HM TREASURY	Title: Impact Assessment of Proposals for Facilitating Financial Promotions in the Workplace	
Stage: Final	Version: 1	Date: 22 March 2010
Related Publications:		

Available to view or download at:

[http://www.hm-treasury.gov.uk/consultations\\_and\\_legislation/consult\\_li](http://www.hm-treasury.gov.uk/consultations_and_legislation/consult_li)

Contact for enquiries: John Sparrow

Telephone: 0207 270 5312

What is the problem under consideration? Why is government intervention necessary?

Obtaining approval from an FSA-authorized person for a financial promotion can be expensive, however unauthorised persons making unapproved financial promotions risk civil or criminal sanctions.

Confusion about what constitutes a financial promotion has resulted in employers/contracted third parties being cautious about making communications about financial products such as work related insurance. Government intervention is necessary to clarify the situation facilitating improved communication with employees on these matters.

What are the policy objectives and the intended effects?

Objectives: To facilitate improved communication between employers/contracted third parties and employees about group personal pension schemes or a stakeholder pension schemes, work related insurance and staff mortgages.

Benefits: Employees should be able to make better informed decisions about their pensions etc. Employers and pensions administrators should benefit from greater clarity on what communications constitute a financial promotion

What policy options have been considered? Please justify any preferred option.

1. Not to legislate in which case employees would remain in a weaker position to make optimal decisions about their pensions, mortgage and insurance cover.

2. Non-legislative options: FSA guidance can help interpret the boundary of financial services regulation but it cannot mitigate the effects of legislation which specifies the boundary of regulation in a confusing or uncertain way.

3. Legislation - the preferred option - would clarify what constitutes a financial promotion, encouraging employers/contracted third parties to increase awareness & information access for employees.


When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The 2005 Order is subject to a process of continuous review by the Treasury.

**Ministerial Sign-off** For SELECT STAGE Impact Assessments:

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible Minister:



Date: 22.3.10

## Summary: Analysis & Evidence

Policy Option:	Description:
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<b>COSTS</b>	<b>ANNUAL COSTS</b>	Description and scale of <b>key monetised costs</b> by 'main affected groups' These changes are deregulatory and do not generate new or additional regulatory costs, because their purpose is to clarify and simplify the boundary of financial services regulation, thereby reducing the perceived need for certain financial promotions to be approved or issued by an authorised person.
	One-off (Transition)      Yrs	
	£ De-minimis	
	Average Annual Cost (excluding one-off)	
	£ De-minimis	
<b>Total Cost (PV)</b>		<b>£ De-minimis</b>
Other <b>key non-monetised costs</b> by 'main affected groups'		

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>	Description and scale of <b>key monetised benefits</b> by 'main affected groups' Much of this benefit is unquantifiable and relates to increased awareness and information access. Employees should be able to make better informed decisions about their pensions etc. Employers and pensions administrators should benefit from greater clarity on what what communications constitute a financial promotion.
	One-off      Yrs	
	£ De-minimis	
	Average Annual Benefit (excluding one-off)	
	£ De-minimis	
<b>Total Benefit (PV)</b>		<b>£ De-minimis</b>
Other <b>key non-monetised benefits</b> by 'main affected groups'		

Key Assumptions/Sensitivities/Risks
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Price Base Year	Time Period Years	<b>Net Benefit Range (NPV)</b> <b>£ De-minimis</b>	<b>NET BENEFIT (NPV Best estimate)</b> <b>£ De-minimis</b>
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	Enactment of FPO
Which organisation(s) will enforce the policy?	FSA
What is the total annual cost of enforcement for these organisations?	£ De-minimis
Does enforcement comply with Hampton principles?	Yes
Will implementation go beyond minimum EU requirements?	No
What is the value of the proposed offsetting measure per year?	£ None
What is the value of changes in greenhouse gas emissions?	£ None
Will the proposal have a significant impact on competition?	No
Annual cost (£-£) per organisation (excluding one-off)	Micro      Small      Medium      Large
Are any of these organisations exempt?	No      No      N/A      N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)
Increase of    £	Decrease of    £	<b>Net Impact</b> £ De-minimis

Key:      Annual costs and benefits: Constant Prices      (Net) Present Value

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

## BACKGROUND

1. The Financial Services and Markets Act 2000 (FSMA) contains a prohibition on all persons, in the course of business, communicating an invitation or inducement to engage in investment activity unless they are authorised, or the content of the communication is approved by an authorised person, or they are exempt by way of an order made by the Treasury.
2. Obtaining approval from an FSA-authorized person for a financial promotion can be expensive, however unauthorised persons making unapproved financial promotions risk civil or criminal sanctions. Confusion about what constitutes a financial promotion has resulted in many employers taking a cautious approach towards making communications about financial products such as work related insurance which might appear to be financial promotions.

## CONSULTATION

3. The February 2004 consultation document 'Financial Services and Markets Act: Two Year Review: Changes to Secondary Legislation' invited views on the desirability of providing employers with an exemption from the financial promotion regime in respect of communications made by them to their employees about group personal pension schemes and stakeholder pension schemes. A number of respondents to this consultation who approved these proposals suggested that they should be extended to work-related insurance products. One respondent subsequently proposed that they should also apply to pensions administrators.
4. The March 2006 Consultation covered the following two proposals:
  - to provide a new exemption in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 for communications made to employees about company pension schemes by the employer's pensions administrators; and
  - to provide a new exemption in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 for communications made by employers to employees about work-related insurance products.
5. A summary of responses is available on the Treasury website. Respondents to the 2006 consultation suggested the following additional changes.
  - The financial promotion restriction should not apply to communications made by employers or third party administrators in relation to staff mortgages;
  - For employee pensions it does not matter whether the employer or the third party administrator notifies the employee of the amount of the employer's contribution;
  - The exemption should be extended to exempt communications made by third party administrators in relation to work-related insurance products.
5. Respondents to the 2008 consultation supported these changes.

## OPTIONS

### *Not to legislate*

6. In which case the current uncertainties would remain as they are, and employees would remain in a weaker position to make optimal decisions about their pensions, work-related insurance cover and staff mortgages.

### *Non-legislative options*

7. Although FSA guidance can help interpret the boundary of financial services regulation it cannot define the law. Guidance cannot mitigate the effects of legislation which specifies the boundary of regulation in a confusing or uncertain way.

### *Legislation*

8. The preferred option is to extend the existing financial promotion exemption to cover:
  - the promotion of staff pensions by third party pensions administrators
  - communications made by employers and third party administrators in relation to work-related insurance products
  - communications made by employers or third party administrators in relation to staff mortgages;
9. Pensions: existing legislation exempts communications about staff pensions by employers. Many companies outsource the administration of their pension schemes and are likely to turn to staff from the outsourced company to provide information about the pension. It is anomalous for the financial promotion regime to require regulation of communications where the pension is outsourced, so the legislation would extend the existing exemption to cover such communications.
10. Work related insurance products: the objective of the changes is to facilitate improved communication between employers and employees about the types and levels of work-related insurance.
11. Staff mortgages: staff mortgages tend to be offered at favourable rates and form a valuable part of an employer's benefits package. The legislation would provide that the financial promotion restriction should not apply to communications made by employers or third party administrators in relation to these products. It would be anomalous for the financial promotion regime to require regulation such of communications if communications relating to work-related pension or insurance products are to be exempt.
12. These changes can be made by extending the exemption from the financial promotion restriction provided by Article 72 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005. This exemption currently allows employers to make real time and non-real time promotions to their employees in relation to group personal pensions schemes and stakeholder pension schemes, without employers needing to be authorised by the Financial Services Authority (FSA) and without these promotions needing to be approved or issued by an FSA-authorized person.
13. These changes are deregulatory and do not generate new or additional regulatory costs, because their purpose is to clarify and simplify the boundary of financial services regulation, thereby reducing uncertainties and reducing the perceived need for certain financial promotions to be approved or issued by persons authorised by the FSA.
14. If the new exemptions are used by employers and by their pensions administrators there may be resource implications in terms of the staff time and resources taken to provide employees with information about company pension schemes, work-related insurance products and staff mortgages. Employees may also have to devote time to considering the additional information they receive.

15. It is difficult to quantify these costs upfront, however, as they would depend upon the extent to which the new exemptions are used. These costs would not be imposed as they would arise from employers and pensions administrators making use of new regulatory freedoms, and they are only likely to do so when the benefits of doing so outweighs the costs.

#### *Benefits*

16. Employees should receive more information about company pension schemes, work-related insurance cover and staff mortgages which should enable them to make better informed decisions about how much to invest in their pensions, what types and levels of work-related cover they should benefit from and take out.
17. Employers and pensions administrators should benefit from being able to provide information to their employees without needing to take legal advice on whether particular communications constitute financial promotions, and without needing to secure the approval from FSA-authorized persons for communications which are considered to be financial promotions, or seeking FSA-authorized persons to issue these promotions on their behalves.

#### **IMPACT ON SMALL FIRMS**

18. These changes apply to all employers and to all (unauthorized) pensions administrators. Clarifying the boundary of regulation and reducing uncertainties in this way may benefit smaller firms relatively more, as they are less likely to have compliance specialists.

#### **COMPETITION ASSESSMENT**

19. No impact is foreseen on the position of individual firms, in the sense that the changes apply to all those doing particular activities and are not specific to particular individual firms.
20. By placing employers who have contracted out their pensions administration to third parties in the same position as those who have not, these changes should place all employers in more of a similar position than is currently the case.
21. In practice it is expected that employers and pensions administrators will provide generic advice to employees, and will refer employees to FSA-authorized persons when they are seeking specific advice relating to individual circumstances. As such these exemptions should lead to workplace financial promotions complementing the activities of FSA-authorized advisers, rather than employers or pensions administrators somehow competing unfairly against them.

#### **RACE, DISABILITY, GENDER AND HUMAN RIGHTS**

22. This proposal will have no impact on race, disability, gender or human rights.



## Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes/No	Yes/No
Small Firms Impact Test	Yes/No	Yes/No
Legal Aid	Yes/No	Yes/No
Sustainable Development	Yes/No	Yes/No
Carbon Assessment	Yes/No	Yes/No
Other Environment	Yes/No	Yes/No
Health Impact Assessment	Yes/No	Yes/No
Race Equality	Yes/No	Yes/No
Disability Equality	Yes/No	Yes/No
Gender Equality	Yes/No	Yes/No
Human Rights	Yes/No	Yes/No
Rural Proofing	Yes/No	Yes/No

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