

EXPLANATORY MEMORANDUM TO

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (FINANCIAL PROMOTION) (AMENDMENT AND TRANSITIONAL PROVISION) ORDER 2024

2024 No. 301

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 2000 (Financial Promotion) Order 2005 (S.I. 2005/1529) (“the FPO”) provides exemptions from the restriction on communicating financial promotions. These include exemptions that enable financial promotions for unlisted companies to be made to high net worth individuals and self-certified sophisticated investors. The Government is legislating to make further amendments to these exemptions, in response to new concerns raised about the unintended impact of recent changes that were made.

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 (2000 c. 8) (“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, or (ii) the content of the communication is approved by an authorised person. The Treasury may, by Order, specify circumstances which are exempt from this restriction. These circumstances are set out in the FPO.¹

¹ The FPO revoked and replaced the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (S.I. 2001/1335)

- 6.2 The FPO provides exemptions for promotions to high net worth individuals (article 48) and self-certified sophisticated investors (article 50A), referred to in this memorandum as ‘the exemptions’. The exemptions can only be used to market investments related to unlisted companies.
- 6.3 In light of the changing context in which the exemptions operate, the Government reviewed the exemptions and brought forward an instrument to amend the exemptions, The Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (No. 2) Order 2023 (S.I. 2023/1411) (“the 2023 Order”).
- 6.4 The 2023 Order amended the high net worth individual (article 48) and self-certified sophisticated investor (article 50A) exemptions in the FPO. The 2023 Order also applied these changes in relation to the promotion of collective investment schemes, through amending the similar relevant exemptions set out in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (S.I. 2001/1060) (“the PCIS”).
- 6.5 Following significant stakeholder concern raised about the changes to the eligibility criteria for the exemptions that were made by the 2023 Order, this instrument makes further amendments to the FPO and PCIS.

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 relevant financial product or service or claims management 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. firms that are not authorised for the purposes of Part 4A of FSMA 2000) must be approved by authorised firms that have the necessary permission to approve such promotions, unless the promotion is otherwise subject to an FPO exemption.
- 7.3 The exemptions enable unauthorised persons to communicate financial promotions in certain circumstances, including to defined groups or individual investors, without requiring approval. Since financial promotions which are communicated within the scope of the exemptions do not require the approval of an authorised person, they are also not subject to the detailed FCA rules that authorised firms must otherwise comply with when communicating or approving financial promotions. The scope of the exemptions must therefore be carefully considered given these financial promotions are not subject to the safeguards of the financial promotion regime. The relevant PCIS exemptions provide exemptions for an authorised person to communicate an invitation or inducement to participate in a collective investment scheme.
- 7.4 The Government brought forward amendments to the scope of the exemptions and the relevant PCIS exemptions through the 2023 Order. However, significant concerns have since been raised by stakeholders about potential unintended impacts of the

changes to the exemptions. Specifically, the technology, angel investing, and theatre sectors have raised new concerns that the changes to the eligibility criteria for the exemptions could affect the ability of start-up businesses to obtain investment, and the ability to finance theatre productions through small-scale investors.

7.5 This instrument amends the criteria to be eligible for the exemptions, and the relevant PCIS exemptions, while retaining the updated format of the investor statements introduced in the 2023 Order. The changes made by this instrument can be summarised as:

- (a) Reducing the financial thresholds to be eligible for the high net worth individual exemption to:
 - o Income of at least £100,000 in the last financial year; or
 - o Net assets of at least £250,000 throughout the last financial year;
- (b) Amending the criteria to be eligible for the self-certified sophisticated investor exemption by:
 - o Reinstating the criterion of having made two or more investments in an unlisted company in the previous two years; and
 - o Reducing the company turnover required to satisfy the “company director” criterion to £1 million (i.e. individuals who have been directors of companies with at least £1 million turnover in the last two years will remain eligible for the self-certified sophisticated investor exemption);
- (c) Providing that investor statements that comply with the 2023 Order remain valid until and including 30 January 2025. After 30 January 2025, investor statements that comply with the 2023 Order will have no effect for any purpose.

(a) Reducing the financial thresholds to be eligible for the high net worth individual exemption

7.6 This instrument reduces the financial thresholds to be eligible for the high net worth individual exemption to at least £100,000 of income in the previous financial year (from the current threshold of at least £170,000), or to have held net assets – excluding a primary residence or pension – of at least £250,000 through the previous financial year (from the current threshold of at least £430,000). It does this through amending the investor statements that potential investors are required to complete and sign, in order to be classified as high net worth individuals.

7.7 The effect of these changes is to reinstate the financial thresholds that were in place prior to the 2023 Order coming into force.

(b) Amending the criteria to be eligible for the self-certified sophisticated investor exemption

7.8 This instrument reinstates the criteria to be eligible for the self-certified sophisticated investor exemption that were in place prior to the 2023 Order coming into force. It does this through amending the investor statements that potential investors are required to complete and sign, in order to be classified as self-certified sophisticated investors.

7.9 Those who have made two or more investments in an unlisted company in the previous two years (and state in the relevant statement how many such investments they have made in that time period), or who have been a director of a company with

an annual turnover of at least £1 million in the last two years, will once again be eligible for this exemption.

(c) Providing that investor statements that comply with the 2023 Order remain valid until and including 30 January 2025

- 7.10 This instrument provides that, where a person completes and signs an investor statement that complies with the 2023 Order, that statement has effect as an alternative to the statements included in this instrument, until and including 30 January 2025.
- 7.11 Where an individual completes and signs a statement complying with the 2023 Order, that statement will be considered valid for the purposes of qualifying for the exemptions and relevant PCIS exemptions up to and including 30 January 2025. This aims to ensure that those who have recently completed and signed statements complying with the 2023 Order do not need to complete and sign an updated investor statement until 31 January 2025 to fall within the exemptions and relevant PCIS exemptions. This reflects that where a person meets the eligibility criteria for the exemptions and relevant PCIS exemptions under the 2023 Order, they will meet the updated criteria in this instrument.
- 7.12 The final day on which statements complying with the 2023 Order will be valid, for all purposes, is 30 January 2025. From 31 January 2025, potential investors must have completed and signed the statements contained within this instrument to fall within the exemptions and relevant PCIS exemptions (regardless as to when they may have signed a 2023 Order statement).

Explanations

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

- 7.13 The high net worth individual exemption (article 48 of FPO, article 21 of PCIS) was introduced in 2001 and since the 2023 Order exempts from the financial promotion restriction communications to individuals where investors complete and sign a statement confirming that they meet the relevant criteria by having an income of £170,000 or more in the last financial year, or net assets of £430,000 or more throughout the last financial year.
- 7.14 The self-certified sophisticated investor exemption (article 50A of FPO, article 23A of PCIS) was introduced in 2005 and since the 2023 Order allows individuals to self-certify as sophisticated, by completing and signing a prescribed statement, if they meet one of the following three criteria:
- They are a member of a network or syndicate of business angels (and have been for more than six months);
 - They are working or have worked in the previous two years in a professional capacity in the private equity sector or in the provision of finance for SMEs; or
 - They are currently or have been in the previous two years a director of a company with an annual turnover of at least £1.6 million.

Why is it being changed?

- 7.15 The Government brought forward legislation to amend the exemptions and the relevant PCIS exemptions through the 2023 Order, which was the first time they had been substantively updated since 2005. Those changes aimed to address the fact that

the real value of the financial thresholds has fallen as a result of inflation, and the risk that ordinary retail investors could be captured within the scope of the exemptions and the relevant PCIS exemptions.

- 7.16 However, as explained above, the technology, angel investing, and theatre sectors have raised new and significant concerns that the changes to the eligibility criteria for the exemptions could affect the ability of start-up businesses to obtain investment, and the ability to finance theatre productions through small-scale investors. The Government is addressing these concerns through this instrument, to ensure that no unintended impacts arise.

What will it now do?

- 7.17 This instrument will reinstate the eligibility criteria for the exemptions and relevant PCIS exemptions that were in force prior to the 2023 Order, through making the changes described in 7.5.

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 No consultation was carried out in connection with this instrument.
- 10.2 The Government had consulted on the measures brought forward in the 2023 Order, and consultation respondents were mostly supportive of the proposals that the Government took forward through that Order. However, the technology, angel investing, and theatre sectors subsequently raised new concerns about the potential unintended impacts of changes to the eligibility criteria for the exemptions. The instrument addresses the concerns raised by those stakeholders.

11. Guidance

- 11.1 No guidance is to be provided by the Government in connection with this instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 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 because it reinstates pre-existing regulatory exemptions that were in force until 31 January 2024.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 The instrument will reinstate the previous, wider eligibility criteria for individuals to be classified as a high net worth individual or as a self-certified sophisticated investor.
- 13.3 Small businesses will benefit from the ability to market investments under these exemptions to a wider cohort of individuals.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that HM Treasury will keep the regulatory framework for financial promotions under review. In particular, the Government intends to carry out further work to review the scope of the exemptions.
- 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, Bim Afolami, 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 new ongoing 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 Dan Rusbridge, Deputy Director for Personal Finances and Funds, at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Bim Afolami MP, the Economic Secretary to the Treasury at HM Treasury can confirm that this Explanatory Memorandum meets the required standard.