

Chapter 8

Financial promotion and related activities

8.15 Financial promotions by members of the professions (articles 55 and 55A)

Real time financial promotions by professional firms

- 8.15.1 **G** Article 55 of the *Financial Promotion Order* contains a specific exemption for *professional firms* allowing them to make *solicited or unsolicited real time financial promotions*. This is provided the *financial promotion* is made:
- (1) by a *person* who carries on a *regulated activity* without needing *authorisation* under the *Part XX exemption*; and
 - (2) to someone who has already (that is, before the *financial promotion* is made) engaged the *person* making the *financial promotion* to provide professional services (that is services which are not *regulated activities* and whose provision is supervised and regulated by a *Designated Professional Body*).
- 8.15.2 **G** The article 55 exemption also requires that:
- (1) the *financial promotion* relates to an activity to which the *Part XX exemption* applies or which would be a *regulated activity* but for the exclusion in article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) which concerns activities which are a necessary part of professional services; and
 - (2) the activity to which the *financial promotion* relates would be undertaken for the purposes of, and be incidental to, the provision of professional services to or at the request of the recipient.
- 8.15.3 **G** The *FCA* considers that, to satisfy the condition in ■ PERG 8.15.2G (2) that an activity be incidental to the provision of professional services, *regulated activities* cannot be a major part of the practice of the *professional firm*. The *FCA* also considers that the following further factors are relevant.
- (1) The scale of *regulated activity* in proportion to other professional services provided.
 - (2) Whether and to what extent services that are *regulated activities* are held out as separate services.

- (3) The impression given of how the *professional firm* provides *regulated activities*, for example, through its advertising or other promotions of its services.

In the *FCA* opinion, one consequence of this is that the *professional firm* cannot provide services which are *regulated activities* if they amount to a separate business to the provision of professional services. This does not, however, preclude the *professional firm* operating its professional business in a way which involves separate teams or departments one of which handles the *regulated activities*.

- 8.15.4** G One of the effects of the requirements in ■ PERG 8.15.2 G concerns *financial promotions* which relate to an activity which is not a *regulated activity* as the result of an exclusion in the *Regulated Activities Order*. In this case, a *professional firm* using the *Part XX exemption* cannot make a *real time financial promotion* relying on article 55 of the *Financial Promotion Order* unless the exclusion is provided by article 67 of the *Regulated Activities Order*. Neither can a *professional firm* rely on article 55 to make *real time financial promotions*, in connection with the provision of professional services to an existing client, if the *financial promotions* are made to a third party. Third parties may be prospective counterparties, rather than a client. In such circumstances, another exemption would need to be available.

Non-real time financial promotions by professional firms.....

- 8.15.5** G Article 55A of the *Financial Promotion Order* exempts *non-real time financial promotions* where the *financial promotion*:
- (1) is made by a *person* who carries on a *regulated activity* without needing *authorisation* under the *Part XX exemption* (referred to in ■ PERG 8.15.6 G and ■ PERG 8.15.7 G as 'Part XX activities'); and
 - (2) contains a specified statement and is limited in its content to the matters referred to in ■ PERG 8.15.6 G.

- 8.15.6** G A *financial promotion* made under article 55A must contain a statement in the following terms: "The [firm/company] is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment and consumer credit-related and claims-management related services to clients because we are members of [relevant designated professional body]. We can provide these investment and consumer credit-related and claims-management related services if they are an incidental part of the professional services we have been engaged to provide". The *financial promotion* may also set out the *Part XX activities* which the *person* is able to offer to his clients, provided it is clear that these are the incidental services to which the statement relates. The exemption also provides that a defect in the wording of the statement does not affect its validity. This is provided that the defect does not alter the meaning of the communication.

- 8.15.7** G The article 55A exemption should enable *professional firms* to issue brochures, websites and other *non-real time financial promotions* without any need for *approval* by an *authorised person*. This is provided the *financial promotion* does not also contain an invitation or inducement relating to

regulated activities other than those covered by the *Part XX exemption*. In this respect, it should be noted that, unlike article 55, the article 55A exemption does not extend to activities which are excluded under article 67 of the *Regulated Activities Order*. The *FCA* takes the following views in relation to article 55A.

- (1) It is not necessary for the details of the *Part XX* activities to be set out in one place or adjacent to the statement. A brochure or website, for example, may contain details of *Part XX* activities in various places so long as it is made clear that they will be incidental investment activities as referred to in the statement. So, this only needs to be set out once in the brochure or website.
- (2) The inclusion of contact details would be regarded as part of the description of *Part XX* activities.
- (3) A *financial promotion* made under article 55A may be likely, on occasion, to result in the carrying on by the *professional firm* of activities which are excluded under the *Regulated Activities Order*. However, this does not mean that the *financial promotion* will fail to satisfy the terms of article 55A. There will be occasions where a *professional firm* will have to offer to provide services which may or may not involve *Part XX* activities or excluded activities. In the area of corporate finance, for example, a *professional firm* may offer its services in relation to the sale of an incorporated business or a substantial shareholding in such a business. It will not be clear whether the *professional firm's* services will be *Part XX* activities or excluded activities until the details of a proposed deal are known. Similarly, a *professional firm* may offer services which in some instances, will fall under the 'necessary' exclusion in article 67 of the *Regulated Activities Order* but, in others, will be *Part XX* activities. In practice, it will often be impossible for a *professional firm* to distinguish between *Part XX* activities and excluded activities at the preliminary stage of a brochure or website offering its services. In the *FCA's* view, the article 55A exemption will apply provided the only *regulated activities* held out in the brochure, website or other *non-real time financial promotion* are *Part XX* activities. It will, of course, be possible for a *professional firm* to make an offer involving excluded activities to a *person* who responds to a *financial promotion* issued under article 55A. But this is provided another exemption (such as the one-off *financial promotion* exemption (see ■ PERG 8.14.3 G)) is available in respect of any subsequent *financial promotions*.