

Chapter 8

Financial promotion and related activities

8.2 Introduction

- 8.2.1** G (1) The effect of section 21 of the *Act* (Restrictions on financial promotion) is that in the course of business, an *unauthorised person* must not *communicate* an invitation or inducement to *engage in investment activity* or to *engage in claims management activity* unless either the content of the communication is *approved* for the purposes of section 21 by an *authorised person* or it is exempt.
- (2) By virtue of section 21(2A) of the *Act* an *authorised person* is unable to *approve* the content of a communication for the purposes of section 21 of the *Act* unless:
- (a) the *firm* is a *permitted approver* in relation to the *financial promotion*; or
- (b) an *approver permission exemption* applies.
- (3) References in this chapter to *financial promotions* being *approved* by an *authorised person* should be read as referring to *approval* by an *authorised person* who is either a *permitted approver* in relation to that *financial promotion* or where the *approval* falls within the scope of an *approver permission exemption*.
- (4) Under section 25 of the *Act* (Contravention of section 21), a *person* commits a criminal offence if they carry on activities in breach of the restriction in section 21 of the *Act*. A *person* who commits this criminal offence is subject to a maximum of two years imprisonment and an unlimited fine. However, it is a defence for a *person* to show that they took all reasonable precautions and used all due diligence to avoid committing the offence.
- 8.2.2** G Another consequence of a breach of section 21 of the *Act* is that certain agreements could be unenforceable (see section 30 of the *Act* (Enforceability of agreements resulting from unlawful communications)). This applies to agreements entered into by a *person* as a customer as a consequence of a communication made in breach of section 21.
- 8.2.3** G An *authorised person* will not breach section 21 when *communicating* a *financial promotion*. Nevertheless, this *guidance* may be relevant where an *authorised person* needs to know whether the *financial promotion rules* apply to a particular communication.
- 8.2.4** G A *person* who is concerned to know whether his communications will require *approval* or, if he is an *authorised person*, whether the appropriate *financial*

promotion rules will apply to his communications will need to consider the following:

- (1) am I making a communication or causing a communication to be made? (see ■ PERG 8.6);
- (2) if so, is it an invitation or inducement? (see ■ PERG 8.4);
- (3) if so, does the invitation or inducement relate to a *controlled investment*? (see ■ PERG 8.7);
- (4) if so, is the invitation or inducement to *engage in investment activity*? (see ■ PERG 8.7);
- (4A) alternatively, is the invitation or inducement to *engage in claims management activity*? (see ■ PERG 8.7A);
- (5) if so, is it made in the course of business? (see ■ PERG 8.5);
- (6) if so, and the *financial promotion* originates outside the *United Kingdom*, is it capable of having an effect in the *United Kingdom*? (see ■ PERG 8.8);
- (7) if so, or if the answer to (5) is yes and the *financial promotion* was made in the *United Kingdom*, is the promotion exempt? (see ■ PERG 8.12 to ■ PERG 8.15 and ■ PERG 8.21);
- (8) if not, am I an *authorised person*?

8.2.5

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- (1) If the answer to ■ PERG 8.2.4G (8) is yes, then the appropriate *financial promotion rules* will potentially apply (subject to the relevant application provisions).
- (2) If the answer to ■ PERG 8.2.4G(8) is no, then the promotion must be *approved* by an *authorised person* if it is a *non-real time financial promotion*. *Authorised persons* are not allowed to *approve*:
 - (a) *financial promotions* other than within the scope of:
 - (i) *approver permission* given by the *FCA* under section 55NA of the *Act*; or
 - (ii) an *approver permission exemption* (see ■ PERG 8.9.1AG);
 - (b) *real time financial promotions* (see ■ COBS 4.10.4R).
- (3) ■ PERG 8.36.1G contains a flowchart explaining these steps.

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8.2.7

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The restriction in section 21 applies to all forms of communication such as advertising, broadcasts, websites, e-mails and all other forms of written or oral communication whether sent to one *person* or many. However, the restrictions only apply to a communication made in the course of business and not, for example, to personal communications between individuals.

8.2.8 **G** There are extensive exemptions in the *Financial Promotion Order*. This is explained in greater detail in ■ PERG 8.11 to ■ PERG 8.15 and ■ PERG 8.21.

8.2.9 **G** Because of the *United Kingdom's* exit from the *EU*, the Treasury amended the *Financial Promotion Order*. This included the amendment or removal of certain exemptions in the *Financial Promotion Order* that had previously been in place to take account of the *United Kingdom's* membership of the *EU*. Where those amendments are relevant to the *guidance* in this Chapter the *FCA* has amended the *guidance* accordingly. The Treasury also made transitional provision so that nothing in those amendments to the *Financial Promotion Order* will cause a *communication* to breach the restriction in section 21, if the *communication* is required under a contract entered into before *IP completion day*, and it would not have constituted a breach if it had been made before *IP completion day*.

[**Note:** see Part 4 of the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632)]