

## Chapter 8

# Financial promotion and related activities

## 8.21 Company statements, announcements and briefings

- 8.21.1** **G** There is a general concern that the practice of *companies* issuing statements and giving briefings may involve a *financial promotion*. These arise sometimes as a result of requirements imposed by a listing authority or an exchange or market, **■ PERG 8.4.14 G** offers *guidance* on when such statements or briefings may amount to or involve an inducement to *engage in investment activity*. It indicates that whilst statements of fact alone will not be inducements, there may be circumstances where there is a promotional element which may amount to an inducement (typically to buy the *company's shares*). In the *FCA's* experience, it is rare for *company* statements or briefings to involve an invitation.
- 8.21.2** **G** It is common practice for *listed companies* to brief analysts, usually at the time of the *company's* preliminary, interim and, if applicable, quarterly results and after the information has been issued to the market as a whole. Briefings may be made personally to a small or large number of analysts in a meeting or through a conference call. It is increasingly becoming the practice for *listed companies* to make their briefings available live to journalists and the general public on the basis that they may listen to or view, but not take part in, the briefing and any question and answer session. This is usually done through a conference call or a live broadcast (usually termed a webcast) through the *company's* website or the website of a specialist provider. Where such briefings include a *financial promotion* they must be *approved* by an *authorised person* (if they are *non-real time financial promotions*) or exempt.
- 8.21.3** **G** **■ PERG 8.21.4 G** to **■ PERG 8.21.21 G** set out the *FCA's* views on the potential relevance of certain exemptions to *company* statements and briefings. The exemptions are referred to in the same order as the *Financial Promotion Order*. In the *FCA's* view, these exemptions (whether alone or, where applicable, in combination) should enable most statements and briefings which involve *financial promotions* to be made by the *company* concerned without the need for *approval*. In particular, the *FCA* considers that article 69 (see **■ PERG 8.21.17 G**) should ensure that *financial promotions* made during the course of analyst briefings by *listed* and *AIM companies* are exempt and do not require *approval*. Some but not all of these exemptions apply equally to *financial promotions* which are *communicated* by a third party (for instance, a public relations adviser) on behalf of its corporate client. Those exemptions which are not available to a third party in such circumstances are those contained in article 20A (see **■ PERG 8.21.6 G**), 59 (see **■ PERG 8.21.11 G**), and 69 (see **■ PERG 8.21.17 G**).

**Article 17: Generic promotions**

8.21.4 **G** Any statement or briefing which did not identify the *company* as an *issuer* of *securities* (for example, by referring to its *securities*) and which does not identify any other particular *investment* or provider of *investments* or *investment services* will be exempt as a generic promotion (see ■ PERG 8.12.14 G). In practice, it will be unlikely that such a statement or briefing would involve a *financial promotion* but the article 17 exemption may be useful where any doubt arises.

**Article 19: Investment professionals**

8.21.5 **G** Where statements or briefings are only available to analysts who are, or who work for, *authorised persons* (including *overseas persons* who would need to be *authorised* if they were conducting their business in the *United Kingdom*), article 19 will exempt any *financial promotion* that may be made (see ■ PERG 8.12.21 G). Furthermore, where a *financial promotion* is made in the course of an interactive dialogue with an analyst and is addressed to him, the *financial promotion* will be regarded as having been made to that analyst irrespective of who else may hear or view it (article 6(b) of the *Financial Promotion Order* (see ■ PERG 8.6.9 G). For example, where a representative of the *company* is responding to a particular question article 19 would then apply. This is not to say that every time a *company* representative answers a question his response, if it involves a *financial promotion*, will be addressed to the questioner for the purpose of article 6(b). This will depend upon the particular circumstances.

**Article 20A: Promotion broadcast by company director etc**

8.21.6 **G** ■ PERG 8.12.32 G contains detailed *guidance* on the exemption in article 20A. The exemption is capable of applying to *financial promotions* in a *company* statement or briefing where they are *communicated* through a webcast if the website is a regularly updated news or information service. For this to be the case, the website must be a service provided to *persons* who use it (so it must not, for example, simply be an advertising vehicle) and that service must be one of providing news or information which will be updated regularly. This is capable of applying to some corporate websites. For example, the website of a *company* may amount to a service of information about the *company's* activities, services and products which is regularly updated and the webcast may be seen as part of that service. Not all corporate websites will qualify, however, and each website must be considered on its merits. *Company* representatives seeking to use this exemption will need to bear in mind any restrictions on the making available of certain information to which they may be subject (for example, under *listing rules*).

**Article 28 and 28A: One off promotions**

8.21.7 **G** Article 28 applies to one-off *non-real time* and *solicited real time financial promotions*. Article 28A applies to one-off *unsolicited real time financial promotions*. It is possible that articles 28 or 28A could apply to *financial promotions* in *company* statements or briefings if they were to be made other than to an analyst or journalist. In this respect, the comments made in ■ PERG 8.14.3 G about one-off *financial promotions* are relevant.

**Article 43: Members and creditors of certain bodies corporate**

8.21.8 **G** Article 43 applies to *non-real time* and *solicited real time financial promotions* made by, or on behalf of, a *company* ('C') to *persons* who, in broad terms, are:

- (1) members or creditors of C or a *group* member of C ('G');
- (2) entitled to a relevant investment issued by C or G;
- (3) entitled to become a member of C or G;
- (4) entitled to have transferred to them title to a relevant investment issued by C or G.

The *financial promotion* must relate only to relevant investments issued or to be issued by C or G or, in certain circumstances, another *person* (see ■ PERG 8.21.9G (2)). C and G must not be *open-ended investment companies*.

8.21.9 **G** A 'relevant investment' in article 43 means:

- (1) *shares* or *debentures* or *alternative debentures*; and
- (2) *warrants* and *certificates representing certain securities* relating to (1) and issued by G or a *person* acting on behalf of or under arrangements made with C.

Article 43 allows a *company* to *communicate* a *financial promotion* to its shareholders about rights issues or a cash offer by a third party for their *shares*. It also allows a *company* to *communicate* with its creditors about restructuring debt obligations.

**Article 47: Persons in the business of disseminating information**

8.21.10 **G** Article 47 will exempt *financial promotions* in *company* statements or briefings where they are made to members of the press and may be combined with article 19 (Investment professionals). This means that *companies* will only need to look for other exemptions where the recipients of their *financial promotions* are *persons* other than analysts or journalists or both.

**Article 59: Annual accounts and directors' report**

8.21.11 **G** Article 59 is capable of applying to *financial promotions* in *company* statements and briefings where they are accompanied by:

- (1) the whole or any part of the annual accounts of the *company* (provided it is not an *open-ended investment company*); or
- (2) any report prepared and approved by the directors of such a *company* under sections 414A and 414D of the Companies Act 2006 (strategic reports) or sections 415 and 419 of that Act (directors' reports).

In this respect, the *FCA* considers that the annual accounts (or part of them) or directors' report accompanies a *financial promotion* where it is made available to the recipients of the *financial promotion* at the same time. The *financial promotion* should refer to the accompanying material. For example, the accounts or report may be available on a *company's* website and referred to in a *financial promotion* on that website. Or they may be contained in or enclosed with a written communication (including an e-mail) or handed over during a meeting or discussion.

**8.21.12** G Article 59 imposes certain conditions.

- (1) The *financial promotion* must be an inducement and not be an invitation or amount to advice to acquire or dispose of an *investment*.
- (2) The inducement must not relate to any *investment* other than *shares* or *debentures* or *alternative debentures* issued, or to be issued, by the *company* making the *financial promotion* (or a member of its *group*) or *warrants* relating to or certificates representing such *shares* or *debentures* or *alternative debentures*.
- (3) If the *financial promotion* contains any reference to past prices of or yields on the *company's securities* as referred to in (2), it must be accompanied by a statement that past performance cannot be relied on as guide to future performance.

**Article 67: Promotions required or permitted by market rules**

**8.21.13** G Article 67 exempts any *financial promotion* other than an *unsolicited real time financial promotion* which relates to *shares*, *debentures*, *alternative debentures*, *government and public securities*, *warrants* or *certificates representing certain securities* which are permitted to be traded or dealt in on a relevant market. A relevant market for the purposes of article 67 is one which meets the criteria in Part I of, or is specified in or established under the rules of an exchange specified in Part III of schedule 3 to the *Financial Promotion Order*. This includes *recognised investment exchanges* and various overseas markets. The *financial promotion* must, however, be required or permitted to be *communicated* by the rules of the market or by a body which either regulates the market or regulates offers or issues of *investments* to be traded on the market.

**8.21.14** G The reference to *financial promotions* which are permitted to be *communicated* relates, in the *FCA's* opinion, to something which is expressly permitted rather than simply not expressly prohibited. Article 67 itself does not specify any particular medium for *communicating* required or permitted material. So, it will be enough for the *financial promotion* to be part of a document which is itself required or permitted to be *communicated* (such as reports or financial statements). Market rules or usual market practice may require the *financial promotion* to be *communicated* in a particular form or by a particular medium. However, the exemption will still apply if the *financial promotion* is *communicated* in a different form or by a different medium provided that its substance is unchanged. But article 67 will not apply to a *financial promotion* simply because it is included in another document which is required or permitted where the *financial promotion* amounts to additional information to that which is required or permitted. Neither does article 67 specify what form permission can take. In the *FCA's*

view, however, permission would need to be given either in rules or guidance applicable to the market in question.

**8.21.15** G Article 67 refers to an *investment* which is permitted to be traded or dealt in on a relevant market. In the *FCA's* opinion, this includes a situation where a class of *securities* is traded on a relevant market but the *financial promotion* relates to new *securities* of that class which have not yet themselves been issued or started trading. Where *securities* of that class have not yet been admitted to trading on a relevant market, article 68 may apply – see ■ PERG 8.21.16 G.

**Article 68: Promotions in connection with admission to certain EEA markets**

**8.21.16** G Article 68 applies where the *financial promotion* relates to *securities* which have not yet been admitted to trading but for which application has been or is to be made. It exempts a *non-real time* or a *solicited real-time financial promotion* which a relevant *EEA* market requires to be *communicated* before admission to trading can be granted. A relevant *EEA* market for this purpose is a market with its head office in an *EEA State* and which meets the conditions in Part I of Schedule 3 to the *Financial Promotion Order*. Article 68 also requires that the *financial promotion* be one:

- (1) which, if it were included in a prospectus issued in line with prospectus rules made under Part VI of the *Act*, would be required to be *communicated* by those rules; and
- (2) which is not accompanied by any information other than that information which is required or permitted to be published by the rules of the relevant *EEA* market.

**Article 69: Promotion of securities already admitted in certain markets**

**8.21.17** G Article 69 is somewhat similar to article 59 in the conditions it imposes (see ■ PERG 8.21.12 G). There are two main differences between article 69 and article 59.

- (1) Article 69 does not apply to *unsolicited real time financial promotions*.
- (2) The requirement in article 59 that the *financial promotion* be accompanied by accounts or a report is replaced in article 69. It is replaced by a requirement that *shares* or *debentures* or *alternative debentures* of the *company* or another *body corporate* in its *group* (or *warrants* relating to or certificates representing such *investments*) are permitted to be traded on a relevant market (relevant market having the same meaning as in article 67 - see ■ PERG 8.21.13 G).

**8.21.18** G [deleted]

**8.21.19** G In the *FCA's* opinion, companies whose *securities* are permitted to be traded or dealt in on a relevant market should be able to make good use of the article 69 exemption. But such companies will need to ensure that they meet

the specific requirements in article 69(3). In very general terms, a *financial promotion* will comply with these requirements if:

- (1) the only reason it is a *financial promotion* is that it contains or is accompanied by an inducement about certain *investments* issued, or to be issued, by the *company* or a *group* member; and
- (2) should it contain any reference to past prices of or yields on the *company's investments*, it is accompanied by a statement that past performance cannot be relied on as a guide to future performance.

**Article 70: Promotions included in listing particulars, etc**

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Article 70 applies to a *non-real time financial promotion* included in:

- (1) *listing particulars*; or
- (2) *supplementary listing particulars*; or
- (3) a prospectus or supplementary prospectus approved in line with *Prospectus Rules* – including part of such a prospectus or supplementary prospectus; or
- (4) any other document required or permitted to be published by *listing rules* or *Prospectus Rules*.

Article 70 also applies to a *non-real time financial promotion* comprising the final terms of an offer or the final offer price or amount of *securities* which will be offered to the public and that complies with articles 8(1), 8(4), 8(5), 8(10), 17 and 21(2) of the *Prospectus Regulation*.

**General issues**

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A requirement common to the exemptions in articles 59, 67 and 69 is that the *financial promotions* must not relate to *investments* other than those issued, or to be issued, by the *company* or a member of its *group*. The *FCA* is aware that there is concern about comments made in *company statements* or briefings. This is that they may be held to be inducements to acquire or dispose of, or exercise rights conferred by, an *investment* issued by a third party. For example, traded options on or certificates representing the *company's shares*. ■ PERG 8.4 sets out the *FCA's* general views on when a communication is an inducement. It appears to the *FCA* that, for a *company* statement or briefing to involve an inducement to *persons* to, for example, exercise rights under a traded option written on or acquire certificates representing the *securities*, it must seek to persuade or induce *persons* specifically to do that. The mere fact that a *person* reading, hearing or viewing a *company* statement or briefing containing an inducement to acquire the *company's securities* may be influenced to exercise traded options which he holds is not enough to make it an inducement to exercise those rights.