

Chapter 8

Financial promotion and related activities

8.5 In the course of business

- 8.5.1** **G** Under section 21(4) of the *Act*, the Treasury has the power to specify circumstances in which a *person* is viewed as 'acting in the course of business' or 'not acting in the course of business'. The power under section 21(4) relates only to *financial promotions* and is distinct from the power in section 419 which relates to *regulated activities*. To date, the Treasury has not used the power in section 21(4). As a result, the phrase has its ordinary or natural meaning.
- 8.5.2** **G** The *FCA* considers that 'in the course of business' requires a commercial interest on the part of the communicator. This does not necessarily have to be a direct interest. And the communicator does not need to be carrying on *regulated activities* (the test in section 19 of the *Act*) as or as part of his business. Neither does the communication need to be made in the course of carrying on activities as a business in their own right (the test in article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001) (SI 2001/1177). For example, if a holding company proposes to sell one of its subsidiaries, that sale will be 'in the course of business' irrespective of the fact that the company may well not be in the business of selling subsidiaries.
- 8.5.3** **G** The position is slightly more blurred with individuals. The 'in the course of business' test is intended to exclude genuine non-business communications. Examples of these would be friends talking in a pub, letters between family members or e-mails sent by individuals using an Internet chat-room or bulletin board for personal reasons. An issue arises where capital is raised for small private *companies*. Where such a *company* is already in operation, it will be acting 'in the course of business' when seeking to generate additional share or loan capital. At the pre-formation stage, however, it will often be the case that individuals who are proposing to run the *company* will approach a small number of friends, relatives and acquaintances to see if they are willing to provide start-up capital. In the *FCA's* view, such individuals will not be acting 'in the course of business' during the pre-formation stage of a small private *company*. This is provided that they are not:
- (1) forming *companies* with such regularity that they would be regarded as carrying on the business of forming *companies*; or
 - (2) already running the business which the *company* will carry on (for example, as a partnership).
- 8.5.4** **G** There is, of course, no reason why an individual cannot act 'in the course of business'. For example, sole traders who are independent financial advisers

will give investment advice 'in the course of business' and so satisfy the test. Individuals who are merely seeking to make personal investments will not be acting 'in the course of business' by approaching a company about making an investment in its shares. However, it is possible that an individual who regularly seeks to invest in companies who are seeking to raise venture capital with a view to becoming a director and influencing their affairs may be regarded as acting in the course of business. In approaching *companies*, such a *person* should be able to make use of the exemptions for one-off *financial promotions* in articles 28 and 28A of the *Financial Promotion Order* (see ■ PERG 8.14.3 G).

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Persons who carry on a business which is not a *regulated activity* will need to be particularly careful in making communications which may amount to *financial promotions* (because they seek to persuade or incite *persons* to *engage in investment activity* (see ■ PERG 8.4)). For example, where a *company* makes *financial promotions* to its employees, they may well be made in the course of business. Examples of these include *financial promotions* concerning employee share schemes, group wide insurance arrangements and *stakeholder pension schemes*. These would need to be *approved* by an *authorised person* unless an appropriate exemption is available. ■ PERG 8.4.34 G provides further *guidance* on this.