

## Chapter 8

# Financial promotion and related activities

## 8.10 Types of financial promotion

**8.10.1** **G** Although the restriction in section 21 addresses all forms of *financial promotion*, it is necessary to distinguish between particular types of *financial promotion* as these are treated differently under the *Financial Promotion Order*. This regime recognises two types of *financial promotion*. These are *real time* and *non-real time financial promotions*. *Real time financial promotions* are then divided into *solicited* or *unsolicited real time financial promotions*.

### Real time v non-real time financial promotions

**8.10.2** **G** The terms *real time financial promotion* and *non-real time financial promotion* are defined in article 7 of the *Financial Promotion Order* (Interpretation: real time communications). Article 7(1) defines a *real time financial promotion* as a *financial promotion* made in the course of a personal visit, telephone conversation or other interactive dialogue. A *non-real time financial promotion* is one that is not a *real time financial promotion*. Article 7(5) states that *financial promotions* made by letter or e-mail or in a publication (defined in article 2 (Interpretation: general) as a newspaper, journal, magazine or other periodical publication, a website, a television or radio programme or a teletext service) are *non-real time financial promotions*. Articles 7(4) and (5) provide certain indicators that a *financial promotion* is a *non-real time financial promotion*. These are that:

- (1) the *financial promotion* is made to or directed at more than one recipient in identical terms (save for details of the recipient's identity);
- (2) the *financial promotion* is made or directed by way of a system which in the normal course is or creates a record of the *financial promotion* which is available to the recipient to refer to at a later time; and
- (3) the *financial promotion* is made by way of a system which in the normal course does not enable or require the recipient to respond to it immediately.

■ PERG 8.6.9 G explains the meaning of 'made to' and 'directed at'.

**8.10.3** **G** In the *FCA's* view, the matters identified in ■ PERG 8.10.2 G mean that:

- (1) for a communication to be real time it must be made in course of an interactive dialogue; but that
- (2) if the interactive dialogue takes place by means of the exchange of letters or e-mails or in a publication, the communication will be

deemed to be non-real time. In this case, publications include newspapers, journals, magazines or other periodical publications, websites or similar systems for the electronic display of information, television or radio programmes and teletext services.

**8.10.4** **G** The words 'personal visit, telephone conversation or other interactive dialogue' clearly imply that the first two are types of the third. In the *FCA's* view, it is difficult to envisage circumstances in which a personal visit or telephone conversation would not be interactive. The very fact of a conversation taking place would mean two or more *persons* were interacting with each other. A telephone call is not the same thing as a conversation. It may be made to, or even by, an intelligent machine which asks questions and responds to answers. That is, in the *FCA's* view, no more an interactive dialogue than a questionnaire or an electronic decision tree. The *FCA* cannot see how a scripted call can avoid being an interactive dialogue. The caller presumably has prompts as to what to say depending on the response given or question asked by the recipient of the call. However, the recipient is clearly able to and likely to interact and the degree of interaction cannot be determined in advance.

**8.10.5** **G** In the *FCA's* view, the fact that scope for interaction is essential if a *financial promotion* is to be real time leads to the following conclusions.

- (1) Most communications made in written or pictorial form will not offer scope for interaction. The most likely exception to this is where *persons* are expected to respond immediately. This situation may arise, for example, where the equivalent of a telephone conversation is conducted by e-mail. This is the basis of the exemption in article 20A(1)(b)(ii) (see ■ PERG 8.12.37 G). However, the only communications in written or pictorial form which can be real time communications are those which are not contained in a letter, e-mail or publication. This results from article 7(3) as explained in ■ PERG 8.10.2 G and ■ PERG 8.10.3G (2).
- (2) The factors in article 7(5), whilst they are helpful as indicators, do not necessarily have to be satisfied for a communication to be non-real time provided it does not represent an interactive dialogue. For example, in the *FCA's* view, a broadcast made by megaphone from a moving vehicle or temporary chalk markings on a board are non-real time communications even though there may be no lasting record.
- (3) Some oral communications will not involve an interactive dialogue. This is because:
  - (a) they are recorded or broadcast, so preventing interaction; or
  - (b) they represent a one-way flow such as a speech, address or presentation.

**8.10.6** **G** An issue arises where a *person* (P), during the course of a presentation or meeting, invites or is asked to answer questions from the audience. P's response may or may not be a real time communication. For example, the question may not be personal to the questioner and P may respond by addressing the audience in a way that precludes or does not call for any interaction. This will be a non-real time communication. On the other hand, the question may call for P to pursue a conversation with the questioner, in

which case the communication will be an interactive dialogue and a real time communication. In this case, the communication will not involve a non-real time communication made to or directed at the rest of the audience as it is addressed and made to the questioner. It may be that P, in the course of an interactive dialogue with a questioner, makes an invitation or inducement that is addressed to the audience as a whole. This will be a separate communication that will be non-real time. Any handout or slide or other visual aids used during the presentation will be non-real time communications.

**8.10.7** G In the *FCA's* view, a communication which may exist in enduring form will be a non-real time communication. Examples of this include videos, audio cassettes, bulletin boards, websites and recorded telephone messages. Messages placed on Internet chat-rooms will also be non-real time. Radio or television programmes or teletext services may contain communications that involve an interactive dialogue. For example, a communication made by the broadcaster and addressed to an interviewee studio guest, a member of the audience or a person who speaks to the broadcaster by telephone. These will always be non-real time communications. This is again the effect of article 7(3) as explained in ■ PERG 8.10.2 G and ■ PERG 8.10.3G (2). Broadcasters may be able to use the exemption for journalists in article 20 of the *Financial Promotion Order* (see ■ PERG 8.12.23 G). Interviewee studio guests, if they make *financial promotions* during a broadcast, may be able to use the exemption in article 20A of the *Financial Promotion Order* (Promotion broadcast by company director etc) (see ■ PERG 8.12.32 G).

**Solicited v unsolicited real time financial promotions**.....

**8.10.8** G Article 8(1) of the *Financial Promotion Order* (Interpretation: solicited and unsolicited real time communications) states that a *real time financial promotion* is solicited where it is made in the course of a personal visit, telephone conversation or other interactive dialogue which was initiated by or takes place in response to an express request from the recipient. An express request for these purposes may have been made before section 21 entered into force. An unsolicited *real time financial promotion* is any *real time financial promotion* which is not solicited.

**8.10.9** G Article 8(3) of the *Financial Promotion Order* clarifies that a *person* will not have expressly requested a call, visit or dialogue merely:

- (1) because he does not indicate that he does not wish to receive any or any further visits or calls or to engage in any or any further dialogue; or
- (2) because he agrees to standard terms that state that such visits, calls or dialogue will take place, unless he has signified clearly that, in addition to agreeing to the terms, he is willing for the visit, call or dialogue to take place.

**8.10.10** G Article 8(3) of the *Financial Promotion Order* also has the effect in broad terms that *financial promotions* made during a visit, call or dialogue will be solicited only if they relate to *controlled activities* or *controlled investments* or *controlled claims management activities* of the kind to which the recipient envisaged that they would relate. In determining whether this is the case,

account must be taken of all the circumstances when the call, visit or dialogue was requested or initiated. For example, a *person* may ask for a visit from a representative of an investment product company with a view to receiving advice on an appropriate pension product. In this case, the representative would be likely to be making an *unsolicited real time financial promotion* if, during conversation, he attempts to persuade or incite the recipient to make an investment which would not be for the purposes of pension provision.

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■ PERG 8.6.9 G explains that article 6 of the *Financial Promotion Order* has the broad effect that a communication is made to another *person* where it is addressed to a particular *person* or *persons*. It also states that a 'recipient' of a communication is the *person* or *persons* to whom it is made (that is to whom it is addressed). This takes on importance where certain exemptions which apply to *real time financial promotions* made to a *person* are concerned. It appears to the FCA that, in certain situations, a *person* may make a *financial promotion* to someone who has expressly asked that it be made or who has initiated it but where, at the same time, it is also made (that is addressed) to *persons* who may have not requested or initiated it. For example, a married couple may visit their financial adviser. One partner may request or initiate the dialogue which the adviser then addresses to both. Article 8(4) of the *Financial Promotion Order* recognises this and has the effect that an *unsolicited real time financial promotion* will have been made to the *persons* other than the *person* who expressly asked for or initiated the call, visit or dialogue in which it was made unless they are:

- (1) close relatives of that *person* (that is, a *person's* spouse, children and step-children, parents and step-parents and brothers and sisters and step-brothers and step-sisters, including a spouse of any of those *persons*); or
- (2) expected to engage in any investment activity or to *engage in claims management activity* jointly with that *person*.

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In the FCA's view, *persons* who may be *engaging in investment activity* or *engaging in claims management activity* jointly include:

- (1) a married couple;
- (2) two or more *persons*, who will invest jointly in a product (for example, a cohabiting couple who are not married or members of a family);
- (3) the directors of a *company* or partners in a firm;
- (4) members of a *group of companies*;
- (5) the participants in a joint commercial enterprise;
- (6) the members of an investment club; and
- (7) the managers or prospective managers of a *company* who are involved in a management buy-out or buy-in.

**8.10.13** **G** There will be occasions when *financial promotions* are received by *persons* other than those in ■ PERG 8.10.11G (1) or ■ PERG 8.10.11G (2) who will not have solicited them. For example, a more distant relative or friend ('F') who acts as a support to the *person* who is to *engage in investment activity* or to *engage in claims management activity* ('P') or P's professional adviser ('A'). As explained in ■ PERG 8.6.10 G, in such cases the *financial promotion* will not be made to F or A unless it is also addressed to them. And it will only be addressed to F or A if the invitation or inducement relates to F or A *engaging in investment activity* or *engaging in claims management activity*. So a solicited *financial promotion* made to P will not also be an unsolicited *financial promotion* made to F or A.

**8.10.14** **G** In the FCA's view, the mere fact of a *person* accepting an invitation to attend a meeting does not automatically mean that he has initiated any dialogue which may take place during the meeting and which may amount to a *financial promotion*. This will depend on the facts of each case and such matters as the manner in which the invitations are made, the arrangements for acceptance and how the meeting is conducted. For example, the fact that *investments* or investment services will be offered during the meeting may be made clear in the invitation.