

## Chapter 8

# Financial promotion and related activities



## 8.12 Exemptions applying to all controlled activities

**8.12.1** G Part IV of the *Financial Promotion Order* contains several exemptions which apply to all *controlled activities*. These are summarised in ■ PERG 8.12.2 G to ■ PERG 8.12.38 G.

### Financial promotions to overseas recipients (article 12)

**8.12.2** G This exemption concerns *financial promotions* which are made to or directed only at *overseas persons* (except in the circumstances referred to in ■ PERG 8.12.8 G). But this exemption does not apply to communications in respect of *controlled claims management activity*.

**8.12.3** G The exemption applies to situations where a *financial promotion* is either:

- (1) made to a *person* who receives it outside the *United Kingdom*; or
- (2) directed at *persons* who are outside the *United Kingdom*.

**8.12.4** G The exemption applies whether or not the *financial promotion* is made from the *United Kingdom*. However, there is the exception that, if it is an *unsolicited real time financial promotion*, it must be made from a place outside the *United Kingdom* and be for the purposes of a business carried on entirely outside the *United Kingdom*. To give effect to the principle of *country of origin* regulation of information society services as required by the *E-Commerce Directive*, article 12(7) of the *Financial Promotion Order* prevents the exemption applying to an outgoing electronic commerce communication.

**8.12.5** G Articles 12(3) and (4) of the *Financial Promotion Order* (subject to article 12(5) – see ■ PERG 8.12.8 G) have the effect that, where a *financial promotion* is directed from a place outside the *United Kingdom*, it will be conclusive proof that it is not directed at *persons* in the *United Kingdom* even if it is received by a *person* in the *United Kingdom*, if:

- (1) the *financial promotion* is not referred to in or directly accessible from another communication (for example, an advertisement in a *UK* newspaper or a *UK* website) which is itself made to or directed at *persons* in the *United Kingdom* by the *overseas person* who is directing it; and

- (2) there are proper systems and procedures in place to prevent recipients in the *United Kingdom* other than *persons* to whom the communication might otherwise lawfully have been made from engaging in the investment activity to which the *financial promotion* relates with the *overseas person* or his *close relative* or *group company*.

8.12.6

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There is no definition in the *Financial Promotion Order* of what 'proper systems and procedures' are, and the matter will ultimately be for the courts to determine. This is unsurprising as systems and procedures may take many different forms depending upon the precise circumstances in which *financial promotions* are made. But it is clear that *persons* seeking conclusive proof that the exemption applies must consciously make arrangements to prevent their dealing with certain recipients in the *United Kingdom*. In the *FCA's* view, proper systems and procedures will involve arrangements for scrutinising enquirers or applications with a view to identifying *persons* who are located in the *United Kingdom* and are not *persons* to whom the communication could lawfully have been made. *Persons* to whom the *financial promotion* could lawfully have been made does not mean only those covered by article 12. For example, depending on the *controlled investment* which the *financial promotion* is about, they could include a certified high net worth individual or a sophisticated investor. Such arrangements may be conducted manually using a questionnaire or electronically through password-protected access to information or the programming of software to recognise and reject *United Kingdom* addresses or both. The need for proper systems and procedures does not automatically mean that there will no longer be conclusive proof should, on isolated occasions, the systems or procedures fail to prevent dealings with a recipient in the *United Kingdom*. Provided the systems and procedures were and remain proper there will be conclusive proof that the exemption applies. A *financial promotion* from overseas might lead to a recipient in the *United Kingdom* engaging in investment activity with another *group company* (G) of the *person* (P) who makes the *financial promotion*. In this situation, it is not necessary that P operates the proper systems and procedures to get conclusive proof that the exemption applies. It will be enough that G operates the proper systems and procedures.

8.12.7

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Where a *financial promotion* is directed from within the *United Kingdom*, articles 12(3) and (4) also state (subject to article 12(5) – see ■ PERG 8.12.8 G) that there can be conclusive proof that the *financial promotion* is directed only at *persons* outside the *United Kingdom*. This will be the case if, in addition to the conditions referred to in ■ PERG 8.12.5G (1) and ■ PERG 8.12.5G (2), the *financial promotion* is accompanied by an indication that:

- (1) it is directed only at *persons* outside the *United Kingdom*; and  
 (2) it must not be acted upon by *persons* in the *United Kingdom*.

8.12.8

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In any case, some but not all of the conditions referred to in ■ PERG 8.12.5G (1) to ■ PERG 8.12.5G (2) and ■ PERG 8.12.7G (1) to ■ PERG 8.12.7G (2) (or the additional condition that the communication is included in a website, newspaper or periodical publication which is principally accessed in or intended for a non-UK market or in a radio or television broadcast or teletext service transmitted principally for reception overseas) may be met. In

these cases, those conditions being satisfied will be taken into account in assessing whether the *financial promotion* is directed only at *persons* outside the *United Kingdom*. Even if none of the conditions are satisfied, it is still possible that a *financial promotion* which has been received by a *person* in the *United Kingdom* may properly be regarded as not having been directed at him. In the *FCA's* view, it will be an indication that a *financial promotion* in a website is directed at the *United Kingdom* if the website is registered with a *UK* search engine. Article 12(5) of the *Financial Promotion Order* also states that a *financial promotion* may be regarded as directed only at *persons* outside the *United Kingdom* where it is also directed at *persons* in the *United Kingdom*. This is provided those *persons* are limited to:

- (1) investment professionals (article 19); or
- (2) high net worth companies etc (article 49); or
- (3) previously overseas customers of overseas *communicators* (article 31); or
- (4) any combination of (1), (2) and (3).

Where a *financial promotion* is also directed at such *persons* in the *United Kingdom* the conclusive conditions referred to in ■ PERG 8.12.5G (1) to ■ PERG 8.12.5G (2) and ■ PERG 8.12.7G (1) to ■ PERG 8.12.7G (2) should be read as if references to *persons* to whom the *financial promotion* may be made or directed included investment professionals or high net worth companies etc. ■ PERG 8.11.4 G explains how article 12 may be combined with other exemptions.

**Financial promotions from customers and potential customers (article 13)**

**8.12.9** G *Financial promotions* made by a prospective customer to a *person* who supplies a *controlled investment* or services comprising *controlled activities* or *controlled claims management activities* with a view to his acquiring the *investment*, or receiving the services or receiving information about those *investments* or services, are exempted. This exemption will only be of relevance to corporate customers or others who are acting in the course of business. Other types of customers will not be subject to section 21 to begin with.

**Follow up financial promotions (article 14)**

**8.12.10** G *Financial promotions* other than *unsolicited real time financial promotions* are exempt where they follow up an earlier *financial promotion* which, in compliance with another exemption (such as that for promotions made to high net worth individuals or sophisticated investors – see ■ PERG 8.14.21 G and ■ PERG 8.14.27 G), contains certain indications or information. This is provided the *financial promotion*:

- (1) is made by the *person* who made or directed the earlier *financial promotion*;
- (2) is made to a recipient of the earlier *financial promotion*;
- (3) relates to the same matter as the earlier *financial promotion*; and

(4) is made within 12 months of the earlier *financial promotion*.

This exemption does not help in situations where the original *financial promotion* was made or directed under an exemption which did not require it to include any indications or information. However, it is likely that, in many cases where no indications or information are required, the exemption to which the earlier *financial promotion* applies would also apply to any follow up *financial promotion*. The requirement that the follow up *financial promotion* be made by the *person* who made or directed the earlier one would seem to prevent use of the exemption by someone acting on behalf of that *person*. However, the earlier *financial promotion* may have been made or directed by an individual in his capacity as an officer or employee of a *company* or a partner or employee of a partnership. If so, the exemption will be satisfied if the follow-up *financial promotion* is made by another employee, director or partner of the same *company* or *partnership*.

**Introductions (article 15)**

8.12.11

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This exemption applies to any *financial promotion* that is made with a view to or for the purposes of introducing the recipient to certain kinds of *person*. These are *authorised persons* who carry on the *controlled activity* to which the *financial promotion* relates, or *exempt persons* where the *financial promotion* relates to a *controlled activity* that is also a *regulated activity* in relation to which he is an *exempt person*. This is subject to the requirement that:

- (1) the *person* making the *financial promotion* ('P') is not a *close relative* or *group company* of the *authorised* or *exempt person*;
- (2) P does not receive any financial reward for making the introduction other than from the recipient of the *financial promotion*; and
- (3) the recipient of the *financial promotion* has not, in his capacity as investor, sought advice from P or, if he has, P has declined to provide it and has recommended that he seek advice from an *authorised person*.

For the purposes of (2), it is the *FCA's* view that P may be viewed as not receiving any financial reward other than from the recipient where P treats any commission or other financial benefit received from third parties to whom introductions are made as belonging to and held to the order of the recipient. P cannot simply tell the recipient that P will receive commission. The position must be that the commission belongs to the recipient and must be paid to him unless he agrees to its being kept by P. Where this occurs, the payment may be seen to be received by P from the recipient. In the *FCA's* opinion, the condition would be satisfied by P paying over to the recipient any third party payment he receives. Otherwise, it would be satisfied by P informing the recipient of the sum and that he has the right to require that the sum to be paid to him. This would allow the sum to be used to offset fees due from the recipient for other services provided to him by P. This could take the form of an agreement between P and the recipient that sums received by P will be used to offset any other fees due to P from the recipient. This is provided that P informs the recipient of sums which P has received and of the fees which they have been used to offset. However, it does not allow P to keep third party payments by seeking the recipient's agreement through standard terms and conditions. Similarly, a mere

notification to the recipient that a particular sum has been received coupled with a request to keep it does not satisfy the condition.

**8.12.11A** G This exemption does not apply to any *financial promotion* that is made with a view to, or for the purpose of, an introduction to a person who carries on the *controlled activities* of:

- (1) credit broking;
- (2) operating an electronic system in relation to lending; or
- (3) agreeing to carry on the above activities.

**Exempt persons (article 16)**

**8.12.11B** G This exemption also does not apply to any *financial promotion* that is made with a view to, or for the purpose of, an introduction to a person who carries on a *controlled claims management activity*.

**8.12.12** G This exemption covers three distinct situations. Article 16(1) applies to all *exempt persons* where they make *financial promotions* for the purpose of their exempt activities. These *persons* would include *appointed representatives* (except *appointed representatives* to whom the exemption in article 16(1A) applies; see ■ PERG 8.12.12A G), *recognised investment exchanges*, *recognised clearing houses*, *recognised auction platforms* and those who are able to take advantage of the *Exemption Order*. So, it allows *exempt persons* both to promote that they have expertise in certain *controlled activities* or *controlled claims management activities* and to make *financial promotions* in the course of carrying them on. Article 16(1) does not apply to *unsolicited real time financial promotions*. *Persons* to whom the *general prohibition* does not apply because of Part XX (Provision of financial services by members of the professions) or Part XIX (Lloyd's members and former underwriting members) of the *Act* are not, for the purposes of article 16, *exempt persons* for their Part XX or Part XIX activities.

**8.12.12A** G Article 16(1A) applies to *non-real time financial promotions* and *solicited real time financial promotions* made:

- (1) by an *appointed representative* who is carrying on an activity to which sections 20(1) and (1A) and 23(1A) of the *Act* do not apply as a result of section 39(1D) of the *Act*; and
- (2) for the purposes of the appointed representative's business of carrying on a *controlled activity* which is also a *regulated activity* to which sections 20(1) and (1A) and 23(1A) of the *Act* do not apply by virtue of section 39(1D) of the *Act*.

■ SUP 12.2.2AG (3) provides *guidance* on section 39(1D) of the *Act*.

**8.12.13** G Article 16 (2) applies to *unsolicited real time financial promotions* made by an *appointed representative* in carrying on the business:

- (1) for which his principal has accepted responsibility for the purposes of section 39 of the Act (Exemption of appointed representatives); and
- (2) in relation to which the *appointed representative* is exempt under section 39.

In addition, the *financial promotion* may only be made in the circumstances in which it could be made by the *appointed representative's principal* under the appropriate *financial promotion rules*. This ensures a level playing field as between employed and tied sales forces. This exemption may be of particular use to telephone sales agencies who will often need to be *appointed representatives* of investment product companies.

**Generic promotions (article 17)**

- 8.12.14 G Under this exemption, the *financial promotion* itself must not relate to a *controlled investment* provided by a *person* who is identified in it, nor must it identify any *person* as someone who carries on any *controlled activity* or *controlled claims management activity*. So, it will apply where there is a *financial promotion* of a class of products. For example 'ISAs are great' or 'buy into an investment trust and help the economy'. Such *financial promotions* may be made by a *person* such as a trade association which is not itself carrying on a *controlled activity* or a *controlled claims management activity*. But this is provided there is no mention of any particular *ISA* or investment trust or of any *person* who may give advice on or arrange, *sell* or manage such investments.
  
- 8.12.15 G The exemption can also be used in certain circumstances where an intermediary is advertising its services as an intermediary. This is because advising on and arranging *deposits* and *contracts of insurance* other than *life policies* are not *controlled activities*. This means that an unauthorised intermediary offering to find the best rates on *deposits* may identify himself in the *financial promotion* as he will not be carrying on a *controlled activity*. This is provided that the *financial promotion* does not identify any particular deposit-taker. The same considerations would apply to an *authorised* intermediary who offers to advise on the best available motor insurance.
  
- 8.12.16 G Other *persons* may be able to take advantage of the exemption. For example, a *person* making a generic *financial promotion* may identify himself, whether he may carry on a *controlled activity* or *controlled claims management activity*, or not. This is provided that the *financial promotion* does not (directly or indirectly) identify him as someone who carries on a *controlled activity* or a *controlled claims management activity*.
  
- 8.12.17 G Journalists may be able to take advantage of this exemption when writing about *investments* generally. But the exemption would not apply if the *financial promotion* recommends the purchase or sale of particular *investments* such as XYZ Plc shares. This is because it will be identifying XYZ Plc as a *person* who provides the *controlled investment* (being its *shares*) and as a *person* who carries on the *controlled activity* of dealing in *securities* and *contractually based investments* (by issuing its own *shares*). Nor would the exemption apply if the *financial promotion* identifies an exchange on which *investments* are traded. That would indirectly identify the exchange as a *person* who carries on the *controlled activities* of dealing in *securities* or

*contractually based investments or arranging deals* in investments. Journalists may also be able to use the exemption for journalists in article 20 (See ■ PERG 8.12.23 G).

**Mere conduits (article 18 and 18A)**

- 8.12.18 G The purpose of these exemptions is to ensure that, subject to certain conditions, the restriction in section 21 of the *Act* does not apply to those who merely transport the *financial promotions* of other *persons*. Obvious examples here are postal and Internet service providers, courier companies and telecommunications companies. ■ PERG 8.6.5 G explains that such *persons* may not be regarded as *communicating a financial promotion* simply because they have distributed it. Article 18 (Mere conduits) does not apply to the *person* who causes the mere conduit to make the communication. Neither does it apply where the *financial promotion* is an *electronic commerce communication* that is, or will be, *communicated from an establishment in the United Kingdom to a person in an EEA State other than the United Kingdom*. A *person* acting as a mere conduit for *financial promotions* of this kind will, however, be able to use article 18A (Outgoing electronic commerce communications: mere conduits, caching and hosting). Article 18A is not subject to the conditions that apply to other forms of mere conduit (as referred to in ■ PERG 8.12.19 G and ■ PERG 8.12.20 G). However, it does require compliance with the conditions in articles 12(1), 13(1) and 14(1) of the *E-Commerce Directive* that relate to the liability of intermediary service providers.
- 8.12.19 G The conditions in article 18(2) include a requirement that the *person* making the *financial promotion* does not select, modify or otherwise exercise control over its content before it is transmitted or received. Article 18(3) provides that a *person* is not selecting, modifying or exercising control merely as a result of having power to remove material which is illegal, defamatory or in breach of copyright or at the request of a regulatory body or where the law requires him to do so. However, in the *FCA's* view, the control normally exercised by newspaper publishers or broadcasters over traditional forms of advertising they carry is likely to be enough for the exemption not to be available to such *persons*.
- 8.12.20 G The conditions in article 18 also require that the *person* acting as the mere conduit must *communicate* in the course of an activity carried on by him the principal purpose of which is transmitting or receiving material provided to him by others. In the *FCA's* view, what matters is that the *person* is carrying on an activity which has the required principal purpose. Such an activity might represent but a part of a *person's* overall business activities (however small), so long as it represents a discrete activity. A discrete activity is an activity whose principal purpose is to receive and transmit other *persons'* communications and which is not simply an activity that is carried on incidentally or as an adjunct to another activity. For example, a *person* who operates a website will not be entitled to the exemption (should he be *communicating financial promotions* see ■ PERG 8.6) simply because he chooses to provide a chatroom or bulletin board for the use of his customers.



**Investment professionals (article 19)**

**8.12.21** **G** *Financial promotions* made only to or directed only at certain types of *person* who are sophisticated enough to understand the risks involved are exempt. These are:

- (1) *authorised persons*;
- (2) *exempt persons* (where the *financial promotion* relates to a *controlled activity* which is a *regulated activity* for which the *person* is exempt);
- (3) governments and local authorities; and
- (4) *persons* whose ordinary business involves carrying on a *controlled activity* of the kind to which the *financial promotion* relates and which may include:
  - (a) investment trust companies;
  - (b) *companies* which provide venture capital;
  - (c) large *companies* which have a corporate treasury function;
  - (d) other *persons* who carry on an activity such as dealing in, arranging or advising on *investments* but who do not require *authorisation* because of an exclusion in the *Regulated Activities Order*; and
  - (e) *professional firms* who are exempt under Part XX of the *Act*.

This also includes *persons* acting in their capacity as directors, officers or employees of such *persons*.

**8.12.22** **G** Article 19(4) sets out conditions which, if all are satisfied, offer conclusive proof that a *financial promotion* is directed only at investment professionals. These conditions relate to indications accompanying the *financial promotion* and the existence of proper systems and procedures. The *guidance* about proper systems and procedures in **■ PERG 8.12.6 G** applies equally to article 19. Article 19(6) specifically states that a *financial promotion* may be treated as made only to or directed only at investment professionals even if it is also made to or directed at other *persons* to whom it may lawfully be communicated. This would include *overseas persons* and high net worth companies, etc. Where this is the case, the conditions in article 19(4) should, in the *FCA's* view, be satisfied if:

- (1) the indications make it clear that the *financial promotion* is directed only at investment professionals and other *persons* to whom it may lawfully be promoted; and
- (2) the systems and procedures are designed to prevent *persons* other than such types of *persons engaging in investment activity*.

**8.12.22A** **G** This exemption does not apply to communications in respect of *controlled claims management activity*.

**Journalists (article 20)**

**8.12.23** **G** The broad scope of the restriction in section 21 of the *Act* will inevitably mean that it will, from time to time, apply to journalists and others who make their living from commenting on news including financial affairs (such as broadcasters). This is liable to happen when such *persons* offer share tips or recommend the use of a particular firm for investment purposes. Such tips or recommendations are likely to amount to inducements to *engage in investment activity* or to *engage in claims management activity*.

**8.12.24** **G** The Treasury, in making the *Financial Promotion Order*, noted that financial journalism has an important part to play in increasing consumer awareness of financial services and products. It further observed the need to strike the right balance between protecting consumers and ensuring that the level of regulation is as light as possible, while respecting the principle of the freedom of the press.

**8.12.25** **G** With this objective in mind, the exemption in article 20 applies to any *non-real time financial promotion* the contents of which are devised by a *person* acting as a journalist where the *financial promotion* is in:

- (1) a newspaper, journal, magazine or other periodical publication;
- (2) a regularly updated news or information service (such as a website or teletext service); or
- (3) a television or radio broadcast or transmission.

In addition, the publication, service or broadcast must be one which satisfies the principal purpose test set out in article 54 of the *Regulated Activities Order*. This means that the principal purpose must not be to advise on or lead or enable *persons* to *buy or sell securities or relevant investments*. See ■ PERG 7 for further *guidance* on this. Article 20 does not define what is meant by a *person* 'acting in the capacity of a journalist'. In the *FCA's* opinion, this expression has a potentially wide meaning. It will apply to anyone who writes for or contributes to a publication, service or broadcast. This includes experts or analysts who may be asked to contribute articles for a publication or website service or to offer their opinion in a broadcast.

**8.12.26** **G** Provided the conditions in ■ PERG 8.12.25 G are met, the exemption in article 20 applies to any *non-real time financial promotion*. However, there is an additional condition where the subject matter of the *financial promotion* is *shares or options, futures or contracts for differences* relating to *shares* and the *financial promotion* identifies directly a *person* who issues or provides such an *investment*, or the subject matter of the *financial promotion* is a *controlled claims management activity* and the *financial promotion* directly identifies a *person* who undertakes that activity. In such cases, the exemption is subject to a disclosure requirement which is itself subject to certain exceptions (see ■ PERG 8.12.27 G). This requirement is that the *financial promotion* must be accompanied by an indication of the nature of any financial interest held by the *person* responsible for the promotion (that is, the journalist or editor) or member of his family (his spouse or children under 18). A financial interest would be subject to disclosure where the *person* or a member of his family would be likely to get a financial benefit or avoid a financial loss if *persons* acted in line with the *financial promotion*.

Article 20 does not specify the way in which a financial interest should be indicated. In the FCA's view, a financial interest should be disclosed in a way that will enable recipients to understand readily its nature. For example, 'the writer has a substantial holding of traded call options in these shares'.

- 8.12.27** **G** The exceptions to the disclosure requirement are where the *financial promotion* is in either:
- (1) a publication, service or broadcast which has proper systems and procedures which prevent the publication of communications without disclosure of financial interests; or
  - (2) a publication, service or broadcast which falls within the remit of:
    - (a) the Code of Practice issued by the Press Complaints Commission; or
    - (b) the OFCOM Broadcasting Code; or
    - (c) the Producers' Guidelines issued by the British Broadcasting Corporation.
- 8.12.28** **G** The effect of **■ PERG 8.12.27G (2)** is that *financial promotions* made by journalists in publications, services or broadcasts to which one of the codes or the guidelines apply are not subject to the disclosure requirement. This is so even if a *financial promotion* is made in breach of the codes or guidelines. Such *financial promotions* would remain to be dealt with by the body responsible for the code or guidelines and the publisher concerned. The code or guidelines may, of course, themselves require disclosure but the fact that they have been specified does not necessarily mean that they will or will always require disclosure. That is something which depends on the requirements of the particular code or guidelines.
- 8.12.29** **G** The effect of **■ PERG 8.12.27G (1)** is that a journalist will not breach section 21 by not disclosing a financial interest, providing that the publication, service or broadcast concerned operates proper systems and procedures. As with the exemption in article 12 of the *Financial Promotion Order* (see **■ PERG 8.12.6 G**), what proper systems and procedures are will be a matter ultimately for the courts to determine and may vary according to the medium used. It will depend upon all the circumstances surrounding the publication, service or broadcast. In the FCA's opinion, proper systems and procedures may achieve the objective of preventing the publication of communications without the required disclosure in one of two ways. They may require that disclosure be made. Or they may seek to prevent journalists from acting in a way which would enable them to profit if *persons* follow their published recommendations. For example, by banning their dealing in the *shares* or related investments for a reasonable period following the promotion. This would ensure that the journalist will not have a financial interest to disclose. For example, and in the FCA's opinion, a publication, service or broadcast may be likely to satisfy the test referred to in **■ PERG 8.12.27G (1)** if it has set up procedures:
- (1) for *persons* responsible for devising the content of *financial promotions*, or for deciding that they should be included in the publication, service or broadcast, to register their financial interests in a central log;

- (2) for the central log to be properly maintained and regularly reviewed;
- (3) where disclosure is required, for all *financial promotions* to be subject to review before publication or broadcast by an appropriately qualified and senior *person*; and
- (4) for the *persons* referred to in (1) to be made aware in writing of the procedures and of their obligations to disclose their financial interests or to refrain from any course of action which may be likely to give them a financial interest requiring disclosure and, preferably, to have confirmed their acceptance of those obligations in writing.

**8.12.30** G *Persons* such as experts or analysts may be approached to contribute at very short notice and may be overseas. In such cases, the systems and procedures referred to in ■ PERG 8.12.29 G may not be practical. It is the *FCA's* opinion that, where occasional contributors are concerned, proper systems and procedures may include arrangements for ensuring that the need for disclosure (or the avoidance of financial interests) is drawn to the contributor's attention before the communication is made. The contributor's confirmation that he understands and accepts the position on disclosure would also need to be obtained. The arrangements for bringing the position on disclosure to the contributor's attention and for obtaining his understanding and acceptance should be made in whatever way is most appropriate in the circumstances. In other cases, it may be enough that the *persons* responsible for the broadcast satisfy themselves that contributors represent reputable regulated businesses. And that it would be reasonable to believe that they would not seek to promote an investment or investment service in which they had a financial interest without disclosing that fact. This is, of course, merely an example and not the only circumstances in which overseas broadcasts may be regarded as having proper systems and procedures.

**8.12.31** G It appears to the *FCA*, however, that there will be situations when it may not be practical for the *persons* who are responsible for a publication, service or broadcast to apply proper systems and procedures to every *person* who may, whilst acting in the capacity of a journalist, *communicate a financial promotion*. For example where *persons* are asked to stand in at the last moment. In such cases, it is the *FCA's* opinion that the benefit of the exclusion will not be lost as respects those *persons* who are subject to the proper systems and procedures. However, any *financial promotions communicated by persons* who are not subject to them would still be subject to the restriction in section 21 and would need to be approved by an *authorised person* or otherwise exempt.

**Promotion broadcast by company director etc (article 20A)**.....

**8.12.32** G Article 20A provides a further exemption for certain *financial promotions communicated by means of a service or broadcast* which satisfies the principal purpose test in article 54 of the Regulated Activity Order (see ■ PERG 8.12.25 G and ■ PERG 7). Readers of this section should also refer to the *guidance on company statements* in ■ PERG 8.21.

**8.12.33** G The main purpose of the exemption appears to be to guard against the possibility that, during the course of a broadcast interview or a live website

presentation, a *financial promotion* is made inadvertently by a director or employee of a *company* or other business undertaking when he is not acting in the capacity of a journalist (see ■ PERG 8.12.25 G). The exemption applies if the *financial promotion* relates only to:

- (1) *shares* of the undertaking or of another undertaking in the same *group* or *options*, *futures* or *contracts for differences* related to those *shares*; or
- (2) any *controlled investment* issued or provided by an *authorised person* in the same *group* as the undertaking.

**8.12.34** G The exemption applies where the *financial promotion*:

- (1) comprises words which are spoken by the director or employee and not broadcast, transmitted or displayed in writing; or
- (2) is displayed in writing only because it is part of an interactive dialogue to which the director or employee is a party and in the course of which he is expected to respond immediately to questions put by a recipient of the communication.

This is provided that the *financial promotion* is not part of an organised marketing campaign. ■ PERG 8.14.4G (3) provides *guidance* on the meaning of an organised marketing campaign. In the context of article 20A, it is the FCA's view that an individual or isolated *financial promotion* will not represent or be part of an organised marketing campaign. However, a *company* representative may use a broadcast interview or webcast to encourage or incite viewers or listeners to acquire *investments* or investment services which are the subject of an advertising campaign being conducted at the same time. In such cases, any *financial promotion* contained in that interview or webcast will be part of an organised marketing campaign. Where this is the case, the company representative may be able to rely on other exemptions depending upon the subject matter of the *financial promotion* – see ■ PERG 8.21.

**8.12.35** G The exemption also requires that the director or employee is identified as such in the *financial promotion* before it is *communicated*.

**8.12.36** G The first part of the exemption (referred to in ■ PERG 8.12.34G (1)) specifically precludes any form of written communication. However, the FCA understands that the Treasury did not intend to prohibit the use of written words in the form of subtitling. These may be an aid to those with hearing difficulties or to interpret a foreign language, or the use of captions which supplement a spoken communication by highlighting aspects of it without introducing anything new. The FCA cannot fetter its discretion and must consider potential breaches of section 21 of the *Act* on their merits. However, where the only reason why a *person* may have breached section 21 of the *Act* is because he has used subtitling or captioning in this way the FCA would not expect to take further action. In the FCA's view, the position is different if a transcript of the spoken communication is later made available. This would be a separate communication and would need to be *approved* or otherwise exempt.

8.12.37 **G** The second part of the exemption (referred to in ■ PERG 8.12.34G (2)) envisages that the director or employee will be holding the equivalent of a conversation conducted in writing. Typically this will involve the exchange of e-mails. It is possible that this part of the exemption could be used by companies making so-called webcasts over the Internet. However, this would only be the case if the service through which the webcast is provided is a regularly updated news or information service (and which meets the principal purpose test – see ■ PERG 8.12.25 G). There is no reason why the exemption should not apply to a *company* website which provides regularly updated news or information about the activities, products or services of the *company* where the website represents a service provided to those who use it. However, not all *company* websites will be services of this kind.

### **Incoming electronic commerce communications (article 20B)**

8.12.38 **G** Article 20B gives effect to the provisions of the *E- Commerce Directive* by exempting *electronic commerce communications* made from an *establishment* in an *EEA State* other than the *United Kingdom* to an *ECA recipient* in the *United Kingdom*. However, article 20B does not apply to the following communications:

- (1) an advertisement by the *operator* of a UCITS of *units* in that *scheme*;  
or
- (2) an invitation or inducement to enter into a *contract of insurance* where:
  - (a) it is made by an undertaking which has received official authorisation for direct insurance in line with article 14 of the *Solvency II Directive*; and
  - (b) the insurance falls within the scope of the *Solvency II Directive*; or
- (3) an unsolicited communication made by electronic mail.

For the purposes of (3), a communication is unsolicited unless it is made in response to an express request from its recipient.