

Chapter 8

Financial promotion and related activities

8.14 Other financial promotions

8.14.1 **G** The exemptions in Part VI apply to different types of *financial promotion*, and the exemption available may be based on a number of facts. These may be the identity of the maker of the *financial promotion*, the identity of the recipient of the *financial promotion*, the subject matter of the *financial promotion* or the nature of the *financial promotion* itself. Some of these exemptions apply to *non-real time financial promotions*, others to *solicited real time financial promotions* and others to *unsolicited real time financial promotions*. Many of the exemptions apply to more than one category of *financial promotion*. ■ PERG 8.36.6 G contains a table showing which types of *financial promotion* are covered by each individual exemption.

8.14.2 **G** ■ PERG 8.14.3 G to ■ PERG 8.14.42 G describe some of the more significant exemptions contained in Part VI. See the *Financial Promotions Order* for full details of all the exemptions in Part VI.

One-off financial promotions (articles 28 and 28A)

8.14.3 **G** Article 28 exempts *financial promotions*, other than *unsolicited real time financial promotions*, which are one-off in nature. Whether or not any particular *financial promotion* is one-off in nature will depend upon the individual circumstances in which it is made. Article 28(3) sets out conditions which, if all are met, are conclusive. Otherwise they are indicative. Even if none are met the exemption may still apply. This makes it clear that the overriding issue is whether the *financial promotion* is, in fact, a one-off. The conditions are that:

- (1) the *financial promotion* is made only to one recipient or to a group of recipients in the expectation that they would *engage in investment activity* jointly;
- (2) the product or service involved has been determined having regard to the circumstances of the recipient or recipients; and
- (3) the *financial promotion* is not part of an organised marketing campaign.

8.14.4 **G** The FCA considers the effect of each of the conditions in ■ PERG 8.14.3G (1) to ■ PERG 8.14.3G (3) to be as follows.

- (1) The first condition requires the *financial promotion* to be made, so ruling out any *financial promotions* which are directed at *persons*. The effect of article 6(b) and (e) of the *Financial Promotion Order* is

that a communication is made to a *person* when it is addressed to him and that *person* to whom the *financial promotion* is addressed is its recipient. This means that when one *person* addresses a *financial promotion* to another *person*, it will not be regarded as having been made to anyone else. So, in the case of a *real time financial promotion*, it is not made to any other *person* who may be present. And in the case of a *non-real time financial promotion*, it is not made to any other *person* who may read or hear it. If the *financial promotion* is addressed to more than one *person* they must be proposing to *engage in investment activity* jointly (see ■ PERG 8.14.6 G).

- (2) The second condition requires the *financial promotion* to apply to the personal circumstances of the recipient so not benefiting a *financial promotion* which take no account of the personal circumstances of the recipient or recipients.
- (3) The third condition requires that the *financial promotion* must not be part of an organised marketing campaign. There is no definition of an organised marketing campaign but, in the *FCA's* view, it is appropriate to consider each of the words and their effect in this context:
 - (a) 'organised' suggests that the campaign is planned in advance and not something done on the spur of the moment;
 - (b) 'marketing' suggests an element of public promotion so as not to apply to anything of a personal or very limited nature even if it is promotional; and
 - (c) 'campaign' suggests that the *financial promotion* must be part of an overall plan having a common objective.

8.14.5

G In the *FCA's* opinion, the indicators referred to in ■ PERG 8.14.4 G suggest that there are two essential elements of a one-off *financial promotion*. These are that it is tailored to the circumstances of the recipient and that it is individual in nature (in that it is not simply a personalised letter sent out as part of a general mailshot). Apart from this there is no need for the communication to be an isolated instance. For example, the fact that there may be a considerable number of communications made during negotiations for a transaction will not prevent each communication from being one-off. The *FCA* is of the view that none of the three conditions carries significantly more weight than the others. Each *financial promotion* must be assessed against the conditions on its merits. The *FCA* regards the following to be *financial promotions* which will meet the conclusive conditions provided, in each case, that the *financial promotion* is tailored to the personal circumstances of and addressed to the recipient.

- (1) Individual personal written communications or one-to-one conversations.
- (2) A response printed in a publication or website or given during a broadcast in response to an enquiry from a reader, viewer or listener.
- (3) A response given to a *person* who asks a question at a presentation or meeting.

(4) A response to a question raised by another *person* using an internet chatroom or bulletin board.

8.14.6 **G** In the *FCA's* view, a group of recipients who may be *engaging in investment activity* jointly could 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.

8.14.7 **G** A *financial promotion* may fail to satisfy all of the indicators referred to in **■ PERG 8.14.4 G** because it is addressed to more than one recipient and they are not *persons* who will *engage in investment activity* jointly. In the *FCA's* view, such a *financial promotion* is capable of being one-off where the *persons* are to enter into the same transaction and the promotion is tailored to their individual circumstances. This may typically happen during negotiations for the sale of a *company* or the raising of corporate finance where a small number of parties are involved.

8.14.8 **G** The fact that a *financial promotion* may be made following an organised marketing campaign does not mean that it must automatically be regarded as part of the campaign or that it cannot be one-off. For example, after a *person* has responded to a general promotion, an investment manager may make *financial promotions* to him and tailor them to his individual objectives. Such subsequent *financial promotions* can be one-off. Similarly, a *person* who provides corporate finance services may use an organised marketing campaign to find a potential investor or investee company. Any subsequent *financial promotions* made during negotiations for the deal may be one-off even though they may represent a series of communications to the same recipient. On the other hand, the situation is slightly different where an organised marketing campaign involves the sale of an investment product such as a *life policy*. There will be fewer instances where subsequent *financial promotions* to individual recipients will be capable of being one-off. For example, any *financial promotion* which has the basic elements of selling the product is likely to be part of an organised marketing campaign and will not be a one-off.

8.14.9 **G** In the *FCA's* view, a *person* such as an investment manager or adviser is not conducting an organised marketing campaign purely because he regularly provides a particular client with *financial promotions* as part of his service. Neither is such a *person* conducting an organised marketing campaign purely because he may have several clients whose personal circumstances and

objectives may suggest that a particular investment opportunity may attract them. If he considers the individual circumstances and objectives of each client before determining that the opportunity would be suitable for that client the *financial promotions* should be capable of being one-off.

8.14.10 **G** In the *FCA's* view, a *person* will not be making one-off *financial promotions* simply by sending out a series of letters to a number of customers or potential customers where a few details are changed (such as the name and address) but the bulk of the letter is standard. Such letters would be likely to be part of an organised marketing campaign.

8.14.11 **G** Article 28A exempts one-off *unsolicited real time financial promotions* provided that the *person* making the *financial promotion* believes on reasonable grounds:

- (1) that the recipient understands the risks associated with engaging in the investment activity to which the *financial promotion* relates; and
- (2) (at the time the communication is made) that the recipient would expect to be contacted by him about the investment activity to which the *financial promotion* relates.

8.14.12 **G** In the *FCA's* view, the article 28A exemption should provide scope for *persons* such as professional advisers to make *unsolicited real time financial promotions* in various situations. For example, when approaching *persons* with whom their clients are proposing to do business or those *persons'* professional advisers. The exemption will not apply where the *financial promotions* are part of an organised marketing campaign (see ■ PERG 8.14.4G (3)). So, in cases where a professional adviser is to contact a number of *persons* on a matter which involves each of them it will be necessary for him to consider whether the approaches would be part of an organised marketing campaign. For example, where they are significant shareholders in a *company* for which an offer has been made. In the *FCA's* opinion, provided the professional adviser considers the circumstances of each recipient and tailors the *financial promotions* to them it should be possible for the *financial promotions* to be regarded as one-off. Ultimately, however, the matter depends on the precise circumstances in which the *financial promotions* are made.

8.14.13 **G** Whether or not it would be reasonable to believe that any *person* understands the risks associated with the investment activity covered in a *financial promotion* or would expect to be contacted about it must be judged on the particular circumstances. In the *FCA's* opinion, the exemption requires that the recipient has the required understanding of risk at the time the promotion is made to him. However, it would be reasonable to believe that a *person* understands the risk involved if:

- (1) he is understood to be a professional in relation to the investment activity to which the *financial promotion* relates; or
- (2) he is advised about the risks by a *person* who is professionally qualified to give such advice; or

- (3) he has a position in a *company* which it is reasonable to suppose would require him to have such an understanding (such as a *person* who is in charge of a *company's* treasury function).

In the *FCA's* opinion, a *person* such as the managing director or finance director of a *company* that is seeking venture capital may reasonably be regarded as expecting to be contacted by or on behalf of a potential investor.

Overseas communicators (articles 30-33)

8.14.14 G There are a number of exemptions in the *Financial Promotion Order* relating to *financial promotions* sent into the *United Kingdom* by an overseas *communicator* who does not carry on certain *controlled activities* in the *United Kingdom*. These exemptions apply in addition to any other exemptions which may apply to any particular *financial promotion* by an overseas *communicator*.

8.14.15 G Article 30 exempts any solicited *real time financial promotion* made by an overseas *communicator* in the course of or for the purposes of certain *controlled activities* which he carries on outside the *United Kingdom*. This enables an overseas *communicator*, for example, to respond to an unprompted telephone enquiry made by a *person* in the *United Kingdom* or an enquiry which follows a *financial promotion* made by the overseas *communicator* and which was *approved* by an *authorised person*.

8.14.16 G In order to make an *unsolicited real time financial promotion*, an overseas *communicator* must rely on either article 32 or article 33. Article 32 provides an exemption for *unsolicited real time financial promotions* made by an overseas *communicator* to *persons* who were previously overseas and were a customer of his then. This is subject to certain conditions, including that, in broad terms, the customer would reasonably expect to be contacted about the subject matter of the *financial promotion*. Article 33 is similar to a sophisticated investor exemption and applies where the overseas *communicator* has reasonable grounds to believe that the recipient is knowledgeable enough to understand the risks associated with the *controlled activity* to which the *financial promotion* relates. It is also necessary for the recipient to have been informed that he will not gain the protections under the *Act* in respect of the activity or of the making of *unsolicited real time financial promotions*, and whether he will lose the benefit of dispute resolution and compensation schemes. The recipient must also have signified clearly that he accepts the position after having been given a proper opportunity to consider the information. There is no definition of a proper opportunity for this purpose. In the *FCA's* opinion it is likely to require the recipient to have a reasonable time to reflect on the matter and, if appropriate, seek other advice. What is a reasonable time, will depend upon the circumstances of the recipient, but, in the *FCA's* opinion, it is unlikely that a time of less than 24 hours will be enough.

8.14.17 G Article 31 exempts *non-real time financial promotions* made to previously overseas customers and subject to certain conditions. Again, to satisfy this exemption, the *communicator* must be based overseas and must be *communicating* with a *person* who was previously a customer of his while that *person* was overseas.

Governments, central banks etc (article 34)

8.14.17A **G** A local authority (in the *United Kingdom* or elsewhere) is exempt from the *financial promotion* restriction (that is, the restriction in section 21 of the Act) for a communication which is a *non-real time financial promotion* or a *solicited real time financial promotion*. However, this exemption does not apply to a communication which relates to a *regulated credit agreement*, where entering into the agreement or exercising, or having the right to exercise, the *lender's* rights and duties under the agreement constitutes the carrying on of an activity of the kind specified in article 60B of the *Regulated Activities Order* (and where the exclusion in article 72G of that Order does not apply).

Nationals of EEA States other than the United Kingdom (article 36)

8.14.18 **G** This exemption allows a *person* in another *EEA State* who lawfully carries on a *controlled activity* in that State to promote into the *United Kingdom*. The terms of the exemption are that the promotion must comply with the *rules* in ■ COBS 4, ■ MCOB 3A or ■ CONC 3 (as relevant). Care should be taken as any failure to satisfy any of the relevant requirements of these rules may mean that this exemption is not satisfied and that the *financial promotion* may breach section 21 if it has not been *approved* and no other exemption applies to it. The *FCA* recommends that anyone seeking to rely on this exemption either seeks professional advice or contacts the *FCA* before *communicating* the *financial promotion*. This exemption does not apply to *unsolicited real time financial promotions*.

Joint enterprises (article 39)

8.14.19 **G** Article 39 of the *Financial Promotion Order* exempts a *financial promotion* that:

- (1) is *communicated* by one participator or potential participator in a joint enterprise to another; and
- (2) is in connection with or for the purposes of that enterprise.

A joint enterprise means, in general terms, arrangements entered into by two or more *persons* for commercial purposes related to a business that they carry on. The business must not involve a

controlled activity

. The term 'participant' includes other members of a *group* of which a participant is a member.

8.14.20 **G** In the *FCA's* opinion;

- (1) it will not matter that a *person* enters into arrangements for investment or other purposes provided that he also enters them into for commercial purposes; and
- (2) each participant must be carrying on the business in question in their own right.

This means that the sponsors or promoters of a *company* who arrange for private investors to become shareholders will not be setting up a joint enterprise simply because the *company* may intend to carry on a relevant business which is not a

controlled activity

. Examples of a joint enterprise include a special purpose *company* owned by the participants and set up to operate a commercial project or to hold property of some kind. The participants in joint enterprises of this kind would typically be businesses which are to undertake work on the project or property development and investment companies.

Certified high net worth individuals (article 48)

8.14.21

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This exemption disappplies the restriction in section 21 of the *Act* from *non-real time financial promotions* or *solicited real time financial promotions* which are made to a *person* who the communicator believes on reasonable grounds to be a certified high net worth individual and which relate to certain *investments*. These *investments* must be either:

- (1) *shares* in or *debentures* or *alternative debentures* of an unlisted *company*; or
- (2) *warrants*, *certificates representing certain securities*, *options*, *futures* or *contracts for differences* relating to *shares* in or *debentures* of an unlisted *company*; or
- (3) units in *collective investment schemes* investing predominantly in *shares* in or *debentures* of an unlisted *company*.

There is an additional requirement that the recipient must have no contingent liability so that the maximum he may lose is the amount he invests. The term 'unlisted company' is defined in article 3 of the *Financial Promotion Order*. This exemption is expected to be of help to unlisted *companies* seeking venture capital.

8.14.22

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A certified high net worth individual is an individual who has signed a statement in the form prescribed in Part I (Statement for certified high net worth individuals) of Schedule 5 to the *Financial Promotion Order*. This requires the individual to certify that he has earned at least £100,000 or have held net assets to the value of more than £250,000 throughout the financial year before the date of the certificate. Where the *financial promotion* is an outgoing electronic commerce communication, the earnings or net assets may be of an equivalent amount in another currency. For the exemption to apply, the certificate must have been signed within twelve months of the date on which the communication is made. The validity of the statement is not affected by a defect in its wording or form provided the defect does not alter its meaning or involve failure to place certain paragraphs in bold.

8.14.23

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In addition, the *financial promotion* must be accompanied by:

- (1) a warning in the terms prescribed in article 48(5) and which satisfies certain conditions regarding its form as set out in article 48(6) – this warning must either be given in legible form at the time the

communication is made or given orally at that time and a copy in legible form sent to the recipient within two business days; and

(2) certain indications as set out in article 48(7).

8.14.24 **G** A *person* seeking to make a *financial promotion* to another *person* may wish to make enquiries of that *person* to establish whether he is certified. Unless another exemption applies or the *financial promotion* is approved by an *authorised person*, such enquiries will not be possible if the enquiry communication is an inducement or invitation to *engage in investment activity*. In the FCA's view, a communication which is merely an enquiry seeking to establish that a *person* holds a current certificate will not itself be an inducement or invitation. Once it has been established that the *person* qualifies as a certified high net worth individual *financial promotions* about the *controlled investments* in **■ PERG 8.14.21 G** may then be sent to him under article 48. **■ PERG 8.4.27 G** offers further *guidance* on this.

High net worth companies, unincorporated associations and trusts (article 49)

8.14.25 **G** This exemption works on a different basis to that for high net worth individuals. There is no requirement for a certificate or statement to be signed. Instead, the *person* making the promotion must believe on reasonable grounds that the recipients are high net worth companies, unincorporated associations or trusts or be reasonably regarded as directing the *financial promotion* only at such *persons*. A high net worth company, unincorporated association or trust is a *person* who satisfies the conditions in article 49(2)(a) to (d) which, for the most part, involve the amount of assets held. In addition, the exemption allows a *financial promotion* that is made to, or directed at, *persons* coming under article 49(2)(a) to (d) also to be made to, or directed at, any other *persons* to whom it may lawfully be made (article 49(2)(e)). This would include *persons* such as overseas recipients (article 12 (Communications to overseas recipients)) and investment professionals (article 19 (Investment professionals)).

8.14.26 **G** Article 49(4) gives the list of conditions which, if all are met, is proof that the *financial promotion* is directed at relevant *persons*. It is not necessary for all or any of the conditions to be met for a *financial promotion* to be regarded as directed at relevant *persons*. Ultimately the matter will be one of fact to be determined by taking account of the circumstances in which the *financial promotion* is made. In the FCA's opinion, it is not necessary for a *financial promotion*, to comply with the condition in article 49(4)(a) that there be an indication of the types of *person* to whom it is directed, to refer in detail to the terms of article 49(2). It will be enough that it is clear that the *financial promotion* is directed at *persons* to whom article 49 applies. *Persons* using article 49 will need, however, to consider the extent to which recipients of the *financial promotion* are likely to understand the indication. An appropriate approach may often be to refer to the *financial promotion* being 'directed at high net worth companies, unincorporated associations etc for the purposes of article 49' or similar.

Sophisticated investors (articles 50 and 50A)

8.14.26A **G** There are two exemptions that relate to sophisticated investors. The first (article 50 (Sophisticated investors)) applies to *persons* who are certified by

an *authorised person* and to a broad range of *specified investments*. The second (article 50A (Self-certified sophisticated investors)) is similar to the exemption for certified high net worth individuals and applies where the investor has self-certified himself and to a narrower range of *specified investments*. ■ PERG 8.14.27 G to ■ PERG 8.14.28D G describe these exemptions in greater detail.

8.14.27

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To be a sophisticated investor for the purposes of article 50, the recipient of a *financial promotion* must have a current certificate from an *authorised person* stating that he has enough knowledge to be able to understand the risks associated with the description of investment to which the *financial promotion* relates. Where the *financial promotion* is an outgoing electronic commerce communication, the certificate may be signed by a *person* who is entitled, under the law of an *EEA State* other than the *United Kingdom*, to carry on *regulated activities* in that *EEA State*. The *FCA* considers that a 'description of investment' relates to a category of *investments* with similar characteristics. Examples are given below.

- (1) The *shares* in a private *company* are not the same 'description of investment' as shares in a plc as there will usually be certain significant distinctions. For instance, there will often be restrictions on the transfer of *shares* in a private *company*.
- (2) *Shares* traded on a market or exchange will be a different 'description of investment' to unlisted *shares*.
- (3) *Shares* which have similar characteristics will be of the same 'description of investment' irrespective of whether they are *shares* of *companies* in the same market or geographical sector.

The recipient must also have signed a statement in the terms in article 50(1)(b). The validity of the statement is not affected by a defect in its wording provided the defect does not alter its meaning. The exemption applies to all kinds of *financial promotion* made to a certified sophisticated investor. However, it does not, unlike articles 48 and 50A, provide for the communicator to have reasonable belief that the recipient is a certified sophisticated investor. The *financial promotion* must not invite or induce the recipient to *engage in investment activity* with the *person* who has signed the certificate. But it may invite or induce the recipient to *engage in investment activity* with an associate or *group* member of that *person*.

8.14.28

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The exemption also requires that certain warnings are given to the potential investor. In this respect, article 50(3)(d) provides that the *financial promotion* must state that there is a significant risk of losing all monies invested or of incurring additional liability. In the *FCA*'s view, these are alternative statements and whichever is the relevant statement should be included. If there is no risk of incurring additional liability the statement may simply say that there is a risk of losing the sum invested. This is a mandatory requirement, although the exemption under article 50 may be used to promote *investments* for which either statement would be inappropriate or potentially confusing (for instance if it is used to offer gilts). The *FCA* cannot fetter its discretion to decide individual cases on their merits. However, where a *person* seeks to rely on the article 50 exemption for a *financial promotion* which would otherwise satisfy the terms of article 50 but which omits the statement required under article 50(3)(d), on the grounds that it

would be misleading to include it, the *FCA* would, generally, take no further action.

8.14.28A G The second exemption in article 50A disapplies the restriction in section 21 of the *Act* from any *financial promotions* which are made to a *person* who the communicator believes on reasonable grounds to be a self-certified sophisticated investor and which relate to one or more of the *specified investments* in ■ PERG 8.14.21G (1) to ■ (3) (Certified high net worth individuals (article 48)).

8.14.28B G A self-certified sophisticated investor is an individual who has signed a statement in the form prescribed in Part II (Statement for certified sophisticated investor) of Schedule 5 to the *Financial Promotion Order*. This requires the individual to certify that one or more of the following statements apply to him:

- (1) he is a member of a network or syndicate of business angels and has been so for at least the last six months prior to the date on which the certificate was signed; or
- (2) he has made more than one investment in an unlisted *company* in the two years prior to that date; or
- (3) he is working, or has worked in the two years prior to that date, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises; or
- (4) he is currently, or has been in the two years prior to that date, a director of a *company* with an annual turnover of at least £1 million.

8.14.28C G For the exemption to apply, the certificate must have been signed within twelve months of the date on which the communication is made. The validity of the statement is not affected by a defect in its wording or form provided the defect does not alter its meaning or involve failure to place certain paragraphs in bold.

8.14.28D G In addition, the *financial promotion* must be accompanied by:

- (1) a warning in the terms prescribed in article 50A(5) and which satisfies certain conditions regarding its form as set out in article 50A(6) – this warning must either be given in legible form at the time the communication is made or given orally at that time and a copy in legible form sent to the recipient within two business days; and
- (2) certain indications as set out in article 50A(7).

Associations of high net worth or sophisticated investors (article 51)

8.14.29 G (1) This exemption allows a *non-real time* or *solicited real time financial promotion* to be made to an association with a particular membership. Membership of this association must be reasonably believed to be wholly or predominantly made up of certified high net

worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified sophisticated investors. The *financial promotion* must not relate to an *investment* under the terms of which a *person* can incur additional liability of more than his original investment. In each case, whether the membership of an association is predominantly made up of certified high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified sophisticated investors will be a question of fact. The exemption may be expected to be likely to apply, for example, to *financial promotions* to business angel networks.

- (2) The exemption extends to *financial promotions* made to *persons* who are members of an association with a particular membership and not simply to *financial promotions* made to the operator or secretariat of the association. It would appear that this includes members who are not themselves certified high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified sophisticated investors.

Common interest group of a company (article 52)

8.14.30 G Article 52 concerns *non-real time* and *solicited real time financial promotions* about offers of *shares* or *debentures* or *alternative debentures* of a *company*. The offers must be made only to or be reasonably regarded as only directed at certain *persons*. These *persons* must belong to an identified group of *persons* who, when the *financial promotion* is made, might reasonably be regarded as having an existing and common interest with each other and the *company*.

8.14.31 G The exemption is subject to certain conditions. In broad terms, these are that the *financial promotion* must be accompanied by an indication:

- (1) that the directors or promoters of the *company* have taken all reasonable care to ensure that the *financial promotion* is true and not misleading;
- (2) that the directors or promoters have not limited their liability;
- (3) that any *person* who is in doubt about the investment should consult an *authorised person*; and
- (4) that:
 - (a) the directors or promoters of the *company* have taken all reasonable care to ensure that potential investors have access to relevant information about the *company*; or
 - (b) any *person* considering investing in the *company* should regard his subscription as helping the *company* to meet its non-financial objectives and only secondarily, if at all, as an investment.

Where the *financial promotion* is an outgoing electronic commerce communication, the reference in (3) to an *authorised person* includes a *person* who is entitled, under the law of an *EEA State* other than the *United Kingdom*, to carry on *regulated activities* in that *EEA State*.

8.14.32 **G** In line with other exemptions, article 52 contains indicators which, if all are met, mean that the *financial promotion* is directed at relevant *persons*.

8.14.33 **G** Example of situations where article 52 is likely to apply include offers made by:

- (1) a club or association which is considering incorporation to its members;
- (2) a private school to the parents of its pupils; and
- (3) a *company* to its existing members or creditors (where the exemption in article 43 might also be expected to apply).

8.14.34 **G** However, *persons* are not to be regarded as having a common interest with each other and a *company* simply because:

- (1) they would have such an interest if they became its members or creditors; or
- (2) they all carry on a particular trade or profession; or
- (3) they have an existing business relationship with the *company* whether by being its clients, customers, contractors, suppliers or otherwise.

Insolvency practitioners (article 55B)

8.14.34A **G** The *financial promotion* restriction (that is, the restriction in section 21 of the Act) does not apply to a communication which is a *non-real time financial promotion* or a *solicited real time financial promotion* by an insolvency practitioner who acts in that capacity (see the definition of “acting as an insolvency practitioner” in article 3 of the *Regulated Activities Order*). The exemption only applies where the communication is made in the course of carrying on an activity which is excluded from being a *regulated activity* by virtue of article 72H of the *Regulated Activities Order* (see ■ PERG 2.9.25G and ■ PERG 2.9.26G).

Sale of body corporate (article 62)

8.14.35 **G** The exemption in article 62 of the *Financial Promotion Order* applies to any *financial promotion communicated* by or on behalf of a *body corporate*, a *partnership*, an individual or a group of connected individuals. The *financial promotion* must relate to a transaction which is one to acquire or dispose of *shares* in a *body corporate* and either:

- (1) it is the case that:
 - (a) the *shares*, in addition, where appropriate, to any *shares* already held by the buyer, amount to 50% or more of the voting *shares* in the *body corporate*; and
 - (b) the party or parties who act as seller is a *body corporate*, a *partnership*, a single individual or a group of connected individuals and the party or parties who act as buyer is also one or other of these (but not necessarily the same type as the seller); or

(2) where the conditions in (1) are not met, but the object of the transaction may reasonably be regarded as being the acquisition of day to day control of the affairs of the *body corporate*.

8.14.36 **G** A group of connected individuals is defined in article 62(4) of the *Financial Promotion Order* as being a group of *persons* each of whom is (for sellers) or is to be (for buyers):

- (1) a director or manager of the *body corporate*;
- (2) a *close relative* of such a *person*; or
- (3) a *person* acting as trustee for a *person* as referred to in (1) or (2)

8.14.37 **G** In the *FCA's* view, a main aim of the exemption (see ■ PERG 8.14.35G (1)) is to remove from the scope of section 21 a *financial promotion* concerning the sale of a corporate business by a *person* who, either alone or with others, controls the business to another *person* who, either alone or with others, proposes to control the business.

8.14.38 **G** In any case where the conditions referred to in ■ PERG 8.14.35G (1) are not met, it will be necessary to consider the circumstances in which the transaction is to take place in order to determine whether its objective is the acquisition of day-to-day control (see ■ PERG 8.14.35G (2)). In situations where the 50% holding of voting *shares* test is not met it is still possible that the objective of a transaction could be the acquisition of day-to-day control. For instance, because the remaining shareholders represent a large number of small shareholders who it is reasonable to suppose will not regularly act in concert.

8.14.39 **G** Where the nature of the parties test (see ■ PERG 8.14.35G (1)(b)) is not met and the purpose for which the *person* who is the buyer holds or proposes to hold the voting *shares* is considered, it may still be the case that the objective of the transaction is the acquisition of day-to-day control. This may typically be because there are two or more parties involved as buyer and they do not collectively represent a group of connected individuals as defined. For example, this may happen where the *shares* are to be held by one of the following *persons* who intends to acquire control either alone or with others:

- (1) a *person* (of either sex) with whom a *person* who is to be a manager or director cohabits; or
- (2) a venture capital company which proposes to invest in the *company* and which is to provide a representative to act as a manager or director of the *company*; or
- (3) a private *company* used as a vehicle to hold *shares* by a *person* who is to be a manager or director of the *company* (or his *close relative*).

8.14.40 **G** In the *FCA's* opinion, provided that the purpose of the transaction is for the buyer to acquire the necessary control, it is irrelevant who is the seller. The exemption specifically applies to *financial promotions* which are

communicated on behalf of the parties or potential parties to the transaction.

Pension products offered to employees by employers (article 72) and third parties (article 72A)

8.14.40A G

Article 72 exempts any *financial promotion* made by an employer to an employee in relation to a *group personal pension scheme* or a *stakeholder pension scheme*. This is subject to certain requirements as follows:

- (1) the *financial promotion* must inform the employee that the employer will make a contribution to the pension that the employee will receive from the pension scheme to which the *financial promotion* relates in the event of the employee becoming a member;
- (2) the employer must not receive or have received any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of making the communication;
- (3) the employer must notify the employee in writing, prior to the employee becoming a member, of the amount of the contribution that the employer will make to the scheme in respect of that employee or the basis on which the contribution will be calculated; and
- (4) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek independent advice from an *authorised person* or an *appointed representative*.

8.14.40AA G

Article 72A exempts any *financial promotion* made to an employee by or on behalf of a person ("A") in relation to a *group personal pension scheme* or a *stakeholder pension scheme*. This is subject to certain requirements as follows:

- (1) the employer and A must have entered into a written contract specifying the terms on which the communication may be made;
- (2) in the case of a communication made by a person ("B") on behalf of A, A and B must also have entered into a written contract specifying the terms on which the communication may be made;
- (3) the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of the communication being made;
- (4) the employer must make a contribution to the scheme in the event of the employee becoming a member of the scheme and the communication must contain a statement informing the employee of this;
- (5) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*; and

- (6) the employer or A must notify the employee in writing prior to the employee becoming a member of the *scheme* of:
 - (a) the amount of the contribution that the employer will make to the *scheme* in respect of that employee, or the basis on which the contribution will be calculated; and
 - (b) any remuneration A or B has received, or will receive, as a consequence of the employee becoming a member of the *scheme*, or the basis on which any such remuneration will be calculated.

Insurance product offers communicated to employees by employers (article 72B) and third parties (article 72C)

8.14.40AB G

Article 72B exempts any *financial promotion* made by an employer to an employee in relation to *work-related insurance*. This is subject to certain requirements as follows:

- (1) where the provider of the insurance is not the employer, the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of making the communication; and
- (2) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*.

8.14.40AC G

Article 72C exempts any *financial promotion* made to an employee by or on behalf of a person ("A") in relation to *work-related insurance*. This is subject to certain requirements as follows:

- (1) the employer and A must have entered into a written contract specifying the terms on which the communication may be made;
- (2) in the case of a communication made by a person ("B") on behalf of A, A and B must also have entered into a written contract specifying the terms on which the communication may be made;
- (3) the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of the communication being made;
- (4) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*; and
- (5) the employer or A must notify the employee in writing prior to the employee entering into a contract for the *work-related insurance* of any remuneration A or B has received, or will receive, as a consequence of the employee entering into the contract, or the basis on which any such remuneration will be calculated.

Staff mortgage offers communicated to employees by employers (article 72D) and third parties (article 72E)

8.14.40AD G

Article 72D exempts any *financial promotion* made by an employer to an employee in relation to a *staff mortgage*. This is subject to certain requirements as follows:

- (1) where the provider of the *staff mortgage* is an undertaking in the same group as the employer, the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of making the communication; and
- (2) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*.

8.14.40AE G

Article 72E exempts any *financial promotion* made to an employee by or on behalf of a person (“A”) in relation to a *staff mortgage*. This is subject to certain requirements as follows:

- (1) the employer and A must have entered into a written contract specifying the terms on which the communication may be made;
- (2) in the case of a communication made by a person (“B”) on behalf of A, A and B must also have entered into a written contract specifying the terms on which the communication may be made;
- (3) where the provider of the *staff mortgage* is an undertaking in the same group as the employer, the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of the communication being made;
- (4) in the case of a non-real time communication, the communication must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*; and
- (5) the employer or A must notify the employee in writing prior to the employee entering into the *staff mortgage* of any remuneration A or B has received, or will receive, as a consequence of the employee entering into the *staff mortgage*, or the basis on which any such remuneration will be calculated.

Credit agreements offered to employees by employers (article 72F)

8.14.40AEA G

Article 72F exempts any *financial promotion* which is made to an employee by or on behalf of a *person* in relation to an exempt staff loan. An exempt staff loan is defined as a *credit agreement* which is:

- (1) offered by a *lender* to a *borrower* as an incident of employment with the *lender*, or with an undertaking in the same group as the *lender*; and

- (2) an exempt agreement under a provision of article 60G (exempt agreements: exemptions relating to the total charge for credit) of the *Regulated Activities Order* other than article 60G(2) (relating to loans by *credit unions*). *Guidance* on article 60G can be found in
 - PERG 2.7.19I G.

8.14.40AF G The exemptions described in ■ PERG 8.14.40A G to ■ PERG 8.14.40AEA G should enable employers (and their contracted service providers) to promote employee benefits packages that include any *pension schemes*, *work-related insurance schemes*, *staff mortgages* and certain staff loans to employees without undue concern that they may be breaching the restriction in section 21 of the Act. ■ PERG 8.14.34 G (Communications by employers and contracted service providers to employees) has further *guidance* about the application of section 21 to employers and contracted service providers generally.

Advice centres (article 73)

8.14.40B G Article 73 exempts any *financial promotion* made by a *person* in the course of carrying out his duties as an adviser for, or employee of, an advice centre. This is provided the *financial promotion* relates to:

- (1) a *home finance transaction*; or
- (2) rights under, or rights to or interests in rights under, a *life policy*; or
- (3) a child trust fund within the meaning of section 1(2) of the Child Trust Funds Act 2004.

8.14.40C G An advice centre is defined in article 73 as a body which:

- (1) gives advice which is free and in respect of which it does not receive any fee, commission or other reward;
- (2) provides debt advice as its principal financial services activity; and
- (3) in the case of a body which is not part of a local authority, holds adequate professional indemnity insurance or a guarantee providing comparable cover.

This exemption should be of particular use to bodies such as Citizens Advice Bureaux.

Other issues

8.14.41 G Several exemptions, including article 43 of the *Financial Promotion Order* (Members and creditors of certain bodies corporate), apply only in relation to relevant *investments* being *shares* or *debentures* or *alternative debentures* in the *body corporate* or a member of its group, or *warrants* or *certificates representing certain securities* relating to such *shares* or *debentures* or *alternative debentures*. In the FCA's view, an exchangeable *debt security* which is partly a *debenture* or *alternative debenture* and partly an *option* is a relevant *investment* for these purposes.

- 8.14.42** **G** The exemptions for bearer instruments (articles 41 and 42 of the *Financial Promotion Order*) relate to *financial promotions* made to or directed at *persons* entitled to bearer instruments. For clarity, the *FCA* takes the view that *persons* who hold bearer instruments through a clearing system such as Euroclear or Clearstream are *persons* entitled to those instruments for the purposes of articles 41 and 42.