

Chapter 8

Financial promotion and related activities

8.2 Introduction

- 8.2.1** **G** The effect of section 21 of the *Act* (Restrictions on financial promotion) is that in the course of business, an *unauthorised person* must not *communicate* an invitation or inducement to *engage in investment activity* or to *engage in claims management activity* unless either the content of the communication is *approved* for the purposes of section 21 by an *authorised person* or it is exempt. Under section 25 of the *Act* (Contravention of section 21), a *person* commits a criminal offence if he carries on activities in breach of the restriction in section 21 of the *Act*. A *person* who commits this criminal offence is subject to a maximum of two years imprisonment and an unlimited fine. However, it is a defence for a *person* to show that he took all reasonable precautions and used all due diligence to avoid committing the offence.
- 8.2.2** **G** Another consequence of a breach of section 21 of the *Act* is that certain agreements could be unenforceable (see section 30 of the *Act* (Enforceability of agreements resulting from unlawful communications)). This applies to agreements entered into by a *person* as a customer as a consequence of a communication made in breach of section 21.
- 8.2.3** **G** An *authorised person* will not breach section 21 when *communicating a financial promotion*. Nevertheless, this *guidance* may be relevant where an *authorised person* needs to know whether the *financial promotion rules* apply to a particular communication.
- 8.2.4** **G** A *person* who is concerned to know whether his communications will require *approval* or, if he is an *authorised person*, whether the appropriate *financial promotion rules* will apply to his communications will need to consider the following:
- (1) am I making a communication or causing a communication to be made? (see ■ PERG 8.6);
 - (2) if so, is it an invitation or inducement? (see ■ PERG 8.4);
 - (3) if so, does the invitation or inducement relate to a *controlled investment*? (see ■ PERG 8.7);
 - (4) if so, is the invitation or inducement to *engage in investment activity*? (see ■ PERG 8.7);
 - (4A) alternatively, is the invitation or inducement to *engage in claims management activity*? (see ■ PERG 8.7A);

- (5) if so, is it made in the course of business? (see ■ PERG 8.5);
- (6) if so, and the *financial promotion* originates outside the *United Kingdom*, is it capable of having an effect in the *United Kingdom*? (see ■ PERG 8.8);
- (7) if so, or if the answer to (5) is yes and the *financial promotion* was made in the *United Kingdom*, is the promotion exempt? (see ■ PERG 8.12 to ■ PERG 8.15 and ■ PERG 8.21);
- (8) if not, am I an *authorised person*?

8.2.5 **G** If the answer to ■ PERG 8.2.4G (8) is yes then the appropriate *financial promotion rules* will potentially apply (subject to the application provisions in ■ COBS 1 and ■ COBS 4). If the answer is no, then the promotion must be *approved* by an *authorised person* if it is a *non-real time financial promotion*. *Authorised persons* are not allowed to *approve real time financial promotions* (see ■ COBS 4.10.4 R). ■ PERG 8.36.1G contains a flowchart explaining these steps.

8.2.6 **G** [deleted]

8.2.7 **G** The restriction in section 21 applies to all forms of communication such as advertising, broadcasts, websites, e-mails and all other forms of written or oral communication whether sent to one *person* or many. However, the restrictions only apply to a communication made in the course of business and not, for example, to personal communications between individuals.

8.2.8 **G** There are extensive exemptions in the *Financial Promotion Order*. This is explained in greater detail in ■ PERG 8.11 to ■ PERG 8.15 and ■ PERG 8.21.