

Chapter 8

Financial promotion and related activities

8.9 Circumstances where the restriction in section 21 does not apply

- 8.9.1** G Section 21(2) of the *Act* sets out two circumstances in which a *financial promotion* will not be caught by the restriction in section 21(1). These are where the *communicator* is an *authorised person* or where the content of the *financial promotion* has been approved for the purposes of section 21 by an *authorised person*. Where *approval* is concerned it must be specifically for the purposes of enabling the *financial promotion* to be *communicated* by *unauthorised persons* free of the restriction under section 21. For example, if a solicitor who is an *authorised person* approves a *financial promotion* for legality generally, that would not suffice unless the solicitor also specifically *approves* the *financial promotion* for the purposes of section 21. And it will not be enough that an *authorised person* has ensured that the *financial promotion* complies with the appropriate *financial promotion rules* purely so that he can *communicate* it himself. In the *FCA's* view an *unauthorised person* should be able to rely on a statement made by an *authorised person* on the face of a *financial promotion* that its approval has been given for the purpose of section 21. Such *approval* may be stated to be made for limited purposes. For example, as with the *approval* of a *financial promotion* for an *unregulated collective investment scheme* (see ■ PERG 8.20). In other cases, the *unauthorised person* may satisfy himself that it is evident from the facts that *approval* has been given for the purposes of section 21.
- 8.9.2** G Where an *authorised person* makes a *financial promotion*, he is not subject to the restriction in section 21. So, the *communication* of the *financial promotion* by the *authorised person* will not be a criminal offence under the provisions of section 25 of the *Act* (Contravention of section 21) and any resulting contract will not be unenforceable under section 30 of the *Act* (Enforceability of agreement resulting from unlawful communications). However, the appropriate *financial promotion rules* may apply wholly or partially to any such *financial promotion*.
- 8.9.3** G An *unauthorised person* may wish to pass on a *financial promotion* made to him by an *authorised person*. In this case, the fact that the *financial promotion* was made to him by an *authorised person* will not be enough for the restriction in section 21 not to apply to him. The *authorised person* must also both have *approved* its content and have done so for the purpose of section 21 of the *Act*. If an *authorised person* wishes to ensure that an *unauthorised person* can *communicate* a *financial promotion* made by the *authorised person* to third parties, it may *approve* its own *financial promotion* for the purposes of section 21 of the *Act* (see ■ COBS 4.10.3G (2)).

8.9.4 **G** With *approval* generally, issues may arise as to what would be subject to the restrictions in section 21 where an invitation or inducement to *engage in investment activity* or to *engage in claims management activity* is made through a publication, broadcast or website or is accompanied by other material. In any such instances, it is necessary to consider the circumstances in which the *financial promotion* is made. For example, where a *financial promotion* takes the form of an advertisement or advice in a newspaper, broadcast or website, the rest of the newspaper, broadcast or website would not ordinarily be part of the *financial promotion*. There may, of course, be a number of *financial promotions* in the same publication, broadcast or website. They will be regarded as separate *financial promotions* unless it is clear that they are part of the same invitation or inducement. ■ PERG 8.4.28 G offers *guidance* about when accompanying material may be part of a *financial promotion*.

8.9.5 **G** The restriction in section 21 is also disapplied by means of an order made under section 21(5) (the *Financial Promotion Order*). This contains a number of specific exemptions which are referred to in ■ PERG 8.12 to ■ PERG 8.15, ■ PERG 8.17 and ■ PERG 8.21.