

## Chapter 8

# Financial promotion and related activities

## 8.9 Circumstances where the restriction in section 21 does not apply

### 8.9.1

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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.

### 8.9.1A

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- (1) Section 21(2A) of the *Act* specifies that the content of a *financial promotion* can only be *approved* for the purposes of section 21 by an *authorised person*:
  - (a) who is a *permitted approver* in relation to the *financial promotion*; or
  - (b) within the scope of an *approver permission exemption*.
- (2) Exemptions in the *Financial Promotion Requirement Exemption Regulations* allow an *authorised person* (A) to *approve* the content of a *financial promotion* where the content has been prepared by:
  - (a) A (for the purposes of communication by an *unauthorised person*) (see ■ PERG 8.9.3G);
  - (b) an *unauthorised person* (U), where both A and U are members of the same *group*;
  - (c) an *appointed representative* of A, in relation to any *regulated activity* comprised in the carrying on of the business for which A has accepted responsibility.

(3) In relation to ■ PERG 8.9.1AG(2)(c), the relevant exemption allows a *firm to approve a financial promotion prepared by its appointed representative where that financial promotion is made for the purposes of the appointed representative's exempt activities.*

**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 them by an *authorised person*. In this case, the fact that the *financial promotion* was made to them by an *authorised person* will not be enough for the restriction in section 21 not to apply to them. 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)). An *approver permission exemption* allows an *authorised person* to *approve* its own *financial promotion* without requiring *approver permission*.

**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.