

Chapter 9

Meaning of open-ended investment company

9.10 Significance of being an open-ended investment company

Marketing of shares or securities issued by body corporate

- 9.10.1 **G** A number of controls apply under the *Act* to the promotion of *shares* or *securities* that are issued by any *body corporate*. These controls differ according to whether the *person* making the promotion is an *unauthorised person* (see ■ PERG 9.10.2 G) or an *authorised person* (see ■ PERG 9.10.3 G to ■ PERG 9.10.6 G). In addition, where a *body corporate* is not an *open-ended investment company*:
- (1) the requirements of *Prospectus Rules* relating to the publication of an approved prospectus may apply if its *securities* are offered to the public in the *United Kingdom*; and
 - (2) the listing requirements under Part VI of the *Act* (Official listing) will apply if its *securities* are to be *listed*.
- 9.10.2 **G** The controls under the *Act* that apply to promotions of *shares* or *securities* by *unauthorised persons* are in section 21 of the *Act* (Restrictions on financial promotion). These controls apply where an *unauthorised person* makes a *financial promotion* in, or from, the *United Kingdom* that relates to the *shares* in or *securities* of any *body corporate*. The same controls apply regardless of whether the *shares* or *securities* being promoted are issued by a *body corporate* that is an *open-ended investment company* or one that is not. There are a number of exemptions from the restriction in section 21 of the *Act*. These are explained in ■ PERG 8 (Financial promotion and related activities).
- 9.10.3 **G** Promotions made by *authorised persons* in the *United Kingdom* are generally subject to the controls in ■ COBS 4 (Communicating with clients, including financial promotions). However, in the case of *shares* in, or *securities* of, a *body corporate* which is an *open-ended investment company*, additional controls are imposed by Chapter II of Part XVII of the *Act* (Restrictions on promotion of collective investment schemes) (see ■ PERG 8.20). Section 238 of the *Act* (Restrictions on promotion) prevents an *authorised person* communicating any invitation or inducement to buy *shares* or *securities* issued by an *open-ended investment company*. Section 240 of the *Act* (Restriction on approval of promotion) prevents an *authorised person* approving a *financial promotion* to be communicated by an *unauthorised person*. This is if the *authorised person* would not be able to promote the share or security himself.

9.10.4 G The restrictions mentioned in ■ PERG 9.10.3 G are subject to a number of exemptions. For example, the controls in sections 238 and 240 do not apply to *financial promotions* about certain kinds of *collective investment scheme*. These are:

- (1) *open-ended investment companies* formed in Great Britain and authorised by the FCA under the Open-ended Investment Companies Regulations 2001;
- (2) *authorised unit trust schemes*;
- (2A) *authorised contractual schemes*; and
- (3) *collective investment schemes* that are *recognised schemes* (see ■ COLL 9 (Recognised schemes)).

9.10.5 G There are a number of other exemptions in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/1060). In general terms, these exemptions are equivalent to the exemptions from section 21 of the Act that apply to *units*. There is *guidance* on those exemptions in ■ PERG 8.20.3 G (Additional restriction on the promotion of collective investment schemes).

9.10.6 G The FCA has also made *rules* under section 238(5) which allow *authorised persons* to *communicate* or *approve* a *financial promotion* for an *open-ended investment company* that is an *unregulated collective investment scheme* (that is, one that does not fall within ■ PERG 9.10.4 G). The circumstances in which such a communication or approval is allowed are explained in ■ COBS 4.12B.7R.

Implications for regulated activities

9.10.7 G In the *Regulated Activities Order*, shares in or securities of an *open-ended investment company* are treated differently from *shares* in other *bodies corporate*. They are treated as *units* in a *collective investment scheme* under article 81 of the *Regulated Activities Order* (Units in a collective investment scheme) rather than *shares* under article 76 (Shares etc).

9.10.8 G A *person* who carries on in the *United Kingdom* the business of engaging in any *regulated activity* that relates to *units* or *shares* will need to be an *authorised person* (see ■ PERG 2.7 and ■ PERG 2.8 (Authorisation and regulated activities)).

9.10.9 G In order to be *authorised*, a *person* must have *permission* to carry on the *regulated activities* in question. What the *permission* needs to cover may differ according to whether the *regulated activity* being carried on relates to *units* or *shares*. So, for example, a *body corporate* that is an *open-ended investment company* will need *permission* if it carries on the *regulated activity* of *dealing as principal* or *agent*, *arranging* (bringing about) or *making arrangements with a view to transactions* in its own shares or securities in the *United Kingdom*. This applies also to a *body corporate* that is not an *open-ended investment company* except that it will not need *permission* to issue or arrange for the issue of its own *shares* or *securities*.

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- (1) A person carrying on the regulated activity of establishing, operating or winding up a collective investment scheme that is constituted as an open-ended investment company will need permission for those activities. In line with section 237(2) of the Act (Other definitions), the operator of a collective investment scheme that is an open-ended investment company is the company itself and therefore the starting point for an open-ended investment company that is incorporated in the United Kingdom is that it needs permission to operate itself. However, where an open-ended investment company is managed by a firm with a Part 4A permission to manage an AIF or manage a UK UCITS the exclusion described in ■ PERG 2.8.10 G (2)(b) means that the open-ended investment company would not carry on the regulated activity of establishing, operating or winding up a collective investment scheme.
- (2) If an open-ended investment company is authorised by the FCA under the OEIC Regulations it is an authorised person under Schedule 5 of the Act. As a result of paragraph 2(2) of Schedule 5 of the Act the company has permission, in so far as it is a regulated activity (other than managing an AIF), to carry on the operation of the scheme and any regulated activity in connection with or for the purposes of the operation of the scheme. As explained in (1) the company may not need the permission of establishing, operating or winding up a collective investment scheme in any event. However, as a result of article 18 of the Regulated Activities Order it would otherwise need permission to deal as principal because an open-ended investment company is excluded from the definition of a "company" for the purposes of that article.
- (3) If an open-ended investment company is authorised by the FCA under the OEIC Regulations and has only one director, the OEIC regulations require that director to be a body corporate which is an authorised person and which has a Part 4A permission to carry on the regulated activity of managing a UK UCITS or managing an AIF. This reflects the fact that, in those circumstances, the director is a separate legal person who is responsible for overseeing compliance by the company with requirements implementing the UCITS Directive or AIFMD.