

**FINANCIAL PROMOTION GUIDANCE INSTRUMENT 2002**

**Powers exercised**

- A. The Financial Services Authority amends the Authorisation manual, the Conduct of Business sourcebook, the Professional firms sourcebook and the Glossary in the exercise of the power in section 157(1) of the Financial Services and Markets Act 2000 (Guidance).

**Commencement**

- B. This instrument comes into force on 1 June 2002.

**Amendments to the Authorisation manual**

- C. The Authorisation manual is amended by inserting, as AUTH App 1, the provisions in Annex A to this instrument.

**Amendments to the Conduct of Business sourcebook, the Professional Firms sourcebook and the Glossary**

- D. The Conduct of Business sourcebook, the Professional Firms sourcebook and the Glossary are amended in accordance with Annexes B, C and D to this instrument.

**Citation**

- E. This instrument may be cited as the Financial Promotion Guidance Instrument 2002.

By order of the Board  
16 May 2002

## **Annex A**

# Appendices



# Appendix 1 Appendix 1. Financial promotion and related activities

## 1.1 Application and purpose

### Application

- 1.1.1 **G**<sub>/1</sub> This appendix applies to *persons* who need to know whether their communications are subject to or comply with the *Act*. It also helps them decide whether their activities in making or helping others to make *financial promotions* are *regulated activities*.

### Purpose of guidance

- 1.1.2 **G**<sub>/1</sub> The purpose of this *guidance* is two fold:
- (1) to outline the restriction on financial promotion under section 21 of the *Act* (*Restrictions on financial promotion*) and the main exemptions from this restriction; and
  - (2) to outline the main circumstances in which *persons* who are primarily involved in making or helping others to make *financial promotions* may be conducting *regulated activities* requiring *authorisation* or exemption themselves; this part of the *guidance* may also be of more general relevance to *persons* who may be concerned whether or not they are carrying on the *regulated activities* of *advising on investments* or *making arrangements with a view to transactions in investments*.
- 1.1.3 **G**<sub>/1</sub> In particular, this *guidance* covers:
- (1) invitations and inducements (see ■ AUTH App 1.4);
  - (2) meaning of 'in the course of business' (see ■ AUTH App 1.5);
  - (3) meaning of '*communicate*' (see ■ AUTH App 1.6);
  - (4) meaning of '*engage in investment activity*' (see ■ AUTH App 1.7);
  - (5) meaning of 'having an effect in the *United Kingdom*' (see ■ AUTH App 1.8);

- (6) circumstances where the restriction in section 21 does not apply (see ■ AUTH App 1.9);
- (7) types of *financial promotion*, including:
  - (a) meaning of '*real time financial promotion*' (see ■ AUTH App 1.10.2G); and
  - (b) meaning of '*unsolicited real time financial promotion*' (see ■ AUTH App 1.10.8G);
- (8) types of exemption under the *Financial Promotion Order*, including:
  - (a) exemption for certain one-off promotions (see ■ AUTH App 1.14.3G);
  - (b) exemption for *financial promotions* not directed at the *United Kingdom* (see ■ AUTH App 1.12.2G);
  - (c) exemptions for *financial promotions* by journalists and in broadcasts (see ■ AUTH App 1.12.23G);
- (9) *financial promotions* concerning *deposits* and *contracts of insurance* other than *life policies* (see ■ AUTH App 1.13);
- (10) *financial promotions* concerning promotions by members of the professions (see ■ AUTH App 1.15);
- (11) *financial promotions* concerning funeral plans (see ■ AUTH App 1.16);
- (12) *financial promotions* concerning the Lloyd's market (see ■ AUTH App 1.18);
- (13) additional restrictions on the promotion of:
  - (a) *life policies* (see ■ AUTH App 1.19);
  - (b) *collective investment schemes* (see ■ AUTH App 1.20);
- (14) *company* statements, announcements and briefings (see ■ AUTH App 1.21);
- (15) *financial promotions* made on the Internet (see ■ AUTH App 1.22);
- (16) *regulated activities* :
  - (a) *advising on investments* (see ■ AUTH App 1.24);
  - (b) *making arrangements with a view to transactions in investments* (see ■ AUTH App 1.32); and
- (17) the business test for *regulated activities* (see ■ AUTH App 1.34).

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This *guidance* is issued under section 157 of the *Act*. It represents the FSA's views and does not bind the courts. For example, it would not bind the courts in an action for damages brought by a *private person* for breach of a *rule* (see section 150 of the *Act* (Actions for damages)), or in relation to the enforceability of a contract where there has been a breach of sections 19 (The general prohibition) or 21 (Restrictions on financial promotion) of the *Act* (see sections 26 to 30 of the *Act* (Enforceability of agreements)). Although the *guidance* does not bind the courts, it may be of persuasive effect for a court considering whether it would be just and equitable to allow a contract to be enforced (see sections 28(3) and 30(4) of the *Act*). Anyone

reading this *guidance* should refer to the *Act* and to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (SI 2001/1335) (as amended) (the *Financial Promotion Order*) and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (as amended) (the *Regulated Activities Order*). These should be used to find out the precise scope and effect of any particular provision referred to in the *guidance* and any reader should consider seeking legal advice if doubt remains. If a *person* acts in line with the *guidance* in the circumstances mentioned by it, the *FSA* will proceed on the footing that the *person* has complied with the aspects of the requirement to which the *guidance* relates.

## 1.2 Introduction

**1.2.1** G<sub>/1</sub> 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* 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.

**1.2.2** G<sub>/1</sub> 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.

**1.2.3** G<sub>/1</sub> 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 ■ **COB 3** (Financial promotion) applies to a particular communication. For example, to find out if the communication would be subject to an exemption if it were made by an *unauthorised person* (see ■ **COB 3.2.4R** and ■ **COB 3.2.5R(2)**).

**1.2.4** G<sub>/1</sub> A *person* who is concerned to know whether his communications will require *approval* or, if he is an *authorised person*, whether ■ **COB 3** 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 ■ **AUTH App 1.6**);
- (2) if so, is it an invitation or inducement? (see ■ **AUTH App 1.4**);
- (3) if so, does the invitation or inducement relate to a *controlled investment*? (see ■ **AUTH App 1.7**);
- (4) if so, is the invitation or inducement to *engage in investment activity*? (see ■ **AUTH App 1.7**);

- (5) if so, is it made in the course of business? (see ■ AUTH App 1.5);
- (6) if so, and the *financial promotion* originates outside the *United Kingdom*, is it capable of having an effect in the *United Kingdom*? (see ■ AUTH App 1.8);
- (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 ■ AUTH App 1.12 to ■ AUTH App 1.15 and ■ AUTH App 1.21).
- (8) if not, am I an *authorised person* ?

- 1.2.5** G<sub>/1</sub> If the answer to ■ AUTH App 1.2.4G(8) is yes then ■ COB 3 will apply (subject to additional exemptions in ■ COB 3.2.5R). 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 ■ COB 3.12.2R). ■ AUTH App 1.36.2 contains a flowchart explaining these steps.
- 1.2.6** G<sub>/1</sub> One of the main effects of the *Act* is to bring together in one statute the regulation of *persons* who provide financial services. These would previously have been regulated under the Financial Services Act 1986, the Banking Act 1987, the Insurance Companies Act 1982 or under laws relating to *building societies*, *friendly societies* and *credit unions*. The *Act* also consolidates the provisions of those statutes which governed advertising and making unsolicited personal communications.
- 1.2.7** G<sub>/1</sub> 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.
- 1.2.8** G<sub>/1</sub> There are extensive exemptions in the *Financial Promotion Order*. This is explained in greater detail in ■ AUTH App 1.11 to ■ AUTH App 1.15 and ■ AUTH App 1.21.

## 1.3 Financial promotion

- 1.3.1** G<sub>/1</sub> The basic restriction on the *communication of financial promotions* is in section 21(1) of the *Act*. Sections 21(2) and (5) disapply the restriction in certain circumstances. Their combined effect is that a *person* must not, in the course of business, *communicate* an invitation or inducement to *engage in investment activity* unless :
- (1) he is an *authorised person*; or
  - (2) the content of the communication is *approved* for the purposes of section 21 by an *authorised person*; or
  - (3) the communication is exempt under an order made by the Treasury under section 21(5) – the *Financial Promotion Order* (as amended).

- 1.3.2** **G**<sub>/1</sub> Section 21 of the *Act* does not itself (other than in its heading and side-note) refer to a ‘*financial promotion*’ but rather to the *communication* of ‘an invitation or inducement to *engage in investment activity*’. References in this *guidance* to a *financial promotion* mean an invitation or inducement to *engage in investment activity*.
- 1.3.3** **G**<sub>/1</sub> Section 21 of the *Act* contains a number of key expressions or phrases which will determine whether or not it will apply. These are:
- (1) ‘invitation or inducement’ (see ■ AUTH App 1.4);
  - (2) ‘in the course of business’ (see ■ AUTH App 1.5);
  - (3) ‘*communicate*’ (see ■ AUTH App 1.6);
  - (4) ‘*engage in investment activity*’ (see ■ AUTH App 1.7); and
  - (5) ‘having an effect in the *United Kingdom*’ (see ■ AUTH App 1.8).
- 1.3.4** **G**<sub>/1</sub> The *FSA*’s views as to the meaning of these are explained in ■ AUTH App 1.4 to ■ AUTH App 1.8.
- 1.3.5** **G**<sub>/1</sub> In addition, this *guidance* deals with other factors such as when the exemptions in the *Financial Promotion Order* can be applied, including the exemptions relating to territorial scope and one-off *financial promotions*.
- 1.3.6** **G**<sub>/1</sub> Section 21 of the *Act* was commenced, for most purposes, on 1 December 2001. However, it did not come into effect as respects *financial promotions* about *funeral plan contracts* until 1 January 2002 and will not come into effect for *financial promotions* about agreements for qualifying credit until a date in 2004 yet to be set by the Treasury. *Guidance* on the application of section 21 to *financial promotions* about funeral plans is in ■ AUTH App 1.16.

## 1.4 Invitation or inducement

### Promotional element

- 1.4.1** **G**<sub>/1</sub> The *Act* does not contain any definition of the expressions ‘invitation’ or ‘inducement’, leaving them to their natural meaning. The ordinary dictionary entries for ‘invitation’ and ‘inducement’ offer several possible meanings to the expressions. An ‘invitation’ is capable of meanings ranging from merely asking graciously or making a request to encouraging or soliciting. The expression ‘inducement’ is given meanings ranging from merely bringing about to prevailing upon or persuading. In the *FSA*’s view it is appropriate, in interpreting the expressions, to take due account of the context in which they are being used and their purpose.
- 1.4.2** **G**<sub>/1</sub> The Treasury, responding to consultation on the draft *Financial Promotion Order*, stated its intention that only communications containing a degree of incitement would amount to ‘inducements’ and that communications of purely factual information would not. This is provided the facts are presented in such a way that



they do not also amount to an invitation or inducement. This was made clear both in the Treasury's consultation document on financial promotion and during the passage of the *Act* through Parliament. Under questioning, the Minister confirmed that the government's policy was "to capture promotional communications only". The Minister also stated that 'inducement', in its Bill usage, already incorporates an element of design or purpose on the part of the person making the communication" and that "design or purpose is implicit in this context" (Hansard HL, 18 May 2000 cols 387 and 388). In the same debate, the Minister stated that the restriction would not apply to such things as "public announcements, exchange of draft share purchase agreements in corporate finance transactions or cases in which the recipient of a communication simply misunderstands its contents and engages in investment activity as a result".

**1.4.3** G<sub>/1</sub> The *FSA* recognises that the matter cannot be without doubt. However, it is the *FSA*'s view that the context in which the expressions 'invitation' or 'inducement' are used clearly suggests that the purpose of section 21 is to regulate communications which have a promotional element. This is because they are used as restrictions on the making of financial promotions which are intended to have a similar effect to restrictions on advertising and unsolicited personal communications in earlier legislation. Such communications may be distinguished from those which seek merely to inform or educate about the mechanics or risks of investment. In this respect, the *FSA* supports the views expressed by Ministers as referred to in ■ AUTH App 1.4.2G. To the extent that doubt may remain as to the true meaning of 'invitation' or 'inducement' when used in section 21, it is the opinion of the *FSA* that the courts are likely to take account of the ministerial statements under the judgement in *Pepper (Inspector of Taxes) v Hart* [1993] AC593.

**1.4.4** G<sub>/1</sub> The *FSA* considers that it is appropriate to apply an objective test to decide whether a communication is an invitation or an inducement. In the *FSA*'s view, the essential elements of an invitation or an inducement under section 21 are that it must both have the purpose or intent of leading a *person* to *engage in investment activity* and be promotional in nature. So it must seek, on its face, to persuade or incite the recipient to *engage in investment activity*. The objective test may be summarised as follows. Would a reasonable observer, taking account of all the circumstances at the time the communication was made:

- (1) consider that the *communicator* intended the communication to persuade or incite the recipient to *engage in investment activity* or that that was its purpose; and
- (2) regard the communication as seeking to persuade or incite the recipient to *engage in investment activity*.

It follows that a communication which does not have any element of persuasion or incitement will not be an invitation or inducement under section 21.

### Invitations

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**1.4.5** G<sub>/1</sub> An invitation is something which directly invites a *person* to take a step which will result in his *engaging in investment activity*. It follows that the invitation must cause the *engaging in investment activity*. Examples of an invitation include:

- (1) *direct offer financial promotions*;
- (2) a prospectus with application forms; and

- (3) Internet promotions by brokers where the response by the recipient will initiate the activity (such as ‘register with us now and begin dealing online’).

A communication may contain a statement that it is not an invitation. Such statements may be regarded as evidence that the communication is not an invitation unless its contents indicate otherwise.

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Merely asking a *person* if they wish to enter into an agreement with no element of persuasion or incitement will not, in the FSA’s view, be an invitation under section 21. For example, the FSA does not consider an invitation to have been made where:

- (1) a trustee or nominee receives an offer document of some kind and asks the beneficial owner whether he wishes it to be accepted or declined;
- (2) a *person* such as a professional adviser enquires whether or not his client would be willing to sign an agreement; or
- (3) a *person* is asked to sign an agreement on terms which he has already accepted or to give effect to something which he has already agreed to do.

### Inducements

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An inducement may often be followed by an invitation or vice versa (in which case both communications will be subject to the restriction in section 21 of the *Act*). An inducement may be described as a link in a chain where the chain is intended to lead ultimately to an agreement to *engage in investment activity*. But this does not mean that all the links in the chain will be an inducement or that every inducement will be one to *engage in investment activity*. Only those that are a significant step in persuading or inciting or seeking to persuade or incite a recipient to *engage in investment activity* will be inducements under section 21. The FSA takes the view that the mere fact that a communication may be made at a preliminary stage does not, itself, prevent that communication from being a significant step. However, in many cases a preliminary communication may simply be an inducement to contact the *communicator* to find out what he has to offer. For example, an advertisement which merely holds out a *person* as having expertise in or providing services about investment management or venture capital will not be an inducement to *engage in investment activity*. It will merely be an inducement to make contact for further material and will not be a significant step in the chain. However, that further material may well be a significant step and an invitation or inducement to *engage in investment activity*. In contrast, an advertisement which claims that what the recipient should do in order to make his fortune is to invest in securities and that the *communicator* can provide him with the services to achieve that aim will be a significant step and an inducement to *engage in investment activity*.

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■ AUTH App 1.4.9G to ■ AUTH App 1.4.34G apply the principles in ■ AUTH App 1.4.4G to ■ AUTH App 1.4.7G to communications made in certain circumstances. They do not seek to qualify those principles in any way. A common issue in these circumstances arises when contact details are given (for example, of a provider of investments or investment services). In the FSA’s view, the inclusion of contact details should not in itself decide whether the item in which they appear is an inducement or, if so, is an inducement to *engage in investment activity*. However, they are a factor which should be taken into account. The examples also refer, where appropriate, to specific exemptions which may be relevant if a communication is an invitation or inducement to *engage in investment activity*.

### Directory listings

- 1.4.9** G<sub>/1</sub> Ordinary telephone directory entries which merely list names and contact details (for example where they are grouped together under a heading such as ‘stockbrokers’) will not be inducements. They will be sources of information. Were they to be presented in a promotional manner or accompanied by promotional material they would be capable of being inducements. Even so, they may merely be inducements to make contact with the listed person. Specialist directories such as ones providing details of venture capital providers, unit trust managers or investment trusts will usually carry greater detail about the services or products offered by the listed firms and are often produced by representatives bodies. Such directories may also be essentially sources of information. Whether or not this is the case where individual entries are concerned will depend on their contents. If they are not promotional, the entries will not be inducements to *engage in investment activity*. However, it is possible that other parts of such a directory might seek to persuade recipients that certain *controlled investments* offer the best opportunity for financial gain. They may go on to incite recipients to contact one of the member firms listed in the directory in order to make an investment. In such cases, that part of the directory will be an inducement to *engage in investment activity*. But this does not mean that the individual entries or any other part of the directory will be part of the inducement. AUTH App 1.6 provides *guidance* on the meaning of ‘communicate’ and ‘causing a communication’. This is of relevance to this example and those which follow.

### Tombstone advertisements (announcements of a firm’s past achievements)

- 1.4.10** G<sub>/1</sub> Such advertisements are almost invariably intended to create awareness, hopefully generating future business. So they may or may not be inducements. This depends on the extent to which their contents seek to persuade or incite *persons* to contact the advertiser for details of its services or to do business with it. Merely stating past achievements with no contact details will not be enough to make such an advertisement an inducement. Providing contact details may give the advertisement enough of a promotional feel for it to be an inducement. But, if this is the case, it will be an inducement to contact the advertiser to find out information or to discuss what he can offer. Only if the advertisement contains other promotional matter will it be capable of being an inducement to *engage in investment activity*. In practice, such advertisements are often aimed at influencing only investment professionals. Where this is the case, the exemption in article 19 of the *Financial Promotion Order* (Investment professionals) may be relevant (see ■ AUTH App 1.12.21G). Tombstone advertisements will not usually carry the indicators required by article 19 to establish conclusive proof. However, article 19 may apply even if none of the indicators are present if the *financial promotion* is in fact directed at investment professionals.

### Links to a website

- 1.4.11** G<sub>/1</sub> Links on a website may take different forms. Some will be inducements. Some of these will be inducements under section 21 and others not. Links which are activated merely by clicking on a name or logo will not be inducements. The links may be accompanied by or included within a narrative or, otherwise, referred to elsewhere on the site. Whether or not such narratives or references are inducements will depend upon the extent to which they may seek to persuade or incite *persons* to use the links. Simple statements such as ‘these are links to stockbrokers’ or ‘click here to find out about stockmarkets – we provide links to all the big exchanges’ will

either not amount to inducements or be inducements to access another site to get information. If they are inducements, they will be inducements to *engage in investment activity* only if they specifically seek to persuade or incite *persons* to use the link for that purpose. Where this is the case, but the inducement does not identify any particular *person* as a provider of a *controlled investment* or as someone who carries on a *controlled activity*, the exemption in article 17 of the *Financial Promotion Order* (Generic promotions) may be relevant (see ■ AUTH App 1.12.14G).

#### Banner advertisements on a website

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These are the Internet equivalent to an advertisement in a newspaper and are almost bound to be inducements. So whether they are inducements to *engage in investment activity* will depend upon their contents as with any other form of advertising and the comments in ■ AUTH App 1 4.11G will be relevant.

#### Publication or broadcast of prices of investments (historic or live)

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These may or may not involve invitations or inducements. Where a *person* such as a newspaper publisher, broadcaster or data supplier merely presents prices of *investments* whether historic or live the information can be purely factual and not be an inducement. Historic prices on their own will never be invitations or inducements. Merely adding simple contact details to such prices will not make them invitations or inducements to *engage in investment activity*. However, any additional wording seeking to persuade or incite *persons* to contact firms so that they may buy or sell such *investments* may do so. In other circumstances, the publication of prices may involve an invitation or an inducement to *engage in investment activity*. For example, *persons* may use an electronic trading system to display prices and other terms such as lot size and volume at which they are prepared to deal, on screens viewed by potential counterparties. The price and other terms may be firm or indicative. The *persons* using the trading systems will have accepted the general terms and conditions for trading. Where prices and terms quoted are firm, the screen display may be an invitation to *engage in investment activity* by entering into a transaction at that price and on those terms. This will be where the offer may be accepted by the counterparty by a simple electronic response. Where the price or other terms are indicative, the screen display may be an inducement to *engage in investment activity* after negotiating acceptable terms. But in either case, the display of prices and other terms will only be invitations or inducements to *engage in investment activity* if it also contains material which seeks to persuade or incite the recipient to do so.

#### Company statements and announcements and analyst briefings

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Encouraging (or discouraging) statements may be made by a *company* director. These will typically be made in reports or accounts or at a presentation or road show or during a briefing of analysts. Alternatively, such statements may be made on the company's behalf by its public relations adviser. Statements of fact about a *company's* performance or activities will not, themselves, be inducements to *engage in investment activity* even if they may lead *persons* to decide to buy or sell the *company's* shares. However, statements which speculate about the *company's* future performance or its share price may have an underlying purpose or intent to

encourage investors to act. If this is so, whether they will be inducements to *engage in investment activity* will depend entirely on their contents and the extent to which they seek to promote investment in the *company*. ■ AUTH App 1.21 contains detailed *guidance* on the various exemptions which may apply in this area.

### Journalism

#### 1.4.15

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Journalism can take many forms. But typically a journalist may write an editorial piece on a *listed company* or about the *investments* or investment services that a particular firm provides. This may often be in response to a press release. The editorial may or may not contain details of or, on a website, a link to the site of the *company* or firm concerned. Such editorial may specifically recommend that readers should consider buying or selling *investments* (whether or not particular *investments*) or obtaining investment services (whether or not from a particular firm). If so, those recommendations are likely to be inducements to *engage in investment activity* (bearing in mind that a recommendation not to buy or sell *investments* cannot be an inducement to *engage in investment activity*). In other cases, the editorial may be an objective assessment or account of the *investment* or its issuer or of the investment firm and may not encourage *persons* to make an *investment* or obtain investment services. If so, it will not be an inducement to *engage in investment activity*. Article 20 of the *Financial Promotion Order* (Communications by journalists) contains a specific exemption for journalism and journalists may be able to make good use of the generic promotions exemption in article 17 of the *Financial Promotion Order* (see ■ AUTH App 1.12.23 and ■ AUTH App 1.12.14G). Journalists should bear in mind that they may *communicate* a *financial promotion* by repeating a recommendation that originates from another source. That source could be, for example, an *authorised person*, an academic or another publication. Such a *financial promotion* would be viewed as *communicated* by the journalist where he has editorial control over its form and content. In the *FSA's* view, a *person* is not causing the *communication* of a *financial promotion* merely by providing material, including a press release or a quotation, to a journalist who uses it in an article. This is provided that the *person* has no control over the way in which the article is prepared and published. The press release or quotation itself, if it is a *financial promotion*, should be exempt under article 47 of the *Financial Promotion Order* (Persons in the business of disseminating information) – see ■ AUTH App 1.21.10G.

### Performance tables

#### 1.4.16

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League tables showing the past performance of investment products of a particular kind or investment firms of a particular class (such as investment managers) and determined by the application of pre-set criteria will not, in themselves, be inducements. The fact that such tables represent pure information could, for example, be made clear by their being accompanied by a statement to the effect that the fact of a product or firm being well placed in the tables based on past performance is no guide to their likely future performance. The effectiveness of such a statement will, of course, depend upon it being the case that they do, in fact, represent mere information. But if, for example, the tables are accompanied by or presented or provided in a way that they are an actual or implied recommendation that a particular product's performance suggests it is a potential buy or sell they may become inducements.

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Tables or other forms of list may identify products with their relevant features such as interest rates, redemption periods and charges. Again, provided that the tables

amount to purely factual information enabling comparison of products they will not be inducements. This includes such things as electronic systems that allow users to programme in their requirements and find details of the products that meet them. Producers of the table or list may, to some extent, expect that the information will lead *persons* to make investments. Or they might have negotiated a payment from the firms featured that reflects leads generated. In either case, the absence of a promotional element in the table will be determinative. As with performance tables, these can become inducements to *engage in investment activity*. This will happen when there is an actual or implied recommendation that either the products which come out best in respect of certain features or a specific combination of features or those that have been chosen for inclusion are likely to be good or best buys. This might, for example, include identifying the top ten *deposit* accounts for *persons* looking for *deposit* accounts offering certain features. The mere inclusion in tables of the kind referred to generally in this paragraph or those in ■ AUTH App 1.4.16G of contact details should not turn what is otherwise factual or neutral information into an inducement. Both types of table may benefit, if necessary, from the exemption for journalists in article 20 (see ■ AUTH App 1.12.23G). This will be where they are prepared by a *person* acting as a journalist and are included in a publication, service or broadcast as described in article 20(5)(b). Where the tables are merely a reproduction of information supplied by a third party data source which does not provide them as a journalist article 20 will not be available.

### Decision Trees

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A decision tree (or flow chart) will generally be used in one of two ways. Either it will be an educational tool (for instance, where an employer wishes to help his employees understand their pension options) or a promotional tool. As an educational tool which does no more than enable a *person* to identify generic investment options it will not be an inducement. But if its use is intended to procure business for an investment firm then it is likely to be an inducement. For example, electronic decision trees on websites may typically invite *persons* to enter basic information about their circumstances and objectives leading to a recommendation or choice of products or services, or both, possibly with links to other firms' sites. These decision trees will be inducements to *engage in investment activity* although, in some cases, the journalists' exemption in article 20 of the *Financial Promotion Order* may be relevant (see ■ AUTH App 1.12.23G).

### Investment agreements, share purchase agreements and customer agreements

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These types of agreements will only rarely be inducements or invitations. For instance, where the terms of a deal have been agreed in principle and the agreement is merely the means of giving it effect, the inducement phase has clearly passed. And an agreement or draft agreement itself may usually be seen as a document setting out the terms and conditions of a deal and not itself an inducement (or an invitation) to deal. However, an agreement or draft agreement may often be accompanied by an invitation or inducement such as a covering letter or an oral communication that seeks to persuade or incite a *person* to enter into the agreement. Whilst such accompaniments are capable of being inducements (or invitations), merely offering concessions or amendments to a draft agreement during negotiations will not turn those accompaniments into inducements. It is, however, possible for an agreement itself to be or to include an invitation or inducement. For example, an advertisement that contains the terms and conditions

and the means to enter into it as a binding contract, a *direct offer financial promotion* or a prospectus with an application form included.

### Image advertising

- 1.4.20** G<sub>/1</sub> Activities which are purely profile raising and which do not identify and promote particular *investments* or investment services may not amount to either an invitation or inducement of any kind. Examples of this include where *listed companies* sponsor sporting events or simply put their name or logo on the side of a bus or on an umbrella. This is usually done with a view, among other things, to putting their names in the minds of potential investors or consumers. In other cases, an image advertisement for a *company* which provides investment services (for example, on a pencil or a diary) may include, along with its name or logo, a reference to its being an investment adviser or fund manager or a telephone or fax number or both. Profile raising activities of this kind may involve an inducement (to contact the advertiser) but will be too far removed from any possible investment activity to be considered to be an inducement to *engage in investment activity*.

### Advertisements which invite contact with the advertiser

- 1.4.21** G<sub>/1</sub> These will be advertisements that contain encouragement to contact the advertiser. They are likely to be inducements to do business with him or to get more information from him. If so, they will be inducements to *engage in investment activity* if they seek to persuade or incite *persons* to buy or sell *investments* or to get investment services. See ■ AUTH App 1.4.7G for more guidance on preliminary communications and whether they are a significant step in the chain of events which are intended to lead to the recipient *engaging in investment activity*. Where advertisements invite *persons* to send for a prospectus, article 73 (Material relating to prospectus for public offer of unlisted securities) may provide an exemption. Any *financial promotion* which contains more information than is allowed by article 73 but which is not the prospectus itself is likely to require *approval* by an *authorised person* unless another exemption applies. ■ AUTH 1.9.1G explains about *approval*.

### Introductions

- 1.4.22** G<sub>/1</sub> Introductions may take many forms but typically involve an offer to make an introduction or action taken in response to an unsolicited request. An introduction may be an inducement if the introducer is actively seeking to persuade or incite the *person* he is introducing to do business with the *person* to whom the introduction is made. So it may fall under section 21 if its purpose is to lead to investment activity. For example, if a *person* answers the question ‘do you or can you provide investment advice’ with a simple ‘no, but I can introduce you to someone who does’, that may be an inducement. But, if so, it is likely to be an inducement to contact someone to find out information about his services rather than to *engage in investment activity*. Where a *person* calls in to an office or branch of a *company* and asks to see ‘the investment adviser’, a *person* who responds merely by directing or showing the way is not making an inducement. Neither would a *person* be making an inducement by responding to an enquiry with ‘we do not provide investment services – you need to consult an *authorised person*’ or words to that effect. That is provided he does not go on to seek to persuade or incite the enquirer to contact a particular *authorised person* for investment services. But a *person* would be making an inducement to *engage in investment activity* if, for example, he

seeks to persuade or incite *persons* to allow him to introduce them to a particular *authorised person* so that they may take advantage of the cheap dealing rates which that *person* offers. Where introductions do amount to inducements under section 21 they may fall under the exemption for generic promotions (article 17 of the *Financial Promotion Order*) (see ■ AUTH App 1.12.14G). This will be the case provided the *financial promotion* does not identify any particular *investment* or *person* to whom introductions are to be made or identify the introducer as a *person* who carries on a *regulated activity* (typically of *making arrangements with a view to transactions in investments* under article 25(2) of the *Regulated Activities Order* - (see ■ AUTH App 1.33). It is most likely to apply where the *financial promotion* relates to *deposits* or *contracts of insurance* which are not *contractually based investments*. The journalists' exemption in article 20 may be relevant where the introduction is made through or in a publication, broadcast or regularly updated news or information service (see ■ AUTH App 1.12.23G). Article 15 (Introductions) may apply where the introduction is a *real time financial promotion* (see ■ AUTH App 1.12.11G).

### Distributors

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A *person* may be distributing *financial promotions* which have been issued or *approved* by an *authorised person*. This may be by displaying copies or delivering them or handing them out whether or not on request. ■ AUTH App 1.6 explains when such a person will be *communicating* the *financial promotions*. Where this is so, the exemption for mere conduits in article 18 of the *Financial Promotion Order* may apply (see ■ AUTH App 1.12.18G). But article 18 will not apply if the distributor creates his own *financial promotion* by seeking to persuade or incite the recipient to act upon the *financial promotions* he is distributing.

### Investment trading methods and training courses

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Trading methods and techniques, such as traded options training courses and software-based or manual trading tools will, in many cases, be too remote from any eventual investment dealing activities to be inducements to *engage in investment activity*. Promotions of such things will be inducements (or invitations) to receive training and general trading tips and techniques. However, such things may be sold on the basis that they are almost certain to produce profits from the trading which the recipient will undertake using the training or technique. If this is the case, the promotions are capable of being inducements to engage in those trading activities. Such *financial promotions* are capable of being generic promotions under article 17 of the *Financial Promotion Order* (see ■ AUTH App 1.12.14G).

### Invitations to attend meetings or to receive telephone calls or visits

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These are clearly invitations or inducements. Whether they will involve invitations or inducements to *engage in investment activity* rather than to attend the meeting or receive the call or visit, will depend upon their purpose and content. ■ AUTH App 1.4.7G discusses communications which are a significant step in the chain of events leading to an agreement to *engage in investment activity*. The purpose of the meeting, call or visit to which the invitation or inducement relates may be to offer the audience or recipient investment services. In this case, the invitation or inducement will be a significant step in the chain if it seeks to persuade or incite the



invitee to *engage in investment activity* at the meeting, call or visit. Any *financial promotions* made during the meeting, call or visit would still need to be *communicated* or *approved* by an *authorised person* or be exempt.

### Explanation of terms

- 1.4.26** G<sub>/1</sub> An explanation of the terms of an agreement or of the consequences of taking a particular course of action can be merely factual information unless it includes or is accompanied by encouragement to enter into the agreement or take the course of action. The mere fact that the explanation may present the investment in a good light or otherwise influence the recipient will not make it an inducement. Where such communications are *financial promotions* they may fall under one of the exemptions for one-off promotions in articles 28 and 28A of the *Financial Promotion Order* (see ■ AUTH App 1.14.3G).

### Enquiries about a person's status or intentions

- 1.4.27** G<sub>/1</sub> A *person* ('A') may enquire:
- (1) whether another *person* is certified as a high net worth individual or a sophisticated investor so that A may determine whether an exemption applies;
  - (2) whether a *person* has received material sent to him; or
  - (3) how a *person* might propose to react to a take-over offer.

Enquiries of this or a similar kind will not amount to inducements to *engage in investment activity* unless they involve persuasion or incitement to do so. The enquiry may be accompanied by a brief statement of the reason why it is being made. This may, for example, include a reference to the type of *investment* to which any subsequent *financial promotions* would relate. Such initial enquiries may be followed up with an inducement but this fact alone will not turn the initial enquiry into a *financial promotion*. For example, an enquiry about whether a *person* is certified for the purposes of article 48 (Certified high net worth individuals) or article 50 (Sophisticated investors) may, where the answer is positive, be followed by a *financial promotion*. That *financial promotion* can then rely on article 48 or 50 as the case may be.

### Solicited and accompanying material

- 1.4.28** G<sub>/1</sub> Solicited or accompanying material which does not contain any invitation or inducement to *engage in investment activity* will not itself be a *financial promotion*. This is provided that the material is not part of any *financial promotion* which may accompany it. This is explained in greater detail in ■ AUTH App 1.4.29G to ■ AUTH App 1.4.30G.
- 1.4.29** G<sub>/1</sub> *Persons* may sometimes be asked to send material which has not been prepared for use as a *financial promotion* to a *person* who is interested in making an investment. For example, a prospective participant in a Lloyd's *syndicate* may ask for a copy of the business plan or forecast prepared by the *managing agent* to comply with Lloyd's requirements. As another example, a prospective purchaser of, or investor in, a *company* may wish to see a valuation report, a due diligence report or legal

advice. The fact that the *person* requesting the material may intend to rely on it in making his investment decision does not, itself, make the material an inducement under section 21.

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The *person* who responds to the request for the material in the circumstances in ■ AUTH App 1.4.29G may make a *financial promotion* in the form of a covering letter or oral communication ('C'). This will not mean that the material accompanying C must itself be treated as an inducement. This will depend on the circumstances. The material itself would only become an inducement if it is turned into part of the *financial promotion* in C. For example, C may refer to the contents or part of the contents of the accompanying material and claim that they will convince the recipient that he should *engage in investment activity*. In such a case, the contents, or the relevant part of the contents as the case may be, would become part of the *financial promotion* in C. In other cases, C may simply refer to the fact that certain material has been enclosed or is available without using it as a selling point to persuade or incite the recipient to *engage in investment activity*. In that case, the material will not become part of the *financial promotion*. A similar situation arises if a *person* other than the *person* who originated an oral or written communication which is not itself a *financial promotion* uses it to persuade or incite a potential investor.

### Telephone services

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A *person* ('P') may be engaged, typically by investment product companies, to provide telephone services. Where such services require P to seek to persuade or incite prospective customers to receive investment literature or a personal call or visit from a representative of his principal they will frequently involve inducements to *engage in investment activity*. This is so whether the inducement results from P making unsolicited calls or by his raising the issue during a call made by the prospective customer. Generally speaking, it is likely that P would be carrying on a *regulated activity* under article 25(2) of the *Regulated Activities Order* and require *authorisation* or exemption (for example, as an *appointed representative*) if he is required to procure leads for his principal. In other cases, P may merely respond to a request from a prospective customer. This may be a request for investment literature or to arrange a call or visit. P will not be making an inducement simply by agreeing to send the literature, referring the caller to a representative of his principal or agreeing to arrange for the visit or call. Where *persons* providing telephone services are *appointed representatives* the exemption in article 16 of the *Financial Promotion Order* (Exempt persons) may apply (see ■ AUTH App 1.12.12G).

### Personal illustrations

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A personal illustration (for instance, of the costs of and benefits under a particular investment product) may or may not be an invitation or inducement. This will depend on the extent to which it seeks to persuade or incite the recipient to invest as opposed to merely providing him with information. A personal illustration may, however, be accompanied by an invitation or inducement to buy the investment in which case the exemptions for one-off *financial promotions* in articles 28 or 28A may apply (see ■ AUTH App 1.14.3G). *Authorised persons* should note that, where personal quotations or illustrations do amount to a *financial promotion* ■ COB 3 will not usually apply to them (see ■ COB 3.2.5R (6)).

**Instructions or guidance on how to invest**

- 1.4.33** G<sub>/1</sub> Things such as help-lines for *persons* who wish to make an investment will not usually involve invitations or inducements to *engage in investment activity*. This is where their purpose is merely to explain or offer guidance on how to invest or to accept an offer. In such cases, the investor will already have decided to invest and there will be no element of persuasion on the part of the *person* giving the explanation or guidance.

**Communications by employers to their employees**

- 1.4.34** G<sub>/1</sub> Employers may *communicate* with their employees on matters which involve *controlled investments*. For example, personal pension schemes (including stakeholder schemes) and other employee benefit schemes other than *occupational pension schemes*. Interests under the trusts of an *occupational pension scheme* are not a *controlled investment* (see paragraph 27 (2) of Schedule 1 to the *Financial Promotion Order*). Such communications will only be invitations or inducements to *engage in investment activity* if they seek to persuade or incite employees to do things such as:
- (1) participate in or leave the pension or other benefit scheme;
  - (2) exercise certain rights under such a scheme, include making additional contributions or exercising options.

Communications which are intended to educate or give employees information with no element of persuasion or incitement will not be invitations or inducements under section 21. Employers may wish to give their employees investment material prepared and *approved* by an *authorised person*. This material may be given under cover of a communication from the employer. If so, the covering communication will not itself be an inducement if all it does is to refer employees to the material and explain what they should do if they wish to act on it, without seeking to persuade or incite them to act. Where the covering communication is itself a *financial promotion* it will need to be *approved* by an *authorised person* provided it is a *non-real time financial promotion* unless an exemption applies. If it is a *real time financial promotion* it cannot be *approved* (see ■ COB 3.12.2R). In such cases, an exemption would need to apply. Where employee share schemes are concerned, the exemption in article 60 of the *Financial Promotion Order* (Participation in employee share schemes) is likely to apply to any *financial promotions* made by employers or members of their *group*. Where an employer's *financial promotions* relate to such things as company health or general insurance benefit packages, the exemptions in article 24 (Relevant insurance activity: non real time communications) or 26 (Relevant insurance activity: real time communications) of the *Financial Promotion Order* may apply. Any *financial promotion* made by an employer for the purpose of meeting his obligations under the Welfare Reform and Pensions Act 1999 to offer his employees a *stakeholder pension scheme* should be able to use the exemption in article 29 (Communications required or authorised by enactments).

**1.5 In the course of business**

- 1.5.1** G<sub>/1</sub> Under section 21(4) of the *Act*, the Treasury has the power to specify circumstances in which a *person* is viewed as ‘acting in the course of business’ or ‘not acting in the course of business’. The power under section 21(4) relates only to *financial promotions* and is distinct from the power in section 419 which relates to *regulated activities*. To date, the Treasury has not used the power in section 21(4). As a result, the phrase has its ordinary or natural meaning.
- 1.5.2** G<sub>/1</sub> The *FSA* considers that ‘in the course of business’ requires a commercial interest on the part of the communicator. This does not necessarily have to be a direct interest. And the communicator does not need to be carrying on *regulated activities* (the test in section 19 of the *Act*) as or as part of his business. Neither does the communication need to be made in the course of carrying on activities as a business in their own right (the test in article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001). For example, if a holding company proposes to sell one of its subsidiaries, that sale will be ‘in the course of business’ irrespective of the fact that the company may well not be in the business of selling subsidiaries.
- 1.5.3** G<sub>/1</sub> The position is slightly more blurred with individuals. The ‘in the course of business’ test is intended to exclude genuine non-business communications. Examples of these would be friends talking in a pub, letters between family members or e-mails sent by individuals using an Internet chat-room or bulletin board for personal reasons. An issue arises where capital is raised for small private *companies*. Where such a *company* is already in operation, it will be acting ‘in the course of business’ when seeking to generate additional share or loan capital. At the pre-formation stage, however, it will often be the case that individuals who are proposing to run the company will approach a small number of friends, relatives and acquaintances to see if they are willing to provide start-up capital. In the *FSA*’s view, such individuals will not be acting ‘in the course of business’ during the pre-formation stage of a small private *company*. This is provided that they are not:
- (1) forming *companies* with such regularity that they would be regarded as carrying on the business of forming *companies*; or
  - (2) already running the business which the *company* will carry on (for example, as a partnership).
- 1.5.4** G<sub>/1</sub> There is, of course, no reason why an individual cannot act ‘in the course of business’. For example, sole traders who are independent financial advisers will give investment advice ‘in the course of business’ and so satisfy the test. Individuals who are merely seeking to make personal investments will not be acting ‘in the course of business’ by approaching a company about making an investment in its shares. However, it is possible that an individual who regularly seeks to invest in companies who are seeking to raise venture capital with a view to becoming a director and influencing their affairs may be regarded as acting in the course of business. In approaching *companies*, such as a *person* should be able to make use of the exemptions for one-off *financial promotions* in articles 28 and 28A of the *Financial Promotion Order* (see ■ AUTH App 1.14.3G).
- 1.5.5** G<sub>/1</sub> *Persons* who carry on a business which is not a *regulated activity* will need to be particularly careful in making communications which may amount to *financial promotions* (because they seek to persuade or incite *persons* to *engage in investment activity* (see ■ AUTH App 1.4)). For example, where a *company* makes *financial promotions* to its employees, they may well be made in the course of business. Examples of these include *financial promotions* concerning employee share schemes, group wide insurance arrangements and *stakeholder pension schemes*. These would need to be *approved* by an *authorised person* unless an appropriate exemption is available. ■ AUTH App 1.4.34G provides further *guidance* on this.

## 1.6 Communicate

**1.6.1** G<sub>/1</sub> The word ‘*communicate*’ is extended under section 21(13) of the *Act* and includes causing a communication to be made. This means that a *person* who causes the *communication* of a *financial promotion* by another *person* is also subject to the restriction in section 21. Article 6(d) of the *Financial Promotion Order* also states that the word ‘*communicate*’ has the same meaning when used in exemptions in the Order. Article 6(a) also states that the word ‘communication’ has the same meaning as ‘*financial promotion*’. It appears to the FSA that a *person* is *communicating* where he gives material to the recipient or where, in certain circumstances (see ■ AUTH App 1.6.5G), he is responsible for transmitting the material on behalf of another *person*. As both causers and communicators *communicate* under section 21 the distinction between them is not usually of great significance. What is important is whether a *person* who is not himself *communicating* is or is not causing a communication to be made by another. In the FSA’s view, primary responsibility for a communication to which section 21 applies and which is capable of being read will rest with its originator. This is the *person* responsible for its overall contents. Where it is an oral communication primary responsibility will rest with the speaker. A speaker will, of course, be an individual. But where the individual speaks on behalf of his employer, it will be the employer who is responsible. The same will apply if the individual is an officer of a *company* or partner in a partnership and speaks on behalf of the *company* or partnership. Individuals who make *financial promotions* otherwise than in their capacity as employees, officers or partners will need to consider their own position (they may not be acting in the course of business (see ■ AUTH App 1.5)). Where a *person* other than the originator (for example a newspaper publisher) transmits a communication on the originator’s behalf he is *communicating* it and the originator is causing its *communication*.

### Persons who communicate or cause a communication

**1.6.2** G<sub>/1</sub> Apart from the originators of a *financial promotion*, the FSA considers the following *persons* to be *communicating* it or causing it to be *communicated*:

- (1) publishers and broadcasters who carry advertisements (including websites carrying banner advertisements); and
- (2) intermediaries who redistribute another *person*’s communication probably with their own communications.

### Persons who do not communicate or cause a communication

**1.6.3** G<sub>/1</sub> In the FSA’s view, the following *persons* will not be causing or *communicating*:

- (1) advertising agencies and others when they are designing advertising material for originators;
- (2) *persons* who print or produce material for others to use as advertisements;
- (3) professional advisers when they are preparing material for clients or advising them on the need to *communicate* or the merits or consequences of their *communicating* a *financial promotion*; and

- (4) *persons* who are responsible for securing the placing of an advertisement provided they are not responsible for its contents.

### Need for an active step to communicate or cause a communication

**1.6.4** G<sub>/1</sub> The FSA considers that, to *communicate*, a *person* must take some active step to make the communication. This will be a question of fact in each case. But a *person* who knowingly leaves copies of a document where it is reasonable to presume that *persons* will pick up copies and may seek to act on them will be *communicating* them.

**1.6.5** G<sub>/1</sub> The *Financial Promotion Order* contains an exemption for mere conduits in article 18. It does not follow that all *persons* who provide services for facilitating the distribution of *financial promotions* are *communicating*. Where *persons* of this kind would normally be unaware of the fact that they may be distributing *financial promotions* or are indifferent as to whether they are doing so, or both, they will not be regarded as *communicating* them. This may, for example, include:

- (1) postal services providers;
- (2) telecommunication services providers;
- (3) broadcasting services providers;
- (4) courier services providers;
- (5) *persons* employed to hand out or disseminate communications.
- (6) a newsagent who sells newspapers and journals containing *financial promotions*.

In other cases, persons of this kind may need to rely on the mere conduit exemption (see ■ AUTH 1.12.18G).

### Website operators

**1.6.6** G<sub>/1</sub> Where a website operator provides links to other sites he is not usually to be regarded as causing the *communication* of the contents of those other sites to *persons* who may use the links. See further *guidance* on Internet issues in ■ AUTH App 1.22.

### Application of exemptions to persons causing a communication

**1.6.7** G<sub>/1</sub> A general point arises about causing and *communicating* on whether a particular exemption includes a *person* who is causing a communication to be made by another *person*. For example, article 43 of the *Financial Promotion Order* (Members and creditors of certain bodies corporate) applies only to a communication by a *body corporate* to its own shareholders or creditors about its own *securities*. This exemption may apply where a *company* ('P') wishes to acquire another *company* ('C') for cash and arranges for C to *communicate* its offer to C's shareholders. In this case, where P causes C to *communicate*, it is the FSA's view that the exemption that applies to C will also apply to P. This is because, as

'communicate' includes 'causing to *communicate*', the exemption applies where P causes the *communication* of the *financial promotion* by C.

### Application of exemptions to persons who communicate on behalf of others

- 1.6.8** G<sub>/1</sub> Another general point arises about the scope of exemptions that apply only to *financial promotions* by a particular *person*. This is whether the exemption applies to the *communication* of a *financial promotion* by an *unauthorised person* on behalf of the *person* to whom the exemption applies. In the FSA's view, this will not be the case unless the exemption specifically states that it applies to a communication made on behalf of the *person* identified in the exemption. For example, article 62 (Sale of body corporate) applies to 'any communication by or on behalf of a body corporate'.

### Meaning of 'made to', 'directed at' and 'recipient'

- 1.6.9** G<sub>/1</sub> Section 21(1) of the *Act* refers only to the *communication* of an invitation or inducement. It says nothing about communications being 'made to' or 'directed at' *persons* or about who the 'recipient' of a communication will be. These facts are determined by the following sequence:
- (1) section 21(13) of the *Act* indicates that communications are 'made';
  - (2) article 6 of the *Financial Promotion Order* (Interpretation: communications) indicates that communications are made by being 'addressed to' a *person*;
  - (3) article 6 then indicates that communications may be addressed:
    - (a) to a particular *person* or *persons* whether verbally or in a legible form (for example, in a telephone call or letter) – these are referred to as communications which are 'made to' *persons*; or
    - (b) to *persons* generally (for example, in a television broadcast or on a website) – these are referred to as communications which are 'directed at' *persons*;
  - (4) article 6 also indicates that a recipient of a communication is the *person* to whom the communication is made, or, in the case of a non-real time communication directed at *persons* generally, anyone who reads or hears the communication.
- 1.6.10** G<sub>/1</sub> In the FSA's opinion, the matters in ■ AUTH App 1.6.9G have the following effects.
- (1) Any one particular communication will either be real time or non-real time but not both. This is because:
    - (a) a real time communication is one made in the course of an interactive dialogue (see ■ AUTH App 1.10.2G for guidance on the meaning of real time);
    - (b) those exemptions which concern real time communications apply only to communications which are made to *persons* and not those which are directed at *persons*;

- (c) a communication is made to a *person* where it is addressed to him specifically;
- (d) the persons to whom a real time communication is addressed are those *persons* who take part in the interactive dialogue; and
- (e) where a communication is addressed to a particular *person* or *persons* it is not made to anyone else who may read or hear it.

This means that a real time communication cannot also be a non-real time communication made to *persons* other than those to whom it is addressed. But it is possible for the same communication to be issued in different forms. For example, the text of a *real time financial promotion* may be made available to *persons* generally in writing intending to persuade or incite them to *engage in investment activity*. In that case, the written version will be a separate *non-real time financial promotion* which will need to be *approved* or exempt. A similar situation may arise where a *real time financial promotion* made during a meeting is recorded on video and then made available to the public. Also, a *person* may, in the course of an interactive dialogue with a particular *person*, address an invitation or inducement to others who may be present. Where this does not result in an interactive dialogue taking place with those other *persons*, the invitation or inducement will be a separate non-real time communication.

- (2) A communication in the form of a letter or e-mail addressed to a particular *person* is not made to anyone else who, legitimately or otherwise, may read it. For example, it will not be made to any *persons* to whom it is copied unless any invitation or inducement that may be in it is addressed also to those *persons*.
- (3) A communication in the form of a personal conversation or telephone call will not be *communicated* to anyone else who may eavesdrop or otherwise listen to the conversation.
- (4) The recipient of a communication to whom it is addressed, will not always be the *person* who physically receives it. As a communication under section 21 is an invitation or inducement *to engage in investment activity*, it will be addressed to the *person* or *persons* (P) who is or are being invited or induced. An invitation or inducement may be *communicated* to someone such as a friend or relative of P who is asked to pass it on. If so, the communication will be regarded as addressed to P and not to the friend or relative. The same will usually apply where an invitation or inducement is *communicated* to P's adviser or other agent. However, this will not always be the case. The communication made to the agent may be aimed at getting him to act in a particular way. For example, to exercise discretion on his client's behalf. In this case, the communication may be an invitation or inducement to the agent himself to *engage in investment activity*. In the FSA's view, the friend, relative or agent should not himself be regarded as *communicating* the invitation or inducement simply because he faithfully relays the message to P. This is provided that the friend, relative or adviser, in relaying the message, does not make his own invitation or inducement. Friends and relatives would not, in any case, be *communicating* in the course of business. Should agents be making their own *financial promotions* in relaying messages, it is likely that the exemptions for one-off *financial promotions* in articles 28 and 28A of the *Financial Promotion Order* will apply.
- (5) It is important to consider whether any particular *financial promotion* is 'made to' or 'directed at' *persons* as some exemptions in the *Financial Promotion Order* apply only to *financial promotions* which are made to *persons*.



## 1.7 Engage in investment activity

**1.7.1** G<sub>/1</sub> A communication must be an invitation or inducement to *engage in investment activity* for the restriction in section 21 to apply. Section 21(8) defines this phrase as :

- (1) entering or offering to enter into an agreement the making or performance of which by either party is a *controlled activity*; or
- (2) exercising any rights conferred by a *controlled investment* to acquire, dispose of, underwrite or convert a *controlled investment*.

**1.7.2** G<sub>/1</sub> *Controlled activity* and *controlled investment* are defined in Schedule 1 to the *Financial Promotion Order* and are listed in ■ AUTH App 1.36.4 and ■ AUTH App 1.36.5. Broadly speaking, *controlled activities* and *controlled investments* are similar to *regulated activities* and *specified investments* under the *Regulated Activities Order*. However, with *controlled activities*, the exclusions set out in the *Regulated Activities Order* do not, in most cases, apply. It is important to note, however, that there are certain differences between *controlled activities* and *regulated activities* – most notably with certain credit agreements and funeral plans. So, it is quite possible for a *person* to be carrying on a business in the *United Kingdom* for which he does not require *authorisation* because the business activity either is not connected with financial services or falls within one of the exclusions in the *Regulated Activities Order* but find that the restriction in section 21 applies to his communications.

**1.7.3** G<sub>/1</sub> The overall effect is that a *financial promotion* must relate in some way to a *controlled investment* and may be summarised as the *communication*, in the course of business, of an invitation or inducement to :

- (1) acquire, dispose of or underwrite certain *investments* or exercise rights conferred by such an *investment* for such purpose or for the purpose of converting it; or
- (2) receive or undertake investment services such as *dealing in investments as principal or as agent, managing investments, advising on investments or safeguarding and administering investments*.

**1.7.4** G<sub>/1</sub> So a *financial promotion* will not include an invitation or inducement to:

- (1) refrain from doing any of the things in ■ AUTH App 1.7.3G; or
- (2) exercise rights conferred by an *investment* other than to acquire, dispose of, underwrite or convert an *investment*.

This means that most invitations or inducements to exercise voting rights will not be *financial promotions*.

**1.7.5** G<sub>/1</sub> In the FSA's opinion, section 21 will apply to a communication (made in the course of business) if it contains an invitation or inducement to *engage in investment activity* which is addressed to a particular *person* or to *persons* generally. Where this is the case, it will not matter that the communication may be physically delivered to someone other than the *person* who is intended to *engage in investment activity*. ■ AUTH App 1.6.10G gives more *guidance* on this.

## 1.8 Having an effect in the United Kingdom

- 1.8.1** G<sub>/1</sub> Section 21(3) of the *Act* states that, in the case of a communication originating outside the *United Kingdom*, the restriction in section 21(1) applies only if it is capable of having an effect in the *United Kingdom*. In this respect, it is irrelevant whether the communication has an effect provided it is capable of doing so.
- 1.8.2** G<sub>/1</sub> This appears to give a potentially broad jurisdictional scope to section 21. It seems clear that a communication which originates overseas will be capable of having an effect in the *United Kingdom* if it is an invitation or inducement to *engage in investment activity* which is *communicated* to a *person* in the *United Kingdom*. It would seem that communications made in other circumstances may also be capable of having an effect in the *United Kingdom*. However, the exemption for communications to overseas recipients in article 12 of the *Financial Promotion Order* (Communications to overseas recipients) (see ■ AUTH App 1.12.2G) prevents section 21 from applying to communications which are not directed at *persons* in the *United Kingdom*.
- 1.8.3** G<sub>/1</sub> Where communications by *persons* in another *EEA State* are made to or directed at *persons* in the *United Kingdom* account must be taken of the effect of any relevant *EU Directives*. For example, the Electronic Commerce Directive (2000/31/EC) will, with limited exceptions, prevent the *United Kingdom* from imposing restrictions on incoming *financial promotions* in information society services. The Treasury has stated in its consultative document ‘Implementation of the E-Commerce Directive in Financial Services: a Second Consultation document’ issued in March 2002 that it intends to amend the *Financial Promotion Order* to give effect to this. Other potentially relevant directives include the Television Without Frontiers Directive (89/552/EEC). This prevents the *United Kingdom* from restricting the re-transmission in the *United Kingdom* of television broadcasts from other *EEA States*. The *Financial Promotion Order* does not have any specific provisions about the Television Without Frontiers Directive. However, it is not intended to block incoming television programmes from other *EEA States*. The *FSA* will take this into account in interpreting the *Financial Promotion Order* and enforcing the restriction in section 21 of the *Act*.

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

- 1.9.1** G<sub>/1</sub> 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 ■ COB 3 purely so that he can *communicate* it himself. In the FSA'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 ■ AUTH App 1.20). 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.

- 1.9.2** G<sub>/1</sub> 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, ■ COB 3 may apply wholly or partially to any such *financial promotion*.
- 1.9.3** G<sub>/1</sub> 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 ■ COB 3.12.1G(3)).
- 1.9.4** G<sub>/1</sub> 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* 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. ■ AUTH App 1.4.28G offers guidance about when accompanying material may be part of a *financial promotion*.
- 1.9.5** G<sub>/1</sub> The restriction in section 21 is also disapplied under section 21(5) where provided for by the Treasury by order. The Treasury made such an order on 2 April 2001 (the *Financial Promotion Order*). This contains a number of specific exemptions which are referred to in ■ AUTH App 1.12 to ■ AUTH App 1.15 and ■ AUTH App 1.21. The *Financial Promotion Order* has been amended by:
- (1) The Financial Services and Markets Act 2000 (Financial Promotion (Amendment) Order 2001 (SI 2001/2633);
  - (2) The Financial Services and Markets Act 2000 (Miscellaneous Provisions) Order 2001 (SI 2001/3650); and
  - (3) The Financial Services and Markets Act 2000 (Financial Promotion) (Amendment No2) Order 2001 (SI 2001/3800).

A consolidated version of the *Financial Promotion Order* is available on the Treasury website [www.hm-treasury.gov.uk](http://www.hm-treasury.gov.uk) under 'consultations'.

## 1.10 Types of financial promotion

- 1.10.1** G<sub>/1</sub> Although the restriction in section 21 addresses all forms of *financial promotion*, it is necessary to distinguish between particular types of *financial promotion* as these are treated differently under the *Financial Promotion Order*. This regime recognises two types of *financial promotion*. These are *real time* and *non-real time financial promotions*. *Real time financial promotions* are then divided into *solicited* or *unsolicited real time financial promotions*.

### Real time v non-real time financial promotions

- 1.10.2** G<sub>/1</sub> The terms *real time financial promotion* and *non-real time financial promotion* are defined in article 7 of the *Financial Promotion Order* (Interpretation: real time communications). Article 7(1) defines a *real time financial promotion* as a *financial promotion* made in the course of a personal visit, telephone conversation or other interactive dialogue. A *non-real time financial promotion* is one that is not a *real time financial promotion*. Article 7(5) states that *financial promotions* made by letter or e-mail or in a publication (defined in article 2 (Interpretation: general) as a newspaper, journal, magazine or other periodical publication, a website, a television or radio programme or a teletext service) are *non-real time financial promotions*. Articles 7(4) and (5) provide certain indicators that a *financial promotion* is a *non-real time financial promotion*. These are that:

- (1) the *financial promotion* is made to or directed at more than one recipient in identical terms (save for details of the recipient's identity);
- (2) the *financial promotion* is made or directed by way of a system which in the normal course is or creates a record of the *financial promotion* which is available to the recipient to refer to at a later time; and
- (3) the *financial promotion* is made by way of a system which in the normal course does not enable or require the recipient to respond to it immediately.

■ AUTH App 1.6.9G explains the meaning of 'made to' and 'directed at'.

- 1.10.3** G<sub>/1</sub> In the FSA's view, the matters identified in ■ AUTH App 1.10.2G mean that:

- (1) for a communication to be real time it must be made in course of an interactive dialogue; but that
- (2) If the interactive dialogue takes place by means of the exchange of letters or e-mails or in a publication (that is, a newspaper, journal, magazine or other periodical publication, a website, a television or radio programme or a teletext service) the communication will be deemed to be non-real time.

- 1.10.4** G<sub>/1</sub> The words 'personal visit, telephone conversation or other interactive dialogue' clearly imply that the first two are types of the third. In the FSA's view, it is difficult to envisage circumstances in which a personal visit or telephone conversation would not be interactive. The very fact of a conversation taking place would mean two or more *persons* were interacting with each other. A telephone call is not the same thing as a conversation. It may be made to, or even by, an intelligent machine which asks questions and responds to answers. That is, in the FSA's view, no more an interactive dialogue than a questionnaire or an electronic

decision tree. The FSA cannot see how a scripted call can avoid being an interactive dialogue. The caller presumably has prompts as to what to say depending on the response given or question asked by the recipient of the call. However, the recipient is clearly able to and likely to interact and the degree of interaction cannot be determined in advance.

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In the FSA's view, the fact that scope for interaction is essential if a *financial promotion* is to be real time leads to the following conclusions.

- (1) Most communications made in written or pictorial form will not offer scope for interaction. The most likely exception to this is where *persons* are expected to respond immediately. This situation may arise, for example, where the equivalent of a telephone conversation is conducted by e-mail. This is the basis of the exemption in article 20A(1)(b)(ii) (see ■ AUTH App 1.12.37G). However, the only communications in written or pictorial form which can be real time communications are those which are not contained in a letter, e-mail or publication. This results from article 7(3) as explained in ■ AUTH App 1.10.2G and ■ AUTH App 1.10.3G(2).
- (2) The factors in article 7(5), whilst they are helpful as indicators, do not necessarily have to be satisfied for a communication to be non-real time provided it does not represent an interactive dialogue. For example, in the FSA's view, a broadcast made by megaphone from a moving vehicle or temporary chalk markings on a board are non-real time communications even though there may be no lasting record.
- (3) Some oral communications will not involve an interactive dialogue. This is because:
  - (a) they are recorded or broadcast, so preventing interaction; or
  - (b) they represent a one-way flow such as a speech, address or presentation.

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An issue arises where a *person* (P), during the course of a presentation or meeting, invites or is asked to answer questions from the audience. P's response may or may not be a real time communication. For example, the question may not be personal to the questioner and P may respond by addressing the audience in a way that precludes or does not call for any interaction. This will be a non-real time communication. On the other hand, the question may call for P to pursue a conversation with the questioner, in which case the communication will be an interactive dialogue and a real time communication. In this case, the communication will not involve a non-real time communication made to or directed at the rest of the audience as it is addressed and made to the questioner. It may be that P, in the course of an interactive dialogue with a questioner, makes an invitation or inducement that is addressed to the audience as a whole. This will be a separate communication that will be non-real time. Any handout or slide or other visual aids used during the presentation will be non-real time communications.

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In the FSA's view, a communication which may exist in enduring form will be a non-real time communication. Examples of this include videos, audio cassettes, bulletin boards, websites and recorded telephone messages. Messages placed on Internet chat-rooms will also be non-real time. Radio or television programmes or teletext services may contain communications that involve an interactive dialogue. For example, a communication made by the broadcaster and addressed to an interviewee studio guest, a member of the audience or a person who speaks to the broadcaster by telephone. These will always be non-real time communications. This is again the effect of article 7(3) as explained in ■ AUTH App 1.10.2G and ■ AUTH App 1.10.3G(2). Broadcasters may be able to use the exemption for

journalists in article 20 of the *Financial Promotion Order* (see ■ AUTH App 1.12.23G). Interviewee studio guests, if they make *financial promotions* during a broadcast, may be able to use the exemption in article 20A of the *Financial Promotion Order* (Promotion broadcast by company director etc) (see ■ AUTH App 1.12.32G).

### Solicited v unsolicited real time financial promotions

- 1.10.8** G<sub>/1</sub> Article 8(1) of the *Financial Promotion Order* (Interpretation: solicited and unsolicited real time communications) states that a *real time financial promotion* is solicited where it is made in the course of a personal visit, telephone conversation or other interactive dialogue which was initiated by or takes place in response to an express request from the recipient. An express request for these purposes may have been made before section 21 entered into force. An *unsolicited real time financial promotion* is any *real time financial promotion* which is not solicited.
- 1.10.9** G<sub>/1</sub> Article 8(3) of the *Financial Promotion Order* clarifies that a *person* will not have expressly requested a call, visit or dialogue merely :
- (1) because he does not indicate that he does not wish to receive any or any further visits or calls or to engage in any or any further dialogue; or
  - (2) because he agrees to standard terms that state that such visits, calls or dialogue will take place, unless he has signified clearly that, in addition to agreeing to the terms, he is willing for the visit, call or dialogue to take place.
- 1.10.10** G<sub>/1</sub> Article 8(3) of the *Financial Promotion Order* also has the effect in broad terms that *financial promotions* made during a visit, call or dialogue will be solicited only if they relate to *controlled activities* or *controlled investments* of the kind to which the recipient envisaged that they would relate. In determining whether this is the case, account must be taken of all the circumstances when the call, visit or dialogue was requested or initiated. For example, a *person* may ask for a visit from a representative of an investment product company with a view to receiving advice on an appropriate pension product. In this case, the representative would be likely to be making an *unsolicited real time financial promotion* if, during conversation, he attempts to persuade or incite the recipient to make an investment which would not be for the purposes of pension provision.
- 1.10.11** G<sub>/1</sub> ■ AUTH App 1.6.9G explains that article 6 of the *Financial Promotion Order* has the broad effect that a communication is made to another *person* where it is addressed to a particular *person* or *persons*. It also states that a ‘recipient’ of a communication is the *person* or *persons* to who it is made (that is to whom it is addressed). This takes on importance where certain exemptions which apply to *real time financial promotions* made to a *person* are concerned. It appears to the FSA that, in certain situations, a *person* may make a *financial promotion* to someone who has expressly asked that it be made or who has initiated it but where, at the same time, it is also made (that is addressed) to *persons* who may have not requested or initiated it. For example, a married couple may visit their financial adviser. One partner may request or initiate the dialogue which the adviser then addresses to both. Article 8(4) of the *Financial Promotion Order* recognises this and has the effect that an *unsolicited real time financial promotion* will have been made to the *persons* other than the *person* who expressly asked for or initiated the call, visit or dialogue in which it was made unless they are:

- (1) close relatives of that *person* (that is, a *person's* spouse, children and step-children, parents and step-parents and brothers and sisters and step-brothers and step-sisters, including a spouse of any of those *persons*); or
- (2) expected to engage in any investment activity jointly with that *person*.

**1.10.12** G<sub>/1</sub> In the FSA's view, *persons* who may be *engaging in investment activity* jointly 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.

**1.10.13** G<sub>/1</sub> There will be occasions when *financial promotions* are received by *persons* other than those in ■ AUTH App 1.10.11G(1) or ■ AUTH App 1.10.11G(2) who will not have solicited them. For example, a more distant relative or friend ('F') who acts as a support to the *person* who is to *engage in investment activity* ('P') or P's professional adviser ('A'). As explained in ■ AUTH App 1.6.10G, in such cases the *financial promotion* will not be made to F or A unless it is also addressed to them. And it will only be addressed to F or A if the invitation or inducement relates to F or A *engaging in investment activity*. So a solicited *financial promotion* made to P will not also be an unsolicited *financial promotion* made to F or A.

**1.10.14** G<sub>/1</sub> In the FSA's view, the mere fact of a *person* accepting an invitation to attend a meeting does not automatically mean that he has initiated any dialogue which may take place during the meeting and which may amount to a *financial promotion*. This will depend on the facts of each case and such matters as the manner in which the invitations are made, the arrangements for acceptance and how the meeting is conducted. For example, the fact that *investments* or investment services will be offered during the meeting may be made clear in the invitation.

## 1.11 Types of exemption under the Financial Promotion Order

**1.11.1** G<sub>/1</sub> The various exemptions in the *Financial Promotion Order* are split into three categories :

- (1) exemptions applicable to all *controlled activities* (Part IV of the Order);
- (2) exemptions applicable only to *controlled activities* concerning *deposits* and *contracts of insurance* other than *life policies* (Part V of the Order); and

(3) exemptions applicable to any other types of *controlled activity* (Part VI of the Order).

**1.11.2** G<sub>/1</sub> Each individual exemption indicates the type of *financial promotion* (for example, non-real time) to which it relates. ■ AUTH App 1.36.7 contains a table showing this breakdown. Each exemption also indicates whether it applies to any communication or only to those made to or directed at *persons*.

**1.11.3** G<sub>/1</sub> Article 11 of the *Financial Promotion Order* (Combination of different exemptions) allows for certain exemptions to be combined when no single exemption may apply. The combinations allowed are:

- (1) exemptions in Part IV of the *Financial Promotion Order* (all *controlled activities*) may be combined with each other or any of the exemptions in:
  - (a) Part V (*deposits and contracts of insurance other than life policies*); or
  - (b) Part VI (other *controlled activities*);
- (2) exemptions in Part V may be combined with each other; and
- (3) exemptions in Part VI may be combined with each other.

However, there is no power to combine exemptions in Part V with exemptions in Part VI.

**1.11.4** G<sub>/1</sub> In a few instances, the requirements of a particular exemption may affect the practicality of its being combined with another. These are article 12 (Communications to overseas recipients) and article 52 (Common interest group of a company). Article 12, for example, requires that *financial promotions* must be made to or directed only at overseas *persons* and certain *persons* in the *United Kingdom*. This presents no difficulty with article 12 being combined with other exemptions in Parts IV or VI of the *Financial Promotion Order* where *financial promotions* are being made to *persons*. But, where a *financial promotion* is directed at the *persons* mentioned in article 12, it is difficult to see how the requirement that it must be directed only at those *persons* can be satisfied if it is also directed at other *persons* under another exemption. However, in the *FSA's* view, this does not prevent the same *financial promotion* being *communicated* under another exemption in another form or at any other time. For example, an electronic version of a *financial promotion* may be directed at overseas *persons* from a *person's* website in the *United Kingdom* using article 12. That *person* may then use another exemption to send paper copies of the same *financial promotion*.

**1.11.5** G<sub>/1</sub> A number of exemptions require that a *financial promotion* must be accompanied by certain indications. Article 9 of the *Financial Promotion Order* states that indications must be presented in a way that can be easily understood and in such manner as is 'best calculated' to bring the matter to the recipient's attention. In the *FSA's* opinion, the expression 'best calculated' should be construed in a sensible manner. It does not, for instance, demand that the indication be presented in bold red capitals at the start of a document or advertisement. If the indication is given enough prominence, taking account of the medium through which it is *communicated*, to ensure that the recipient will be aware of it and able to consider it before deciding whether to *engage in investment activity*, the *FSA* would regard article 9 as being satisfied.

**1.11.6** G<sub>/1</sub> Some exemptions are based on the *communicator* believing on reasonable grounds that the recipient meets certain conditions. For example, articles 19(1)(a), 44, 47 and 49. What are reasonable grounds for these purposes will be a matter for the



courts to decide. In the *FSA's* view, it would be reasonable for a *communicator* to rely on a statement made by a potential recipient that he satisfies relevant conditions. This is provided that there is no reason to doubt the accuracy of the statement. In case of doubt, further checks may be necessary. These could include:

- (1) checking on the record kept by the *FSA* under section 347 of the *Act* (The record of authorised persons etc) that a *person* is *authorised*;
- (2) checking with a *person's* employer that he is employed in a particular capacity; or
- (3) in the case of a *person* claiming to be a certified high net worth individual or sophisticated investor, asking to see a copy of the current certificate or the signed statement or both.

## 1.12 Exemptions applying to all controlled activities

- 1.12.1** G<sub>/1</sub> Part IV of the *Financial Promotion Order* contains several exemptions which apply to all *controlled activities*. These are summarised in ■ AUTH App 1.12.2G to ■ AUTH 1.12.37G.

### Financial promotions to overseas recipients (article 12)

- 1.12.2** G<sub>/1</sub> This exemption concerns *financial promotions* which are made to or directed only at overseas persons (except in the circumstances referred to in ■ AUTH App 1.12.8G).
- 1.12.3** G<sub>/1</sub> The exemption applies to situations where a *financial promotion* is either :
- (1) made to a *person* who receives it outside the *United Kingdom*; or
  - (2) directed at *persons* who are outside the *United Kingdom*.
- 1.12.4** G<sub>/1</sub> The exemption presently applies whether or not the *financial promotion* is made from the *United Kingdom*. However, there is the exception that, if it is an *unsolicited real time financial promotion*, it must be made from a place outside the *United Kingdom* and be for the purposes of a business carried on entirely outside the *United Kingdom*. The exemption as currently drafted conflicts with the requirements of the Electronic Commerce Directive (2000/31/EC). The Treasury has indicated in its consultative document 'Implementation of the E-Commerce Directive in Financial Services: A Second Consultation Document' issued in March 2002 that it intends to amend the *Financial Promotion Order*. The Treasury plans to ensure that section 21 does not restrict *persons* in other *EEA States* who wish to make *financial promotions* in the *United Kingdom* though an information society service. The Treasury document also states that amendments will be made to ensure that section 21 applies to outgoing *financial promotions* of that kind, in order to ensure that the principle of *Home State* regulation of information society services is sustained.
- 1.12.5** G<sub>/1</sub> Articles 12(3) and (4) of the *Financial Promotion Order* (subject to article 12(5) – see ■ AUTH App 1.12.8G) have the effect that, where a *financial promotion* is

directed from a place outside the *United Kingdom*, it will be conclusive proof that it is not directed at *persons* in the *United Kingdom* even if it is received by a *person* in the *United Kingdom*, if:

- (1) the *financial promotion* is not referred to in or directly accessible from another communication (for example, an advertisement in a *UK* newspaper or a *UK* website) which is itself made to or directed at *persons* in the *United Kingdom* by or on behalf of the same overseas *person*; and
- (2) there are proper systems and procedures in place to prevent recipients in the *United Kingdom* other than *persons* to whom the *communication* might otherwise lawfully have been made from engaging in the investment activity to which the *financial promotion* relates with the *overseas person* or his *close relative* or *group company*.

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There is no definition in the *Financial Promotion Order* of what ‘proper systems and procedures’ are, and the matter will ultimately be for the courts to determine. This is unsurprising as systems and procedures may take many different forms depending upon the precise circumstances in which *financial promotions* are made. But it is clear that *persons* seeking conclusive proof that the exemption applies must consciously make arrangements to prevent their dealing with certain recipients in the *United Kingdom*. In the *FSA*’s view, proper systems and procedures will involve arrangements for scrutinising enquirers or applications with a view to identifying *persons* who are located in the *United Kingdom* and are not *persons* to whom the *communication* could lawfully have been made. *Persons* to whom the *financial promotion* could lawfully have been made does not mean only those covered by article 12. For example, depending on the *controlled investment* which the *financial promotion* is about, they could include a certified high net worth individual or a sophisticated investor. Such arrangements may be conducted manually using a questionnaire or electronically through password-protected access to information or the programming of software to recognise and reject *United Kingdom* addresses or both. The need for proper systems and procedures does not automatically mean that there will no longer be conclusive proof should, on isolated occasions, the systems or procedures fail to prevent dealings with a recipient in the *United Kingdom*. Provided the systems and procedures were and remain proper there will be conclusive proof that the exemption applies. A *financial promotion* from overseas might lead to a recipient in the *United Kingdom* engaging in investment activity with another *group company* (G) of the *person* (P) who makes the *financial promotion*. In this situation, it is not necessary that P operates the proper systems and procedures to get conclusive proof that the exemption applies. It will be enough that G operates the proper systems and procedures.

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Where a *financial promotion* is directed from within the *United Kingdom*, articles 12(3) and (4) also state (subject to article 12(5) – see ■ AUTH App 1.12.8G) that there can be conclusive proof that the *financial promotion* is directed only at *persons* outside the *United Kingdom*. This will be the case if, in addition to the conditions referred to in ■ AUTH App 1.12.5G(1) and ■ AUTH App 1.12.5G(2), the *financial promotion* is accompanied by an indication that :

- (1) it is directed only at *persons* outside the *United Kingdom*; and
- (2) it must not be acted upon by *persons* in the *United Kingdom*.

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In any case, some but not all of the conditions referred to in ■ AUTH App 1.12.5G(1) to ■ AUTH App 1.12.5G(2) and ■ AUTH App 1.12.7G(1) to ■ AUTH App 1.12.7G(2) (or the additional condition that the communication is included in a website, newspaper or periodical publication which is principally accessed in or intended for a non-UK market or in a radio or television broadcast or teletext service transmitted

principally for reception overseas) may be met. In these cases, those conditions being satisfied will be taken into account in assessing whether the *financial promotion* is directed only at *persons* outside the *United Kingdom*. Even if none of the conditions are satisfied, it is still possible that a *financial promotion* which has been received by a *person* in the *United Kingdom* may properly be regarded as not having been directed at him. In the FSA's view, it will be an indication that a *financial promotion* in a website is directed at the *United Kingdom* if the website is registered with a UK search engine. Article 12(5) of the *Financial Promotion Order* also states that a *financial promotion* may be regarded as directed only at *persons* outside the *United Kingdom* where it is also directed at *persons* in the *United Kingdom*. This is provided those *persons* are limited to :

- (1) investment professionals (article 19); or
- (2) high net worth companies etc (article 49), or both.

Where a *financial promotion* is also directed at such *persons* in the *United Kingdom* the conclusive conditions referred to in ■ AUTH App 1.12.5G(1) to ■ AUTH App 1.12.5G(2) and ■ AUTH 1.12.7G(1) to ■ AUTH 1.12.7G(2) should be read as if references to *persons* to whom the *financial promotion* may be made or directed included investment professionals or high net worth companies etc. ■ AUTH App 1.11.4G explains how article 12 may be combined with other exemptions.

### Financial promotions from customers and potential customers (article 13)

#### 1.12.9

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*Financial promotions* made by a prospective customer to a *person* who supplies a *controlled investment* or services comprising *controlled activities* with a view to his acquiring the *investment*, or receiving the services or receiving information about those *investments* or services, are exempted. This exemption will only be of relevance to corporate customers or others who are acting in the course of business. Other types of customers will not be subject to section 21 to begin with.

### Follow up financial promotions (article 14)

#### 1.12.10

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*Financial promotions* other than *unsolicited real time financial promotions* are exempt where they follow up an earlier *financial promotion* which, in compliance with another exemption (such as that for promotions made to high net worth individuals or sophisticated investors – see ■ AUTH App 1.14.21G and ■ AUTH App 1.14.27G), contains certain indications or information. This is provided the *financial promotion*:

- (1) is made by the *person* who made or directed the earlier *financial promotion*;
- (2) is made to a recipient of the earlier *financial promotion*;
- (3) relates to the same matter as the earlier *financial promotion*; and
- (4) is made within 12 months of the earlier *financial promotion*.

This exemption does not help in situations where the original *financial promotion* was made or directed under an exemption which did not require it to include any indications or information. However, it is likely that, in many cases where no indications or information are required, the exemption to which the earlier *financial promotion* applies would also apply to any follow up *financial promotion*. The

*requirement* that the follow up *financial promotion* be made by the *person* who made or directed the earlier one would seem to prevent use of the exemption by someone acting on behalf of that *person*. However, the earlier *financial promotion* may have been made or directed by an individual in his capacity as an officer or employee of a company or a partner or employee of a partnership. If so, the exemption will be satisfied if the follow-up *financial promotion* is made by another employee, director or partner of the same *company* or partnership.

### Introductions (article 15)

#### 1.12.11

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This exemption applies only to *real time financial promotions* which are made with a view to or for the purposes of introducing *persons* to an *authorised* or *exempt person* whose *authorisation* or exemption covers the *controlled activity* to which the *financial promotion* relates. This is subject to the requirement that:

- (1) the *person* making the *financial promotion* ('P') is not a *close relative* or *group company* of the *authorised* or *exempt person*;
- (2) P does not receive any financial reward for making the introduction other than from the recipient of the *financial promotion*; and
- (3) the recipient of the *financial promotion* has not, in his capacity as investor, sought advice from P or, if he has, P has declined to provide it and has recommended that he seek advice from an *authorised person*.

For the purposes of (2), it is the FSA's view that P may be viewed as not receiving any financial reward other than from the recipient where P treats any commission or other financial benefit received from third parties to whom introductions are made as belonging to and held to the order of the recipient. P cannot simply tell the recipient that P will receive commission. The position must be that the commission belongs to the recipient and must be paid to him unless he agrees to its being kept by P. Where this occurs, the payment may be seen to be received by P from the recipient. In the FSA's opinion, the condition would be satisfied by P paying over to the recipient any third party payment he receives. Otherwise, it would be satisfied by P informing the recipient of the sum and that he has the right to require that the sum to be paid to him. This would allow the sum to be used to offset fees due from the recipient for other services provided to him by P. This could take the form of an agreement between P and the recipient that sums received by P will be used to offset any other fees due to P from the recipient. This is provided that P informs the recipient of sums which P has received and of the fees which they have been used to offset. However, it does not allow P to keep third party payments by seeking the recipient's agreement through standard terms and conditions. Similarly, a mere notification to the recipient that a particular sum has been received coupled with a request to keep it does not satisfy the condition.

### Exempt persons (article 16)

#### 1.12.12

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This exemption covers two distinct situations. Article 16(1) applies to all exempt persons where they make *financial promotions* for the purpose of their exempt activities. These *persons* would include *appointed representatives*, *recognised investment exchanges*, *recognised clearing houses* and those who are able to take advantage of the *Exemption Order*. So, it allows *exempt persons* both to promote that they have expertise in certain *controlled activities* and to make *financial promotions* in the course of carrying them on. Article 16(1) does not apply to

*unsolicited real time financial promotions*. Persons to whom the *general prohibition* does not apply because of Part XX (Provision of financial services by members of the professions) or Part XIX (Lloyd's members and former underwriting members) of the *Act* are not, for the purposes of article 16, *exempt persons* for their Part XX or Part XIX activities.

- 1.12.13** G<sub>/1</sub> Article 16 (2) applies to *unsolicited real time financial promotions* made by an *appointed representative* in carrying on the business:
- (1) for which his principal has accepted responsibility for the purposes of section 39 of the *Act* (Exemption of appointed representatives); and
  - (2) in relation to which the *appointed representative* is exempt under section 39.

In addition, the *financial promotion* may only be made in the circumstances in which it could be made by the *appointed representative's* principal under ■ COB 3. This ensures a level playing field as between employed and tied sales forces. This exemption may be of particular use to telephone sales agencies who will often need to be *appointed representatives* of investment product companies.

#### Generic promotions (article 17)

- 1.12.14** G<sub>/1</sub> Under this exemption, the *financial promotion* itself must not relate to a *controlled investment* provided by a *person* who is identified in it, nor must it identify any *person* as someone who carries on any *controlled activity*. So, it will apply where there is a *financial promotion* of a class of products. For example 'ISAs are great' or 'buy into an investment trust and help the economy'. Such *financial promotions* may be made by a *person* such as a trade association which is not itself carrying on a *controlled activity*. But this is provided there is no mention of any particular ISA or investment trust or of any *person* who may give advice on or arrange, sell or manage such investments.
- 1.12.15** G<sub>/1</sub> The exemption can also be used where an unauthorised intermediary is advertising its services as an intermediary. For instance, an unauthorised intermediary offering to find the best rates on *deposits* or most competitive premiums on motor insurance will not be carrying on a *controlled activity* himself. So, he may identify himself (but not any particular deposit-taker or *insurer*) in the *financial promotion*.
- 1.12.16** G<sub>/1</sub> Other *persons* may be able to take advantage of the exemption. For example, a *person* making a generic *financial promotion* may identify himself, whether he may carry on a *controlled activity* or not. This is provided that the *financial promotion* does not (directly or indirectly) identify him as someone who carries on a *controlled activity*.
- 1.12.17** G<sub>/1</sub> Journalists may be able to take advantage of this exemption when writing about *investments* generally. But the exemption would not apply if the *financial promotion* recommends the purchase or sale of particular *investments* such as XYZ Plc shares. This is because it will be identifying XYZ Plc as a *person* who provides the *controlled investment* (being its *shares*) and as a *person* who carries on the *controlled activity* of dealing in securities and contractually based investments (by issuing its own *shares*). Nor would the exemption apply if the *financial promotion* identifies an exchange on which *investments* are traded. That would indirectly identify the exchange as a *person* who carries on the *controlled activities* of dealing in securities or contractually based investments or arranging deals in investments. Journalists may also be able to use the exemption for journalists in article 20 (See ■ AUTH App 1.12.23G).

**Mere conduits (article 18)**

- 1.12.18** **G**<sub>/1</sub> The purpose of this exemption is to ensure that, subject to certain conditions, the restriction in section 21 of the *Act* does not apply to those who merely transport the *financial promotions* of other *persons*. Obvious examples here are postal and Internet service providers, courier companies and telecommunications companies. ■ AUTH App 1.6.5G explains that such *persons* may not be regarded as *communicating* a *financial promotion* simply because they have distributed it.
- 1.12.19** **G**<sub>/1</sub> The conditions in article 18(2) include a requirement that the *person* making the *financial promotion* does not select, modify or otherwise exercise control over its content before it is transmitted or received. Article 18(3) provides that a *person* is not selecting, modifying or exercising control merely as a result of having power to remove material which is illegal, defamatory or in breach of copyright or at the request of a regulatory body or where the law requires him to do so. However, in the FSA's view, the control normally exercised by newspaper publishers or broadcasters over traditional forms of advertising they carry is likely to be enough for the exemption not to be available to such *persons*.
- 1.12.20** **G**<sub>/1</sub> The conditions in article 18 also require that the *person* acting as the mere conduit must *communicate* in the course of a business carried on by him the principal purpose of which is transmitting or receiving material provided to him by others. In the FSA's view, what matters is that the *person* is carrying on a business which has the required principal purpose. Such a business might represent but a part of a *person's* activities (however small), so long as it represents a discrete business. A discrete business is an activity whose principal purpose is to receive and transmit other *persons'* communications and which is not simply a service provided incidentally or as an adjunct to another service. For example a *person* who operates a website will not be entitled to the exemption (should he be *communicating financial promotions* see ■ AUTH App 1.6) simply because he chooses to provide a chatroom or bulletin board for the use of his customers.

**Investment professionals (article 19)**

- 1.12.21** **G**<sub>/1</sub> *Financial promotions* made only to or directed only at certain types of *person* who are sophisticated enough to understand the risks involved are exempt. These are:
- (1) *authorised persons*;
  - (2) *exempt persons* (where the *financial promotion* relates to a *controlled activity* which is a *regulated activity* for which the *person* is exempt);
  - (3) governments and local authorities; and
  - (4) *persons* whose ordinary business involves carrying on a *controlled activity* of the kind to which the *financial promotion* relates and which may include:
    - (a) investment trust companies;
    - (b) *companies* which provide venture capital;
    - (c) large *companies* which have a corporate treasury function;
    - (d) other *persons* who carry on an activity such as dealing in, arranging or advising on *investments* but who do not require *authorisation* because of an exclusion in the *Regulated Activities Order*; and

(e) *professional firms* who are exempt under Part XX of the Act.

This also includes *persons* acting in their capacity as directors, officers or employees of such *persons*.

**1.12.22** G<sub>/1</sub> Article 19(4) sets out conditions which, if all are satisfied, offer conclusive proof that a *financial promotion* is directed only at investment professionals. These conditions relate to indications accompanying the *financial promotion* and the existence of proper systems and procedures. The *guidance* about proper systems and procedures in ■ AUTH App 1.12.6G applies equally to article 19. Article 19(6) specifically states that a *financial promotion* may be treated as made only to or directed only at investment professionals even if it is also made to or *directed at* other *persons* to whom it may lawfully be *communicated*. This would include overseas persons and high net worth companies, etc. Where this is the case, the conditions in article 19(4) should, in the FSA's view, be satisfied if:

- (1) the indications make it clear that the *financial promotion* is directed only at investment professionals and other *persons* to whom it may lawfully be promoted; and
- (2) the systems and procedures are designed to prevent *persons* other than such types of *persons engaging in investment activity*.

### Journalists (article 20)

**1.12.23** G<sub>/1</sub> The broad scope of the restriction in section 21 of the *Act* will inevitably mean that it will, from time to time, apply to journalists and others who make their living from commenting on news including financial affairs (such as broadcasters). This is liable to happen when such *persons* offer share tips or recommend the use of a particular firm for investment purposes. Such tips or recommendations are likely to amount to inducements to *engage in investment activity*.

**1.12.24** G<sub>/1</sub> The Treasury, in making the *Financial Promotion Order*, noted that financial journalism has an important part to play in increasing consumer awareness of financial services and products. It further observed the need to strike the right balance between protecting consumers and ensuring that the level of regulation is as light as possible, while respecting the principle of the freedom of the press.

**1.12.25** G<sub>/1</sub> With this objective in mind, the exemption in article 20 (as amended by article 2 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment No2) Order 2001) applies to any *non-real time financial promotion* the contents of which are devised by a *person* acting as a journalist where the *financial promotion* is in:

- (1) a newspaper, journal, magazine or other periodical publication;
- (2) a regularly updated news or information service (such as a website or teletext service); or
- (3) a television or radio broadcast or transmission.

In addition, the publication, service or broadcast must be one which satisfies the principal purpose test set out in article 54 of the *Regulated Activities Order*. This means that the principal purpose must not be to advise on or lead or enable *persons* to *buy* or *sell securities* or *contractually based investments*. See ■ AUTH 7 for further *guidance* on this. Article 20 does not define what is meant by a person 'acting in the

capacity of a journalist'. In the FSA's opinion, this expression has a potentially wide meaning. It will apply to anyone who writes for or contributes to a publication, service or broadcast. This includes experts or analysts who may be asked to contribute articles for a publication or website service or to offer their opinion in a broadcast.

- 1.12.26** G<sub>/1</sub> Provided the conditions in ■ AUTH App 1.12.25G are met, the exemption in article 20 applies to any *non-real time financial promotion*. However, there is an additional condition where the subject matter of the *financial promotion* is *shares or options, futures or contracts for differences* relating to *shares* and the *financial promotion* identifies directly a *person* who issues or provides such an *investment*. In such cases, the exemption is subject to a disclosure requirement which is itself subject to certain exceptions (see ■ AUTH 1.12.27G). This requirement is that the *financial promotion* must be accompanied by an indication of the nature of any financial interest held by the *person* responsible for the promotion (that is, the journalist or editor) or member of his family (his spouse or children under 18). A financial interest would be subject to disclosure where the *person* or a member of his family would be likely to get a financial benefit or avoid a financial loss if *persons* acted in line with the *financial promotion*. Article 20 does not specify the way in which a financial interest should be indicated. In the FSA's view, a financial interest should be disclosed in a way that will enable recipients to understand readily its nature. For example, 'the writer has a substantial holding of traded call options in these shares'.
- 1.12.27** G<sub>/1</sub> The exceptions to the disclosure requirement are where the *financial promotion* is in either :
- (1) a publication, service or broadcast which has proper systems and procedures which prevent the publication of communications without disclosure of financial interests; or
  - (2) a publication, service or broadcast which falls within the remit of:
    - (a) the Code of Practice issued by the Press Complaints Commission;
    - (b) the Programme Code of the Radio Authority; or
    - (c) the Producers' Guidelines issued by the British Broadcasting Corporation.
- 1.12.28** G<sub>/1</sub> The effect of ■ AUTH App 1.12.27G(2) is that *financial promotions* made by journalists in publications, services or broadcasts to which one of the codes or the guidelines apply are not subject to the disclosure requirement. This is so even if a *financial promotion* is made in breach of the codes or guidelines. Such *financial promotions* would remain to be dealt with by the body responsible for the code or guidelines and the publisher concerned. The code or guidelines may, of course, themselves require disclosure but the fact that they have been specified does not necessarily mean that they will or will always require disclosure. That is something which depends on the requirements of the particular code or guidelines.
- 1.12.29** G<sub>/1</sub> The effect of ■ AUTH App 1.12.27G(1) is that a journalist will not breach section 21 by not disclosing a financial interest, providing that the publication, service or broadcast concerned operates proper systems and procedures. As with the exemption in article 12 of the *Financial Promotion Order* (see ■ AUTH App 1.12.6G), what proper systems and procedures are will be a matter ultimately for the courts to determine and may vary according to the medium used. It will depend upon all the circumstances surrounding the publication, service or broadcast. In the FSA's opinion, proper systems and procedures may achieve the objective of preventing the publication of communications without the required disclosure in



one of two ways. They may require that disclosure be made. Or they may seek to prevent journalists from acting in a way which would enable them to profit if *persons* follow their published recommendations. For example, by banning their dealing in the *shares* or related investments for a reasonable period following the promotion. This would ensure that the journalist will not have a financial interest to disclose. For example, and in the *FSA's* opinion, a publication, service or broadcast may be likely to satisfy the test referred to in ■ AUTH App 1.12.27G(1) if it has set up procedures:

- (1) for *persons* responsible for devising the content of *financial promotions*, or for deciding that they should be included in the publication, service or broadcast, to register their financial interests in a central log;
- (2) for the central log to be properly maintained and regularly reviewed;
- (3) where disclosure is required, for all *financial promotions* to be subject to review before publication or broadcast by an appropriately qualified and senior *person*; and
- (4) for the *persons* referred to in (1) to be made aware in writing of the procedures and of their obligations to disclose their financial interests or to refrain from any course of action which may be likely to give them a financial interest requiring disclosure and, preferably, to have confirmed their acceptance of those obligations in writing.

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*Persons* such as experts or analysts may be approached to contribute at very short notice and may be overseas. In such cases, the systems and procedures referred to in ■ AUTH App 1.12.29G may not be practical. It is the *FSA's* opinion that, where occasional contributors are concerned, proper systems and procedures may include arrangements for ensuring that the need for disclosure (or the avoidance of financial interests) is drawn to the contributor's attention before the communication is made. The contributor's confirmation that he understands and accepts the position on disclosure would also need to be obtained. The arrangements for bringing the position on disclosure to the contributor's attention and for obtaining his understanding and acceptance should be made in whatever way is most appropriate in the circumstances. In other cases, it may be enough that the *persons* responsible for the broadcast satisfy themselves that contributors represent reputable regulated businesses. And that it would be reasonable to believe that they would not seek to promote an investment or investment service in which they had a financial interest without disclosing that fact. This is, of course, merely an example and not the only circumstances in which overseas broadcasts may be regarded as having proper systems and procedures.

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It appears to the *FSA*, however, that there will be situations when it may not be practical for the *persons* who are responsible for a publication, service or broadcast to apply proper systems and procedures to every *person* who may, whilst acting in the capacity of a journalist, *communicate a financial promotion*. For example where *persons* are asked to stand in at the last moment. In such cases, it is the *FSA's* opinion that the benefit of the exclusion will not be lost as respects those *persons* who are subject to the proper systems and procedures. However, any *financial promotions communicated* by *persons* who are not subject to them would still be subject to the restriction in section 21 and would need to be *approved* by an *authorised person* or otherwise exempt.

### Promotion broadcast by company director etc

**1.12.32** G<sub>/1</sub> Article 20A (which was added by article 3 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment No 2) Order 2001) provides a further exemption for certain *financial promotions communicated* by means of a service or broadcast which satisfies the principal purpose test in article 54 of the *Regulated Activity Order* (see ■ AUTH App 1.12.25G and ■ AUTH 7). Readers of this section should also refer to the guidance on *company* statements in ■ AUTH App 1.21.

**1.12.33** G<sub>/1</sub> The main purpose of the exemption appears to be to guard against the possibility that, during the course of a broadcast interview or a live website presentation, a *financial promotion* is made inadvertently by a director or employee of a *company* or other business undertaking when he is not acting in the capacity of a journalist (see ■ AUTH App 1.12.25G). The exemption applies if the *financial promotion* relates only to:

- (1) *shares* of the undertaking or of another undertaking in the same *group* or *options*, *futures* or *contracts for differences* related to those *shares*; or
- (2) any *controlled investment* issued or provided by an *authorised person* in the same *group* as the undertaking.

**1.12.34** G<sub>/1</sub> The exemption applies where the *financial promotion*:

- (1) comprises words which are spoken by the director or employee and not broadcast, transmitted or displayed in writing; or
- (2) is displayed in writing only because it is part of an interactive dialogue to which the director or employee is a party and in the course of which he is expected to respond immediately to questions put by a recipient of the communication.

This is provided that the *financial promotion* is not part of an organised marketing campaign. ■ AUTH App 1.14.4G(3) provides guidance on the meaning of an organised marketing campaign. In the context of article 20A, it is the FSA's view that an individual or isolated *financial promotion* will not represent or be part of an organised marketing campaign. However, a *company* representative may use a broadcast interview or webcast to encourage or incite viewers or listeners to acquire *investments* or investment services which are the subject of an advertising campaign being conducted at the same time. In such cases, any *financial promotion* contained in that interview or webcast will be part of an organised marketing campaign. Where this is the case, the company representative may be able to rely on other exemptions depending upon the subject matter of the *financial promotion* – see ■ AUTH App 1.21.

**1.12.35** G<sub>/1</sub> The exemption also requires that the director or employee is identified as such in the *financial promotion* before it is *communicated*.

**1.12.36** G<sub>/1</sub> The first part of the exemption (referred to in ■ AUTH App 1.12.34G(1)) specifically precludes any form of written communication. However, the FSA understands that the Treasury did not intend to prohibit the use of written words in the form of subtitling. These may be an aid to those with hearing difficulties or to interpret a foreign language, or the use of captions which supplement a spoken communication by highlighting aspects of it without introducing anything new. The FSA cannot fetter its discretion and must consider potential breaches of section 21 of the *Act* on their merits. However, where the only reason why a *person* may have breached section 21 of the *Act* is because he has used subtitling or captioning in this way the FSA would not expect to take further action. In the FSA's view, the position is different if a transcript of the spoken communication is later made available. This

would be a separate communication and would need to be *approved* or otherwise exempt.

- 1.12.37** G<sub>/1</sub> The second part of the exemption (referred to in ■ AUTH App 1.12.34G(2)) envisages that the director or employee will be holding the equivalent of a conversation conducted in writing. Typically this will involve the exchange of e-mails. It is possible that this part of the exemption could be used by companies making so-called webcasts over the Internet. However, this would only be the case if the service through which the webcast is provided is a regularly updated news or information service (and which meets the principal purpose test – see ■ AUTH 1.12.25G). There is no reason why the exemption should not apply to a *company* website which provides regularly updated news or information about the activities, products or services of the *company* where the website represents a service provided to those who use it. However, not all *company* websites will be services of this kind.

## 1.13 Exemptions applying to financial promotions concerning deposits and certain contracts of insurance

- 1.13.1** G<sub>/1</sub> The exemptions in Part V of the *Financial Promotion Order* concern *financial promotions* relating to *deposits* and *contracts of insurance* other than *life policies*. The exemptions may be combined with exemptions in Part IV but not with those in Part VI.
- 1.13.2** G<sub>/1</sub> Part V provides two kinds of exemption of a general nature and one specific exemption. The exemptions of a general nature are :
- (1) any form of *real time financial promotion* (articles 23 (Deposits: real time communications) and 26 (Relevant insurance activity; real time communications)); and
  - (2) *non-real time financial promotions* containing certain specified information including the name, country of incorporation (if relevant) and principal place of business of the deposit-taker or *insurer* and whether it is regulated, details of any redress schemes and, for deposit-takers only, certain financial information (articles 22 (Deposits: non-real time communications) and 24 (Relevant insurance activity: non-real time communications)).
- 1.13.3** G<sub>/1</sub> Article 25 (Relevant insurance activity: non-real time communications: reinsurance and large risks) exempts *financial promotions* concerning *contracts of insurance* which are either contracts of reinsurance or contracts covering certain large risks.
- 1.13.4** G<sub>/1</sub> Intermediaries involved with arranging and advising on *deposits* and *contracts of insurance* other than *life policies* may be *unauthorised persons* as such activities do not amount to *regulated activities* and so do not require *authorisation* under section 19 of the *Act*. However, the combination of the exemptions in Part V together with certain of the exemptions in Part IV (such as generic promotions – see ■ AUTH App 1.12.14G – and follow up communications – see ■ AUTH App 1.12.10G) should mean that it will often be possible for such *persons* to avoid any need to seek *approval* for their *financial promotions* from an *authorised person*.

## 1.14 Other financial promotions

**1.14.1** G<sub>/1</sub> 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*. ■ AUTH App 1.36.7 contains a table showing which types of *financial promotion* are covered by each individual exemption.

**1.14.2** G<sub>/1</sub> ■ AUTH App 1.14.3G to ■ AUTH 1.14.42G 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)

**1.14.3** G<sub>/1</sub> 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.

**1.14.4** G<sub>/1</sub> The FSA considers the effect of each of the conditions in ■ AUTH App 1.14.3G(1) to ■ AUTH App 1.14.3G(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 ■ AUTH App 1.14.6G).

- (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 FSA'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.

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In the FSA's opinion, the indicators referred to in ■ AUTH App 1.14.4G 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 FSA 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 FSA 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.

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In the FSA'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.

- 1.14.7** G<sub>/1</sub> A *financial promotion* may fail to satisfy all of the indicators referred to in ■ AUTH App 1.14.4G because it is addressed to more than one recipient and they are not *persons* who will *engage in investment activity* jointly. In the FSA'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.
- 1.14.8** G<sub>/1</sub> 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.
- 1.14.9** G<sub>/1</sub> In the FSA'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.
- 1.14.10** G<sub>/1</sub> In the FSA'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.
- 1.14.11** G<sub>/1</sub> Article 28A was added by article 2 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2001 (SI 2001/2633). It 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.
- 1.14.12** G<sub>/1</sub> In the FSA'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 ■ AUTH App 1.14.4(G)(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 FSA'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.

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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 FSA'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;
- (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 FSA'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)

## 1.14.14

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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*.

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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*.

## 1.14.16

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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 *FSA'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 *FSA's* opinion, it is unlikely that a time of less than 24 hours will be enough.

- 1.14.17 **G**<sub>/1</sub> 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.

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

- 1.14.18 **G**<sub>/1</sub> 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 *financial promotion rules* in ■ COB 3. Care should be taken as any failure to satisfy any of the relevant requirements of ■ COB 3 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 *FSA* recommends that anyone seeking to rely on this exemption either seeks professional advice or contacts the *FSA* before *communicating* the *financial promotion*. This exemption does not apply to *unsolicited real time financial promotions*.

#### Joint enterprises (article 39)

- 1.14.19 **G**<sub>/1</sub> 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.

- 1.14.20 **G**<sub>/1</sub> In the *FSA'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)

**1.14.21** G<sub>/1</sub> 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 certified high net worth individual and relate to certain *investments*. These *investments* must be either;

- (1) *shares* in or *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) *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.

**1.14.22** G<sub>/1</sub> To be certified as a high net worth individual, the individual concerned must have 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. In order to be current, the certificate must be signed and dated by the individual’s accountant or employer within twelve months of the date on which the communication is made. The *financial promotion* must not invite the recipient to *engage in investment activity* with the *person* who has signed the certificate. There is, however, nothing to prevent an accountant signing a certificate for an individual for whom he may be providing investment services of any kind. This is provided he does not seek to use the article 48 exemption to make *financial promotions* to the individual. The exemption can be used by associates or *group* members of the *person* who signs the certificate.

**1.14.23** G<sub>/1</sub> In addition, the *financial promotion* must contain certain information and the recipient must have previously (within the last 12 months) signed a statement in the terms in article 48(2)(b) of the *Financial Promotion Order*.

**1.14.24** G<sub>/1</sub> 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 *FSA*’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 ■ AUTH App 1.14.21G may then be sent to him under article 48. ■ AUTH App 1.4.27G offers further *guidance* on this.

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

**1.14.25** G<sub>/1</sub> 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 (e) which, for the most part, involve the amount of assets held.

**1.14.26** G<sub>/1</sub> 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 FSA'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 (article 50)

**1.14.27** G<sub>/1</sub> To be a sophisticated investor, 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. The FSA 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 *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*.

- 1.14.28** G<sub>/1</sub> 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 FSA'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 FSA 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 FSA would, generally, take no further action.

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

- 1.14.29** G<sub>/1</sub> 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 certified high net worth individuals, high net worth companies or unincorporated associations or trusts, or 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 high net worth individuals, high net worth companies or unincorporated associations or trusts, or 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. In the FSA's view, the exemption allows for *financial promotions* to be made to the members of the association. It is not restricted to *financial promotions* made to the operator or secretariat of the association.

#### Common interest group of a company (article 52)

- 1.14.30** G<sub>/1</sub> Article 52 concerns *non-real time* and *solicited real time financial promotions* about offers of *shares* or *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*.
- 1.14.31** G<sub>/1</sub> 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.

**1.14.32** G /1 In line with other exemptions, article 52 contains indicators which, if all are met, mean that the *financial promotion* is directed at relevant *persons*.

**1.14.33** G /1 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).

**1.14.34** G /1 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;
- (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.

### Sale of body corporate (article 62)

**1.14.35** G /1 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*.

- 1.14.36** G<sub>/1</sub> 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)
- 1.14.37** G<sub>/1</sub> In the *FSA's* view, a main aim of the exemption (see ■ AUTH App 1.14.35G(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.
- 1.14.38** G<sub>/1</sub> In any case where the conditions referred to in ■ AUTH App 1.14.35G(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 ■ AUTH App 1.14.35G(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.
- 1.14.39** G<sub>/1</sub> Where the nature of the parties test (see ■ AUTH App 1.14.35G(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;
  - (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*).
- 1.14.40** G<sub>/1</sub> In the *FSA'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. The *FSA* is aware that the Treasury has received comments about the scope of article 62. These are being considered but no decision has been taken on whether to propose any change. If the Treasury were minded to propose any change it would expect to consult publicly first.

**Other issues**

- 1.14.41** **G**<sub>/1</sub> 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* in the *body corporate* or a member of its group, or *warrants* or *certificates representing certain securities* relating to such *shares* or *debentures*. In the *FSA*'s view, an exchangeable *debt security* which is partly a *debenture* and partly an *option* is a relevant *investment* for these purposes.
- 1.14.42** **G**<sub>/1</sub> 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 *FSA* 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.

**1.15 Financial promotions by members of the professions (articles 55 and 55A)****Real time financial promotions by professional firms**

- 1.15.1** **G**<sub>/1</sub> Article 55 of the *Financial Promotion Order* contains a specific exemption for *professional firms* allowing them to make *solicited* or *unsolicited real time financial promotions*. This is provided the *financial promotion* is made:
- (1) by a *person* who carries on a *regulated activity* without needing *authorisation* under the *Part XX exemption*; and
  - (2) to someone who has already (that is, before the *financial promotion* is made) engaged the *person* making the *financial promotion* to provide professional services (that is services which are not *regulated activities* and whose provision is supervised and regulated by a *Designated Professional Body*).
- 1.15.2** **G**<sub>/1</sub> The article 55 exemption also requires that:
- (1) the *financial promotion* relates to an activity to which the *Part XX exemption* applies or which would be a *regulated activity* but for the exclusion in article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) which concerns activities which are a necessary part of professional services; and
  - (2) the activity to which the *financial promotion* relates would be undertaken for the purposes of, and be incidental to, the provision of professional services to or at the request of the recipient.
- 1.15.3** **G**<sub>/1</sub> The *FSA* considers that, to satisfy the condition in ■ AUTH App 1.15.2G(2) that an activity be incidental to the provision of *professional services, regulated activities* cannot be a major part of the practice of the *professional firm*. The *FSA* also considers that the following further factors are relevant.

- (1) The scale of *regulated activity* in proportion to other professional services provided.
- (2) Whether and to what extent services that are *regulated activities* are held out as separate services.
- (3) The impression given of how the *professional firm* provides *regulated activities*, for example, through its advertising or other promotions of its services.

In the FSA's opinion, one consequence of this is that the *professional firm* cannot provide services which are *regulated activities* if they amount to a separate business to the provision of professional services. This does not, however, preclude the *professional firm* operating its professional business in a way which involves separate teams or departments one of which handles the *regulated activities*.

## 1.15.4

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One of the effects of the requirements in ■ AUTH App 1.15.2G concerns *financial promotions* which relates to an activity which is not a *regulated activity* as the result of an exclusion in the *Regulated Activities Order*. In this case, a *professional firm* using the *Part XX exemption* cannot make a *real time financial promotion* relying on article 55 of the *Financial Promotion Order* unless the exclusion is provided by article 67 of the *Regulated Activities Order*. Neither can a *professional firm* rely on article 55 to make *real time financial promotions*, in connection with the provision of professional services to an existing client, if the *financial promotions* are made to a third party. Third parties may be prospective counterparties, rather than a client. In such circumstances, another exemption would need to be available.

#### Non-real time financial promotions by professional firms

## 1.15.5

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Article 55A of the *Financial Promotion Order* was added by article 2(b) of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2001 (SI 2001/2633). It exempts *non-real time financial promotions* where the *financial promotion*:

- (1) is made by a *person* who carries on a *regulated activity* without needing *authorisation* under the *Part XX exemption* (referred to in ■ AUTH App 1.15.6G and ■ AUTH App 1.15.7G as 'Part XX activities'); and
- (2) contains a specified statement and is limited in its content to the matters referred to in ■ AUTH App 1.15.6G.

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A *financial promotion* made under article 55A must contain a statement in the following terms: "The [firm/company] is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of [relevant designated professional body]. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide". The *financial promotion* may also set out the *Part XX activities* which the *person* is able to offer to his clients, provided it is clear that these are the incidental services to which the statement relates. In the FSA's view, the requirement that a *financial promotion* must contain a statement in the specified terms does not prevent minor changes to the text. This is provided they do not alter or otherwise change the meaning of the statement. For example, replacing "we" with the name of the firm or "because" with "as" or (where relevant) "members of" with "licensed by the" would be acceptable.

## 1.15.7

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The article 55A exemption should enable *professional firms* to issue brochures, websites and other *non-real time financial promotions* without any need for *approval* by an *authorised person*. This is provided the *financial promotion* does not also contain an invitation or inducement relating to *regulated activities* other than those covered by the *Part XX exemption*. In this respect, it should be noted that, unlike article 55, the article 55A exemption does not extend to activities which are excluded under article 67 of the *Regulated Activities Order*. The FSA takes the following views in relation to article 55A.

- (1) It is not necessary for the details of the Part XX activities to be set out in one place or adjacent to the statement. A brochure or website, for example, may contain details of Part XX activities in various places so long as it is made clear that they will be incidental investment activities as referred to in the statement. So, this only needs to be set out once in the brochure or website.
- (2) The inclusion of contact details would be regarded as part of the description of Part XX activities.
- (3) A *financial promotion* made under article 55A may be likely, on occasion, to result in the carrying on by the *professional firm* of activities which are excluded under the *Regulated Activities Order*. However, this does not mean that the *financial promotion* will fail to satisfy the terms of article 55A. There will be occasions where a *professional firm* will have to offer to provide services which may or may not involve Part XX activities or excluded activities. In the area of corporate finance, for example, a *professional firm* may offer its services in relation to the sale of an incorporated business or a substantial shareholding in such a business. It will not be clear whether the *professional firm's* services will be Part XX activities or excluded activities until the details of a proposed deal are known. Similarly, a *professional firm* may offer services which in some instances, will fall under the 'necessary' exclusion in article 67 of the *Regulated Activities Order* but, in others, will be Part XX activities. In practice, it will often be impossible for a *professional firm* to distinguish between Part XX activities and excluded activities at the preliminary stage of a brochure or website offering its services. In the FSA's view, the article 55A exemption will apply provided the only *regulated activities* held out in the brochure, website or other *non-real time financial promotion* are Part XX activities. It will, of course, be possible for a *professional firm* to make an offer involving excluded activities to a *person* who responds to a *financial promotion* issued under article 55A. But this is provided another exemption (such as the one-off *financial promotion* exemption (see ■ AUTH App 1.14.3G)) is available in respect of any subsequent *financial promotions*.

## 1.16

## Financial promotions concerning funeral plans

## 1.16.1

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Section 21 of the *Act* came into force for *financial promotions* about funeral plans on 1 January 2002. A *financial promotion* about funeral plans is subject to the restriction in section 21 of the *Act* if it relates to a pre-paid funeral plan of any kind where the provider of the plan carries on the *regulated activity* of entering into *funeral plan contracts* under article 59 of the *Regulated Activities Order* (see ■ AUTH 2.8.14). This is the case even if the actual plan being promoted is excluded under article 60 of the *Regulated Activities Order*. However, providers may choose only to enter into *funeral plan contracts* which are excluded under article 60 of the



*Regulated Activities Order*. If this is the case, any *financial promotion* relating to those plans will not be subject to the restriction in section 21 of the *Act*.

## 1.17 Financial promotions concerning agreements for qualifying credit

- 1.17.1 **G**<sub>/1</sub> Section 21 will not apply to *financial promotions* concerning agreements for qualifying credit until a date in 2004 yet to be specified by the Treasury. The FSA will be consulting separately on *guidance* on this subject.

## 1.18 Financial promotions concerning the Lloyd's market

- 1.18.1 **G**<sub>/1</sub> A *person* involved in *insurance business* written at Lloyd's may be making *financial promotions* when attracting another *person*:
- (1) to *effect* or *carry out contracts of insurance* written at Lloyd's (where the *controlled activity* which is the subject of the *financial promotion* is effecting and carrying out contracts of insurance);
  - (2) to have assets held under *funds at Lloyd's* (where the *controlled activity* may involve dealing in *securities* and *contractually based investments*, arranging deals in investments, managing investments or safeguarding and administering investments);
  - (3) to participate in particular *syndicates* at Lloyd's (where the *controlled activity* is advising on *syndicate* participation or arranging deals in *syndicate* participations or underwriting capacity);
  - (4) to participate indirectly in the Lloyd's market as a shareholder of a corporate *underwriting member* or a limited partner in a *limited liability partnership* which is an *underwriting member* (where the *controlled activity* is dealing in, arranging deals in or advising on *shares* or *units*); or
  - (5) to take out insurance which is written at Lloyd's (where the *controlled activity* is effecting a *contract of insurance*).
- 1.18.2 **G**<sub>/1</sub> Any *persons* making *financial promotions* as referred to in ■ AUTH App 1.18.1G(3) and ■ AUTH App 1.18.1G (4) are likely to be *authorised persons*. As such they will be subject to ■ COB 3. Any *persons* making *financial promotions* as referred to in ■ AUTH App1.18.1G(1), ■ AUTH App1.18.1G (2) and ■ AUTH App1.18.1G (5) may not be *authorised persons* and, if so, will need to ensure that their *financial promotions* are *approved* by an *authorised person* or that a specific exemption applies (see ■ AUTH App 1.13).

## 1.19 Additional restriction on the promotion of life policies

### 1.19.1

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Article 10 of the *Financial Promotion Order* (Application to qualifying contracts of insurance) precludes any of the exemptions from applying to a *financial promotion* which invites or induces a *person* to enter into a *life policy* with a *person* who is not:

- (1) an *authorised person*;
- (2) an *exempt person* who is exempt in relation to *effecting* or *carrying out contracts of insurance* of the class to which the promotion relates;
- (3) a *company* with its head office or a *branch* or agency in another *EEA State* and which is entitled to carry on in that country the class of *insurance business* being promoted;
- (4) a *company* authorised in one of the following countries or states to carry on the class of *insurance business* being promoted :
  - (a) Guernsey;
  - (b) the Isle of Man;
  - (c) Pennsylvania;
  - (d) Iowa; or
  - (e) Jersey.

■ COB 3.13.1 imposes a similar restriction on *authorised persons* concerning their *communicating* or *approving financial promotions* in the precluded circumstances.

## 1.20 Additional restriction on the promotion of collective investment schemes

### 1.20.1

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Where *collective investment schemes* are concerned additional restrictions are placed on their promotion to ensure that only those which are regulated are promoted to the general public. This is achieved by a combination of sections 21 and 238 (Restrictions on promotion) of the *Act* as explained in ■ AUTH App 1.20.2G. A *regulated collective investment scheme* is:

- (1) an *authorised unit trust scheme*;
- (2) an *investment company with variable capital*;
- (3) a *scheme* recognised under section 264 of the *Act* (Schemes constituted in other *EEA States*).

- (4) a *scheme* recognised under section 270 of the *Act* (Schemes authorised in designated countries or territories); or
- (5) a *scheme* recognised under section 272 of the *Act* (Individually recognised overseas schemes).

## 1.20.2

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Section 21 precludes the promotion by *unauthorised persons* of *unregulated collective investment schemes* unless the *financial promotion* is *approved* by an *authorised person* or is exempt. Section 238 then precludes the promotion of an *unregulated collective investment scheme* by *authorised persons* except where:

- (1) there is an exemption in an order made by the Treasury under section 238(6);
- (2) the *financial promotion* is permitted under *rules* made by the FSA under section 238(5) to exempt the promotion, otherwise than to the general public, of *schemes* of certain descriptions; or
- (3) the *scheme* is a single property scheme and its promotion is exempt under regulations made by the Treasury under section 239 of the *Act* (Single property schemes).

In addition, section 240 of the *Act* (Restriction on approval of promotion) precludes an *authorised person* from *approving* a *financial promotion* for the purpose of section 21 if he would not be able to *communicate* it himself under section 238.

## 1.20.3

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The Treasury has made an order under section 238(6). This is the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (as amended by article 3 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2001 – SI/2633) ('the CIS Financial Promotion Order'). The overall effect of the CIS Financial Promotion Order is to ensure that *authorised persons* are able to promote an *unregulated collective investment scheme* at least as widely as an *unauthorised person* is allowed to do under section 21 without needing the *approval* of an *authorised person*. In general terms, the order contains exemptions equivalent to those in the *Financial Promotion Order* which are relevant to *units* in an *unregulated collective investment scheme*. *Guidance* in ■ AUTH App 1 relating to exemptions in the *Financial Promotion Order* will apply equally to those exemptions where they appear in the CIS Financial Promotion Order. The main exception to this relates to the exemption for one-off *financial promotions* in article 15 of the CIS Financial Promotion Order. That article provides conditions which, if met, are conclusive proof that a *financial promotion* is one-off. However, these do not include the condition that the identity of the product or service must be determined having regard to the recipient's circumstances (see ■ AUTH App 1.14.3G(2) and ■ AUTH App 1.14.4G(2)).

## 1.20.4

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The FSA has made *rules* under section 238(5) which allow *authorised firms* to *communicate* or *approve* a *financial promotion* for an *unregulated collective investment scheme* in certain specified circumstances. These circumstances are set out in ■ COB 3 Ann 5 and referred to in ■ COB 3.11. To date, the Treasury has not made an order exempting single property schemes under section 239.

## 1.21

## Company statements, announcements and briefings

- 1.21.1** G<sub>/1</sub> There is a general concern that the practice of *companies* issuing statements and giving briefings may involve a *financial promotion*. These arise sometimes as a result of requirements imposed by a listing authority or an exchange or market, ■ AUTH App 1.4.14G offers *guidance* on when such statements or briefings may amount to or involve an inducement to *engage in investment activity*. It indicates that whilst statements of fact alone will not be inducements, there may be circumstances where there is a promotional element which may amount to an inducement (typically to buy the *company's shares*). In the FSA's experience, it is rare for *company* statements or briefings to involve an invitation.
- 1.21.2** G<sub>/1</sub> It is common practice for *listed companies* to brief analysts, usually at the time of the *company's* preliminary, interim and, if applicable, quarterly results and after the information has been issued to the market as a whole. Briefings may be made personally to a small or large number of analysts in a meeting or through a conference call. It is increasingly becoming the practice for *listed companies* to make their briefings available live to journalists and the general public on the basis that they may listen to or view, but not take part in, the briefing and any question and answer session. This is usually done through a conference call or a live broadcast (usually termed a webcast) through the *company's* website or the website of a specialist provider. Where such briefings include a *financial promotion* they must be *approved* by an *authorised person* (if they are *non-real time financial promotions*) or exempt.
- 1.21.3** G<sub>/1</sub> ■ AUTH App 1.21.4G to ■ AUTH App 1.21.21G set out the FSA's views on the potential relevance of certain exemptions to *company* statements and briefings. The exemptions are referred to in the same order as the *Financial Promotion Order*. In the FSA's view, these exemptions (whether alone or, where applicable, in combination) should enable most statements and briefings which involve *financial promotions* to be made by the *company* concerned without the need for *approval*. In particular, the FSA considers that article 69 (see ■ AUTH App 1.21.17G) should ensure that *financial promotions* made during the course of analyst briefings by *listed* and AIM *companies* are exempt and do not require *approval*. Some but not all of these exemptions apply equally to *financial promotions* which are *communicated* by a third party (for instance, a public relations adviser) on behalf of its corporate client. Those exemptions which are not available to a third party in such circumstances are those contained in article 20A (see ■ AUTH App 1.21.6G), 59 (see ■ AUTH App 1.21.11G), and 69 (see ■ AUTH App 1.21.17G).

#### Article 17: Generic promotions

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- 1.21.4** G<sub>/1</sub> Any statement or briefing which did not identify the *company* as an *issuer of securities* (for example, by referring to its *securities*) and which does not identify any other particular *investment* or provider of *investments* or *investment services* will be exempt as a generic promotion (see ■ AUTH App 1.12.14G). In practice, it will be unlikely that such a statement or briefing would involve a *financial promotion* but the article 17 exemption may be useful where any doubt arises.

#### Article 19: Investment professionals

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- 1.21.5** G<sub>/1</sub> Where statements or briefings are only available to analysts who are, or who work for, *authorised persons* (including *overseas persons* who would need to be *authorised* if they were conducting their business in the *United Kingdom*), article 19 will exempt any *financial promotion* that may be made (see ■ AUTH App 1.12.21G). Furthermore, where a *financial promotion* is made in the course of an interactive

dialogue with an analyst and is addressed to him, the *financial promotion* will be regarded as having been made to that analyst irrespective of who else may hear or view it (article 6(b) of the *Financial Promotion Order* – see ■ AUTH App 1.6.9G). For example, where a representative of the *company* is responding to a particular question article 19 would then apply. This is not to say that every time a *company* representative answers a question his response, if it involves a *financial promotion*, will be addressed to the questioner for the purpose of article 6(b). This will depend upon the particular circumstances.

### Article 20A: Promotion broadcast by company director etc

- 1.21.6 G<sub>/1</sub> ■ AUTH App 1.12.32G contains detailed *guidance* on the exemption in article 20A. The exemption is capable of applying to *financial promotions* in a *company* statement or briefing where they are *communicated* through a webcast if the website is a regularly updated news or information service. For this to be the case, the website must be a service provided to *persons* who use it (so it must not, for example, simply be an advertising vehicle) and that service must be one of providing news or information which will be updated regularly. This is capable of applying to some corporate websites. For example, the website of a *company* may amount to a service of information about the company's activities, services and products which is regularly updated and the webcast may be seen as part of that service. Not all corporate websites will qualify, however, and each website must be considered on its merits. *Company* representatives seeking to use this exemption will need to bear in mind any restrictions on the making available of certain information to which they may be subject (for example, under *listing rules*).

### Article 28 and 28A: One off promotions

- 1.21.7 G<sub>/1</sub> Article 28 applies to one-off *non-real time* and *solicited real time financial promotions*. Article 28A applies to one-off *unsolicited real time financial promotions*. It is possible that articles 28 or 28A could apply to *financial promotions* in *company* statements or briefings if they were to be made other than to an analyst or journalist. In this respect, the comments made in ■ AUTH App 1.14.3G about one-off *financial promotions* are relevant.

### Article 43: Members and creditors of certain bodies corporate

- 1.21.8 G<sub>/1</sub> Article 43 applies to *non-real time* and *solicited real time financial promotions* made by a *company* ('C') to *persons* who, in broad terms, are:
- (1) members or creditors of C or a *group* member of C ('G');
  - (2) entitled to a relevant investment issued by C or G;
  - (3) entitled to become a member of C or G; or
  - (4) entitled to have transferred to them title to a relevant investment issued by C or G.

The *financial promotion* must relate only to relevant investments issued or to be issued by C or G or, in certain circumstances, another *person* (see ■ AUTH App 1.21.9G(2)). C and G must not be *open-ended investment companies*.

1.21.9 **G** A 'relevant investment' in article 43 means:

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- (1) *shares* or *debentures*; and
- (2) *warrants* and *certificates representing certain securities* relating to (1) and issued by G or a *person* acting on behalf of or under arrangements made with C.

Article 43 allows a *company* to *communicate a financial promotion* to its shareholders about rights issues or a cash offer by a third party for their *shares*. It also allows a *company* to *communicate* with its creditors about restructuring debt obligations. It does not, however, exempt *persons* who may make *financial promotions* on behalf of a *company*.

#### Article 47: Persons in the business of disseminating information

1.21.10

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Article 47 will exempt *financial promotions* in *company* statements or briefings where they are made to members of the press and may be combined with article 19 (Investment professionals). This means that *companies* will only need to look for other exemptions where the recipients of their *financial promotions* are *persons* other than analysts or journalists or both.

#### Article 59: Annual accounts and directors' report

1.21.11

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Article 59 is capable of applying to *financial promotions* in *company* statements and briefings where they are accompanied by:

- (1) the whole or any part of the annual accounts of the *company* (provided it is not an *open-ended investment company*); or
- (2) any report prepared and approved by the directors of such a *company* under section 234 and 234A of the Companies Act 1985 or corresponding legislation in Northern Ireland or in another *EEA State*.

In this respect, the *FSA* considers that the annual accounts (or part of them) or directors' report accompanies a *financial promotion* where it is made available to the recipients of the *financial promotion* at the same time. The *financial promotion* should refer to the accompanying material. For example, the accounts or report may be available on a *company's* website and referred to in a *financial promotion* on that website. Or they may be contained in or enclosed with a written communication (including an e-mail) or handed over during a meeting or discussion.

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Article 59 imposes certain conditions.

- (1) The *financial promotion* must be an inducement and not be an invitation or amount to advice to acquire or dispose of an *investment*.
- (2) The inducement must not relate to any *investment* other than *shares* or *debentures* of the *company* making the *financial promotion* (or a member of its *group*) or *warrants* relating to or certificates representing such *shares* or *debentures*.
- (3) If the *financial promotion* contains any reference to past prices of or yields on the *company's securities* as referred to in (2), it must be accompanied by a

statement that past performance cannot be relied on as guide to future performance.

### Article 67: Promotions required or permitted by market rules

**1.21.13** G<sub>/1</sub> Article 67 exempts any *financial promotion* other than an *unsolicited real time financial promotion* which relates to *shares, debentures, government and public securities, warrants or certificates representing certain securities* which are permitted to be traded or dealt in on a relevant market. A relevant market for the purposes of article 67 is one which meets the criteria in Part I of, or is specified in or established under the rules of an exchange specified in Parts II or III of, schedule 3 to the *Financial Promotion Order*. This includes *recognised investment exchanges* and *EEA regulated markets* which are *exempt persons* under article 36 of the *Exemption Order*, together with various other overseas markets. The *financial promotion* must, however, be required or permitted to be *communicated* by the rules of the market or by a body which either regulates the market or regulates offers or issues of *investments* to be traded on the market.

**1.21.14** G<sub>/1</sub> The reference to *financial promotions* which are permitted to be *communicated* relates, in the FSA's opinion, to something which is expressly permitted rather than simply not expressly prohibited. Article 67 itself does not specify any particular medium for *communicating* required or permitted material. So, it will be enough for the *financial promotion* to be part of a document which is itself required or permitted to be *communicated* (such as reports or financial statements). Market rules or usual market practice may require the *financial promotion* to be *communicated* in a particular form or by a particular medium. However, the exemption will still apply if the *financial promotion* is *communicated* in a different form or by a different medium provided that its substance is unchanged. But article 67 will not apply to a *financial promotion* simply because it is included in another document which is required or permitted where the *financial promotion* amounts to additional information to that which is required or permitted. Neither does article 67 specify what form permission can take. In the FSA's view, however, permission would need to be given either in rules or guidance applicable to the market in question.

**1.21.15** G<sub>/1</sub> Article 67 refers to an *investment* which is permitted to be traded or dealt in on a relevant market. In the FSA's opinion, this includes a situation where a class of *securities* is traded on a relevant market but the *financial promotion* relates to new *securities* of that class which have not yet themselves been issued or started trading. Where securities of that class have not yet been admitted to trading on a relevant market, article 68 may apply – see ■ AUTH App 1.21.16G.

### Article 68: Promotions in connection with admission to certain EEA markets

**1.21.16** G<sub>/1</sub> Article 68 applies where the *financial promotion* relates to *securities* which have not yet been admitted to trading but for which application has been or is to be made. It exempts a *non-real time* or a *solicited real-time financial promotion* which a relevant *EEA* market requires to be *communicated* before admission to trading can be granted. A relevant *EEA* market for this purpose is a market with its head office in an *EEA State* and which meets the conditions in Part I of, or is specified in or established under the rules of an exchange specified in Part II of, Schedule 3 to the *Financial Promotion Order*. Article 68 also requires that the *financial promotion* be one:

- (1) which, if it were included in a prospectus issued in line with Part II of the Public Offers of Securities Regulations 1995, would be required to be *communicated* by those Regulations; and
- (2) which is not accompanied by any information other than that information which is required or permitted to be published by the rules of the relevant *EEA* market.

### Article 69: Promotion of securities already admitted in certain markets

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Article 69 is similar to article 59 in the conditions it imposes (see ■ AUTH App 1.21.12G). These are two main differences between article 69 and article 59.

- (1) Article 69 does not apply to *unsolicited real time financial promotions*.
- (2) The requirement in article 59 that the *financial promotion* be accompanied by accounts or a report is replaced in article 69. It is replaced by a requirement that *shares* or *debentures* of the *company* or its parent undertaking (or *warrants* relating to or certificates representing such *investments*) are permitted to be traded or dealt in on a relevant market (relevant market having the same meaning as in article 67 – see ■ AUTH App 1.21.13G).

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Article 69 exempts *financial promotions* about 'investments issued by' a *company* or a member of its *group*. An issue arises about whether the term 'investments issued by' a *company* includes investments which are 'to be issued by' a *company*. In the FSA's view, there is a case for arguing that this is the effect although the matter is not beyond doubt. Article 69 replaces an earlier exemption made under section 58(3) of the Financial Services Act 1986 and which applied to investments which were to be issued. The FSA understands that article 69 was not intended to be narrower in scope than its predecessor. The FSA considers that the better view is that article 69 applies where investments are 'to be issued'.

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In the FSA's opinion, *companies* whose *securities* are permitted to be traded or dealt in on a relevant market should be able to make good use of the article 69 exemption. But such *companies* will need to ensure that they meet the specific requirements in article 69(3) to (6). In very general terms, a *financial promotion* will comply with these requirements if:

- (1) the only reason it is a *financial promotion* is that it contains an inducement about certain *investments* issued by the *company* or a *group* member and which does not amount to advice to any *person* to acquire or dispose of such *investments*; and
- (2) should it contain any reference to past prices of or yields on the *company's investments*, it is accompanied by a statement that past performance cannot be relied on as a guide to future performance.

### Article 71: Promotions included in listing particulars, etc

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Article 71 applies to a *non-real time financial promotion* included in:

- (1) listing particulars;
- (2) supplementary listing particulars;



- (3) a prospectus approved under *listing rules* under section 84 or 87 of the *Act*;
- (4) a supplementary prospectus approved under *listing rules* made under section 81 of the *Act* (as applied by section 86 or 87); and
- (5) any other document required or permitted to be published by *listing rules* under part VI of the *Act*.

The comments in ■ AUTH App 1.21.14G about when something is required or permitted to be published apply also to (5).

### General issues

#### 1.21.21

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A requirement common to the exemptions in articles 59, 67 and 69 is that the *financial promotions* must not relate to *investments* other than those issued by the *company* or a member of its *group*. The *FSA* is aware that there is concern about comments made in *company* statements or briefings. This is that they may be held to be inducements to acquire or dispose of, or exercise rights conferred by, an *investment* issued by a third party. For example, traded options on or certificates representing the *company's shares*. ■ AUTH App 1.4 sets out the *FSA's* general views on when a *communication* is an inducement. It appears to the *FSA* that, for a *company* statement or briefing to involve an inducement to *persons* to, for example, exercise rights under a traded option written on or acquire certificates representing the *company's securities*, it must seek to persuade or induce *persons* specifically to do that. The mere fact that a *person* reading, hearing or viewing a *company* statement or briefing containing an inducement to acquire the *company's securities* may be influenced to exercise traded options which he holds is not enough to make it an inducement to exercise those rights.

## 1.22

### The Internet

#### 1.22.1

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The Internet is a unique medium for *communicating financial promotions* as it provides easy access to a very wide audience. At the same time, it provides very little control over who is able to access the *financial promotion*.

#### 1.22.2

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The test for whether the contents of a particular website may or may not involve a *financial promotion* is no different to any other medium. If a website or part of a website, operated or maintained in the course of business, invites or induces a *person* to *engage in investment activity*, it will be a *financial promotion*. The *FSA* takes the view that the *person* who caused the website to be created will be a *communicator*. So, any software engineers that may or may not have been involved in establishing the website, provided they have no interest in it other than being paid for its design, will not be *communicating financial promotions* contained in it. Similarly, an Internet services provider who merely manages a website for another *person* and who has no control over or responsibility for its contents will not be *communicating any financial promotion* in the site. An Internet service provider whose circumstances are such that he is *communicating financial promotions* for other *persons* may be able to use the exemption for mere conduits (see ■ AUTH App 1.12.18G).

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The Internet also allows hypertext links, where two different sites in the Internet can be connected almost instantaneously by simply clicking on the link. The FSA's views on the position of hypertext links (which should be read with the remainder of ■ AUTH App 1, especially ■ AUTH App 1.4 (Invitation or inducement)) are as follows.

- (1) A hypertext link may or may not be a *financial promotion* in itself. This will depend on the nature of the hypertext link and the context in which it is placed. However, taken in isolation, a hypertext link which is purely the name or logo of the destination will not be a *financial promotion* in its own right. More sophisticated links, such as banners or changeable text, may be *financial promotions*. This will depend upon the facts in each case.
- (2) The material on a host website which contains the hypertext link may in itself be a *financial promotion*. For example, it may contain text which seeks to encourage or incite *persons* to activate the link with a view to *engaging in investment activity*.
- (3) Website material which represents a directory of website addresses or e-mail addresses will not be a *financial promotion* in its own right. That is unless the material also contains an inducement to contact a named addressee with a view to *engaging in investment activity*.
- (4) The destination website (that is, the one that is reached through the hypertext link) may or may not be a *financial promotion*. This will depend upon the content of that website. Website operators are responsible for the contents of their website if it hosts or creates links to the websites of *unauthorised persons*. In most cases they will not be causing the *communication* of any *financial promotion* in those other websites and so will not be responsible for those websites complying with section 21. In some cases, however, the operator ('O') of a website which hosts a link to another website, may be causing the *communication* of a *financial promotion* on that other website. This will only arise when O has made arrangements with the operator of the other website under which O is to procure users of his site to access the link provided with a view to their *engaging in investment activity*.
- (5) An exemption may require certain indications to be made in a *financial promotion* on a website. In these cases, the requirement may be satisfied by putting information on separate pages which can be accessed through a link on the page, or one of the pages, which contains the *financial promotion*.

## 1.23

## Regulated activities

## 1.23.1

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Under section 19 of the *Act* (The general prohibition) no *person* may, by way of business, carry on a *regulated activity* in the *United Kingdom* unless he is authorised or exempt. The meaning of *regulated activity* is set out in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*) (as amended). Any *person* who breaches section 19 of the *Act* commits a criminal offence for which the maximum penalty is two years' imprisonment and an unlimited fine.

**1.23.2** G<sub>/1</sub> Anyone who is carrying on a *regulated activity* is likely to make *financial promotions* in the course of or for the purposes of carrying on that activity. It is beyond the scope of this *guidance* to cover *regulated activities* as such (for a general guide see ■ AUTH 2). There are circumstances, however, where *persons* whose main aim is either :

- (1) to make *financial promotions* for their own purposes or on behalf of others; or
- (2) to help other *persons* to make *financial promotions*,

may find themselves conducting *regulated activities*. Such *persons* may typically include publishers or broadcasters, financial commentators, Internet service providers and website operators and telephone marketing companies.

**1.23.3** G<sub>/1</sub> The *regulated activities* which are likely to be conducted in the circumstances referred to in ■ AUTH App 1.23.2G are :

- (1) giving advice on investments (articles 53 (Advising on investments) and 56 (Advice on syndicate participation at Lloyd's) of the *Regulated Activities Order*) - for example, where the *financial promotion* is the advice;
- (2) *making arrangements with a view to transactions in investments* (article 25(1) of the *Regulated Activities Order* (Arranging deals in investments)) - for example, where the *person* concerned makes arrangements that are intended to lead to a transaction by a third party; and
- (3) agreeing to carry on either (1) or (2) (article 64 of the *Regulated Activities Order* (Agreeing to carry on specified kinds of activity)).

## 1.24 Advising on investments

**1.24.1** G<sub>/1</sub> Under article 53 of the *Regulated Activities Order*, *advising on investments* covers advice which :

- (1) is given to a *person* in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
- (2) is advice on the merits of his (whether as principal or agent) *buying, selling, subscribing for or underwriting* a particular *investment* which is a *security* or a *contractually based investment* or exercising any right conferred by such an *investment* to *buy, sell, subscribe for or underwrite* such an *investment*.

**1.24.2** G<sub>/1</sub> The effect of advice being given in the circumstances referred to in ■ AUTH App 1.24.1G is that :

- (1) it must relate to an *investment* which is a *security* or a *contractually based investment*;
- (2) that *investment* must be a particular *investment*;
- (3) it must be given to *persons* in their capacity as investors or potential investors;

- (4) it must be advice (that is, not just information); and
- (5) it must relate to the merits of investors or potential investors (or their agents) *buying, selling*, subscribing for or underwriting (or exercising rights to acquire, dispose of or underwrite) the *investment*.

## 1.24.3

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Each of the aspects referred to in ■ AUTH App 1.24.2G is considered in greater detail in ■ AUTH App 1.25 to ■ AUTH App 1.29. In addition, under article 56 of the *Regulated Activities Order*, advising a *person* to become, or continue or cease to be a *member* of a particular Lloyd's *syndicate* is a *regulated activity*.

## 1.25

### Advice must relate to an investment which is a security or contractually based investment

## 1.25.1

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For the purposes of section 53 of the *Regulated Activities Order*, a *security* or *contractually based investment* is any one of the following :

- (1) *shares*;
- (2) *debentures*;
- (3) *government and public securities*;
- (4) *warrants*;
- (5) *certificates representing certain securities*;
- (6) *units* in *collective investment schemes*;
- (7) *stakeholder pension schemes*;
- (8) *options*;
- (9) *futures*;
- (10) *contracts for differences*;
- (11) *life policies*;
- (12) *funeral plan contracts* (with effect from 1 January 2002);
- (13) rights to or interests in such *investments*.

## 1.25.2

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Article 53 does not apply to advice given on any of the following :

- (1) *deposit* or other bank or building society accounts;
- (2) contracts of general insurance or of long term insurance which are not *contractually based investments* (for example, most pure term and permanent health insurance);
- (3) mortgages or other loans;

- (4) National Savings products;
- (5) foreign exchange (or cash);
- (6) commodities (for example, gold);
- (7) real estate;
- (8) any other physical property capable of having investment potential (for example, works of art, racehorses) unless investment is made through a *collective investment scheme*;
- (9) interests under the trusts of an *occupational pension scheme* other than a *stakeholder pension scheme*.

## 1.26 The investment must be a particular investment

**1.26.1** G<sub>/1</sub> For the purposes of article 53 advice must relate to a particular *investment* – generic or general advice is not covered. Generic or general advice may, however, be a *financial promotion* (see ■ AUTH App 1.4).

**1.26.2** G<sub>/1</sub> Generic advice will not be caught by article 53. Examples of generic advice may include:

- (1) financial planning;
- (2) advice on the merits of investing in Japan rather than Europe;
- (3) advice on the merits of investing in investment trusts as opposed to unit trusts or unit-linked insurance; and
- (4) advice on the merits of investing offshore, or in fixed income rather than floating rate bonds.

**1.26.3** G<sub>/1</sub> In the *FSA's* view, guiding a *person* through a decision tree should not, of itself, involve advice within the meaning of article 53 (it should be generic advice). For example, helping a *person* to understand what the questions or options are and how to determine which option applies to his particular circumstances. But a recommendation that the *person* concerned should, if the results of using the decision tree so indicate, buy a stakeholder personal pension from a particular provider (or any other particular *investment*) would be advice for the purpose of article 53. An *unauthorised person* guiding another through a decision tree needs to make it clear that the decision tree aids generic decisions and that the *person* doing the guiding is not recommending any particular *investment*.

**1.26.4** G<sub>/1</sub> Examples of a particular *investment* include :

- (1) *securities* – shares in ABC plc, Treasury 10% 2001 stock, XYZ plc *warrants*;
- (2) *units* in *collective investment schemes* - ABC smaller companies fund, XYZ Growth Trust;

- (3) exchange-traded *derivatives* - LME Copper Grade A 3 months, LIFFE Japanese Government bond, ABC plc traded options;
- (4) contractual *investments*, for example, *futures* and other contracts having specified terms and conditions such as duration, volume, interest rate or price and which are to be entered into with a particular *person*;
- (5) *contracts of insurance* which are *contractually based investments* - these are both products and contractual *investments*; so a particular *investment* would include :
  - (a) the ABC Life Personal Pension or the XYZ Life Guaranteed Bond; or
  - (b) a contract having essential terms and provider specified – for instance, a 25 year with-profits low cost endowment contract covering husband and wife and to be issued by XYZ Life Plc.

## 1.27 Advice to be given to persons in their capacity as investors (on the merits of their investing as principal or agent)

- 1.27.1** G For the purposes of article 53, advice must be given to or directed at someone who either holds *investments* or is a prospective investor (or their agent).  
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- 1.27.2** G Article 53 does not apply where the advice is given to *persons* who receive it as:  
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- (1) an adviser who may use it to inform advice given by him to *persons* for whom he does not act as agent;
  - (2) a journalist or broadcaster; or
  - (3) an employer (for example, on setting up a pension scheme).
- 1.27.3** G Article 53 does not apply to advice given to a *person* (such as an independent financial adviser) who is acting as an agent for an investor if it does not relate to a transaction into which the *person* is to enter as agent for the investor.  
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- 1.27.4** G Article 53 does apply where the recipient is someone who invests on behalf of other *persons* (whether as a principal or agent), such as :  
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- (1) a trustee or nominee; or
  - (2) a discretionary fund manager; or
  - (3) an attorney or anyone else who enters into investment transactions as agent for investors,
- where he receives the advice in that capacity.
- 1.27.5** G Advice will still be covered by article 53 even though it may not be given to or directed at a particular investor (for example, advice given in a periodical publication or on a website). The expression ‘investor’ has a broad meaning and will include institutional or professional investors.  
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## 1.28 Advice or information

**1.28.1** **G**<sub>/1</sub> In the *FSA*'s view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of fact or figures.

**1.28.2** **G**<sub>/1</sub> In general terms, simply giving information without making any comment or value judgement on its relevance to decisions which an investor may make is not advice.

**1.28.3** **G**<sub>/1</sub> Information may often involve:

- (1) listings of *share* and *unit* prices;
- (2) company news or announcements;
- (3) an explanation of the terms and conditions of an *investment*;
- (4) a comparison of the benefits and risks of one *investment* as compared to another;
- (5) league tables showing the performance of *investments* of a particular kind against set published criteria;
- (6) details of directors' dealings in the *shares* of their own companies;
- (7) alerting *persons* to the happening of certain events (for example, XYZ shares reaching a certain price).

**1.28.4** **G**<sub>/1</sub> In the *FSA*'s opinion, however, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example:

- (1) a *person* may offer to provide information on directors' dealings on the basis that, in his opinion, were directors to buy or sell investors would do well to follow suit;
- (2) a *person* may offer to tell a client when certain *shares* reach a certain value (which would be advice if the *person* providing the information has offered to do so on the basis that the price of the *shares* means that it is a good time to buy or sell them); and
- (3) a *person* may provide information on a selected, rather than balanced, basis which would tend to influence the decision of the recipient.

## 1.29 Advice must relate to the merits (of buying or selling a particular investment)

- 1.29.1** **G** Advice must relate to the *buying* or *selling* of an *investment* – in other words, the pros or cons of doing so.  
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- 1.29.2** **G** An explanation of the implications of, for example, exercising certain rights or the happening of certain events (such as death) need not involve advice on the merits of exercising those rights or on what to do following the event.  
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- 1.29.3** **G** Neither does advice on the merits of using a particular stockbroker or investment manager in his capacity as such amount to advice for the purpose of section 53. This is because it is not advice on the merits of *buying* or *selling* an *investment*.  
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- 1.29.4** **G** Advice in the form of rating issuers of *debt securities* as to the likelihood that they will be able to meet their repayment obligations need not, of itself, involve any advice on the merits of *buying*, *selling* or holding on to that issuer's stock.  
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- 1.29.5** **G** Without an explicit or implicit recommendation on the merits of *buying* or *selling* an *investment*, advice will not be covered by article 53 if it is advice on :  
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- (1) the likely meaning of uncertain provisions in an investment agreement;
  - (2) how to complete an application form;
  - (3) the value of *investments* for which there is no ready market;
  - (4) the effect of contractual terms and their commercial consequences;
  - (5) how to structure a transaction to comply with regulatory, competition and taxation requirements; or
  - (6) terms which are commonly accepted in the market.
- 1.29.6** **G** Advice as to what might happen to the price or value of an *investment* if certain events were to take place, however, may be covered by article 53 in some circumstances.  
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## 1.30 Medium used to give advice or information

- 1.30.1** **G** With the exception of periodicals, broadcasts and other news or information services (see ■ AUTH App 1.31.2G), the medium used to give advice should make no difference to whether or not it is caught by article 53.  
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- 1.30.2** **G** Advice can be provided in many ways including:  
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- (1) face to face;
  - (2) orally to a group;
  - (3) by telephone;
  - (4) by correspondence (including e-mail);
  - (5) in a publication, broadcast or website; and



(6) through the provision of an interactive software system.

- 1.30.3** G<sub>/1</sub> Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problems. The provider of the service will be giving advice for the purpose of article 53 only if the service results in something more than a generic recommendation, as with a paper version.
- 1.30.4** G<sub>/1</sub> Advice in publications, broadcasts and websites is subject to a special regime – see ■ AUTH App 1.31.2G and ■ AUTH 7.
- 1.30.5** G<sub>/1</sub> Some software services involve the generation of specific buy, sell or hold signals relating to particular *investments*. These signals are liable, as a general rule, to be advice for the purposes of article 53 (as well as *financial promotions*) given by the *person* responsible for the provision of the software. The exception to this is where the user of the software is required to use enough control over the setting of parameters and inputting of information for the signals to be regarded as having been generated by him rather than by the software itself.

## 1.31 Exclusions for advising on investments

- 1.31.1** G<sub>/1</sub> The *Regulated Activities Order* contains a number of exclusions which prevent certain activities from being a *regulated activity*.
- 1.31.2** G<sub>/1</sub> As respects article 53, the main exclusion relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54: Advice given in newspapers etc). The exclusion applies if the principal purpose of any of these is not to give advice covered in article 53 or to lead or enable *persons* to acquire or dispose of *securities* or *contractually based investments*. This is explained in greater detail, together with the provisions on the granting of certificates, in ■ AUTH 7.
- 1.31.3** G<sub>/1</sub> It is also possible for advice to be excluded if it is given by a *person* in the course of carrying on a profession or business (other than a *regulated activity*). This is if it is reasonably to be regarded as necessary for him to give the advice to provide his professional or other services and he is not separately paid for giving the advice (article 67: Activities carried on in the course of a profession or non-investment business). This could arise in the context of advice given by *persons* such as :
- (1) a solicitor, accountant or tax adviser; or
  - (2) a debt counsellor; or
  - (3) an employment agency.
- 1.31.4** G<sub>/1</sub> For example, it may be necessary for a *person* referred to in ■ AUTH App 1.31.3G(1) or ■ AUTH App 1.31.3G(2) to advise a client to sell all his assets for tax, legal or debt reduction reasons. However, it may not be necessary for him to recommend selling some *investments* and not others. Whether or not this is the case will depend on the circumstances in which the advice is given.

## 1.32 Arranging deals in investments

- 1.32.1** G<sub>/1</sub> Under article 25 of the *Regulated Activities Order*, arranging deals in investments covers:
- (1) making arrangements for another *person* (whether as principal or agent) to *buy, sell*, subscribe for or underwrite a particular *investment* which is :
    - (a) a *security*; or
    - (b) a *contractually based investment*; or
    - (c) an *investment* of the kind specified by article 86, or article 89 so far as relevant to that article (Lloyd's *syndicate* membership and capacity and rights to or interests in such *investments*); or
  - (2) making arrangements with a view to a *person* who participates in the arrangements *buying, selling*, subscribing for or underwriting *investments* falling within ■ AUTH App 1.32.1G(1)(a) to (c) (whether as principal or agent).
- 1.32.2** G<sub>/1</sub> Article 25(1) applies only where the arrangements bring about or would bring about the particular transaction in question. This is because of the exclusion in article 26. In the FSA's view, a *person* brings about or would bring about a transaction only if his involvement in the chain of events leading to the transaction is of enough importance that without that involvement it would not take place. The second limb (article 25(2)) is potentially much wider as it does not require that the arrangements would bring about particular transactions. It is this limb which is of potential relevance within the scope of this *guidance*.
- 1.32.3** G<sub>/1</sub> In the course of their business, people such as publishers or broadcasters, Internet service providers, website operators or telephone marketing companies may provide services for authorised or *exempt persons* or other *persons* (such as *overseas persons*) who carry on *regulated activities*. This does not necessarily mean that any arrangements they make with such *persons* will fall within the scope of article 25(2). For that to be the case, the arrangements must be made with a view to the *authorised* or *exempt* (or overseas) *person* or that *person's* customers or counter-parties or any or all of them *buying* or *selling investments*. This means that a person making arrangements must take account of the purpose for which he makes them.
- 1.32.4** G<sub>/1</sub> The ordinary business of a publisher or broadcaster can involve him in publishing or broadcasting *financial promotions* (for example, advertisements) on behalf of authorised or *exempt persons*. Journalists who write about *investments* or financial services may promote the services of an authorised or *exempt person*. In the FSA's opinion, such *persons* would not normally be regarded as making arrangements under article 25(2). This is the case even if any arrangements they may have made may lead their readers or viewers to *buy* or *sell investments* in response to the promotions. In the FSA's view, the publisher or broadcaster may normally be seen to be making arrangements with a view to publishing or broadcasting promotions which may include *financial promotions*. The same may apply to arrangements made by Internet website operators who may allow the promotion on their site of services including *financial promotions* through the setting up of hypertext links or the placing of banner advertisements.

- 1.32.5** **G**<sub>/1</sub> The *Regulated Activities Order* contains an exclusion (article 27: Enabling parties to communicate) to bring a degree of certainty to this area. This applies to arrangements which might otherwise fall within article 25(2) merely because they provide the means by which one party to a transaction (or potential transaction) is able to *communicate* with other parties. In the FSA's view, the crucial element of the exclusion is the inclusion of the word 'merely'. So that, where a publisher, broadcaster or Internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25(2).
- 1.32.6** **G**<sub>/1</sub> For example, in the FSA's view a publisher or broadcaster would be likely to be making arrangements within the meaning of article 25(2) and be unable to make use of the exclusion in article 27 if :
- (1) he enters into an agreement with a provider of investment services such as a broker or product provider for the purpose of carrying their *financial promotion*; and
  - (2) as part of the arrangements, the publisher or broadcaster does one or more of the following :
    - (a) brands the investment service or product in his name or joint name with the broker or product provider;
    - (b) endorses the service, or otherwise encourages readers or viewers to respond to the promotion;
    - (c) negotiates special rates for his readers or viewers if they take up the offer;
    - (d) holds out the service as something he has arranged for the benefit of his readers or viewers.
- 1.32.7** **G**<sub>/1</sub> It would also be an indicator that a publisher or broadcaster might be making arrangements falling within article 25(2) if he receives a commission or other form of reward based on the amount of regulated business done as a result of his carrying the promotion. This would be on the basis that the existence of the financial interest will inevitably have a bearing on the purpose for which the arrangements are viewed as having been made by him. However, the article 27 exclusion will apply in cases where there is such a reward provided the arrangements are made merely to allow the communication to be made.
- 1.32.8** **G**<sub>/1</sub> So, the same considerations are liable to apply to a website operator or an operator of a similar service (such as an intranet or closed user electronic service) who is carrying banner advertising from, or otherwise setting up links to the sites of, *authorised or exempt persons*.
- 1.32.9** **G**<sub>/1</sub> Other *persons* who may benefit from the exclusion in article 27 include *persons* who provide the means for someone to route an order to another *person*. A *person* providing such order routing services would not, in the FSA's view, be merely facilitating communication (of the orders) if he provides added value. This added value could be in the form, for example, of such things as formatted screens, audit trails, checking completeness of orders or matching orders or reconciling trades.
- 1.32.10** **G**<sub>/1</sub> Companies providing telephone marketing and related services to investment firms will face similar issues. If their services are entirely passive – for example, answering telephone calls, sending out literature upon request or referring enquirers to representatives of their client – they may simply be regarded as making

arrangements with a view to their providing telephone answering services. On the other hand, where a telephone marketing company:

- (1) makes proactive calls to prospective customers of its clients; or
- (2) is expected proactively to raise the possibility, during a call made by the prospective customer, of a meeting with or visit by a representative of their client or of the caller being sent promotional literature,

the arrangements are liable to be made with a view to the company's client and its prospective customers *buying* or *selling investments*. So such arrangements will be likely to fall within article 25(2) unless another exclusion applies (such as that for introductions – see ■ AUTH App 1.33).

- 1.32.11** G<sub>/1</sub> The mere provision by a website operator of a bulletin board or chat room ought not to amount to making arrangements under article 25(2) unless making such arrangements is the specific purpose of the facility. However, operators of websites with such facilities will clearly need to be aware of potential implications (such as the service being used by *unauthorised persons* to give advice or make *financial promotions* or to make misleading statements with a view to manipulating market prices). They may wish to consider drawing such matters to the attention of *persons* who use the facility.

### 1.33 Introducing

- 1.33.1** G<sub>/1</sub> As with advice, there are various exclusions in the *Regulated Activities Order* which take certain arrangements out of the scope of article 25. Two of these are likely to be particularly relevant to *persons* who are mainly concerned with making or helping others to make communications.

- 1.33.2** G<sub>/1</sub> Article 29 of the *Regulated Activities Order* states that certain arrangements are not covered by article 25. These are arrangements made by an *unauthorised person* ('A'). The arrangements must be made for or with a view to a transaction which is or is to be entered into by another *person* (the client) with or through an *authorised person*. It must also be the case that:

- (1) the transaction is or will be entered into on advice given to the client by an *authorised person*; or
- (2) it is clear, in all the circumstances, that the client, in his capacity as an investor, is not seeking and has not sought advice from A on the merits of his entering into the transaction (or, if the client has sought such advice, A has declined to give it but has recommended that the client seek such advice from an *authorised person*).

For article 29 to apply, it is also necessary that, in return for making the arrangements, A does not receive from any *person* other than the client financial reward or other advantage, for which he does not account to the client, arising out of his making the arrangements (■ AUTH App 1.12.11G gives *guidance* on when a *person* will be regarded as having received reward from someone other than his client).

- 1.33.3** **G**<sub>/1</sub> This exclusion may apply, for example, where a website operator, without offering any advice, sets up links to the sites of investment firms but does not receive any form of payment from any of the firms for doing so.
- 1.33.4** **G**<sub>/1</sub> Of potentially greater significance is the exclusion in article 33 of the *Regulated Activities Order* which excludes arrangements where :
- (1) they are arrangements under which *persons* will be introduced to another *person*;
  - (2) the *person* to whom introductions are to be made is :
    - (a) an *authorised person*; or
    - (b) an *exempt person* acting in the course of business comprising a *regulated activity* in relation to which he is exempt; or
    - (c) a *person* who is not unlawfully carrying on *regulated activities* in the *United Kingdom* and whose ordinary business involves him in engaging in certain activities; and
  - (3) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to *investments* generally or in relation to any class of *investments* to which the arrangements relate.
- 1.33.5** **G**<sub>/1</sub> In the FSA's view, article 33 will apply, for example, where *persons* are finding potential customers for independent financial advisers, advisory stockbrokers or independent investment managers. In this case, the introducer is allowed to receive a payment for making introductions. However, it will not apply where the introductions are made either to a *person* whose advice or management services would not be independent (for example, a product provider such as a life office or a manager of unit trust schemes) or for the purposes of execution-only dealing.
- 1.34** **The business test**
- 1.34.1** **G**<sub>/1</sub> *Persons* who may be carrying on the activity of *advising on investments* or *making arrangements with a view to transactions in investments* will only require *authorisation* or exemption if they are carrying on those activities by way of business. This is the effect of section 22(1) of *the Act*. Under section 419 of the *Act*, the Treasury has the power, by order, to require activities which would otherwise be treated as carried on by way of business to be treated as not carried on by way of business and vice versa. The Treasury has used this power to restrict the business test when applied to *regulated activities* such as *advising on investments* or *making arrangements with a view to transactions in investments* to situations where a *person* is carrying on the business of engaging in those activities. This is the effect of article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001.
- 1.34.2** **G**<sub>/1</sub> In the FSA's view, for a *person* to be carrying on the business of *advising on investments* or *making arrangements with a view to transactions in investments*, he will usually need to be carrying on those activities with a degree of regularity. The *person* will also usually need to be carrying on the activities for commercial

purposes. That is to say, he will normally be expecting to gain a direct or indirect financial benefit of some kind. Activities carried on out of friendship or for altruistic purposes will not normally amount to a business. However, in the FSA's view, it is :

- (1) not necessary that a *person* be seeking to profit from carrying on activities; for example a company set up by a number of other companies operating in a particular area to provide research may simply charge to recover its costs but may still be regarded as carrying on its activities as a business; and
- (2) not necessarily the case that services provided free of charge will not amount to a business; for example, much investment advice is provided free of charge to investors but in the course of a business funded by commission payments; services (particularly advice, information or links) available on a website may also be free of charge to users of the site but be part of a business funded by advertising fees or sponsorship; and free newspapers may well represent a business for similar reasons.

## 1.35 Authorisation and exemption

- 1.35.1** G Any *person* who is contemplating carrying on the *regulated activities* of *advising on investments* or *making arrangements with a view to transactions in investments* by way of business will need *authorisation* or exemption. *AUTH* explains about the *authorisation* process and the procedures for obtaining *Part IV permission* and for the approval of individuals. Exemption would usually be obtained by a *person* entering into an agreement with an *authorised person* under section 39 of the *Act* and the Financial Services and Markets Act 2000 (Appointed Representative) Regulations 2001.

## 1.36 Illustrative tables

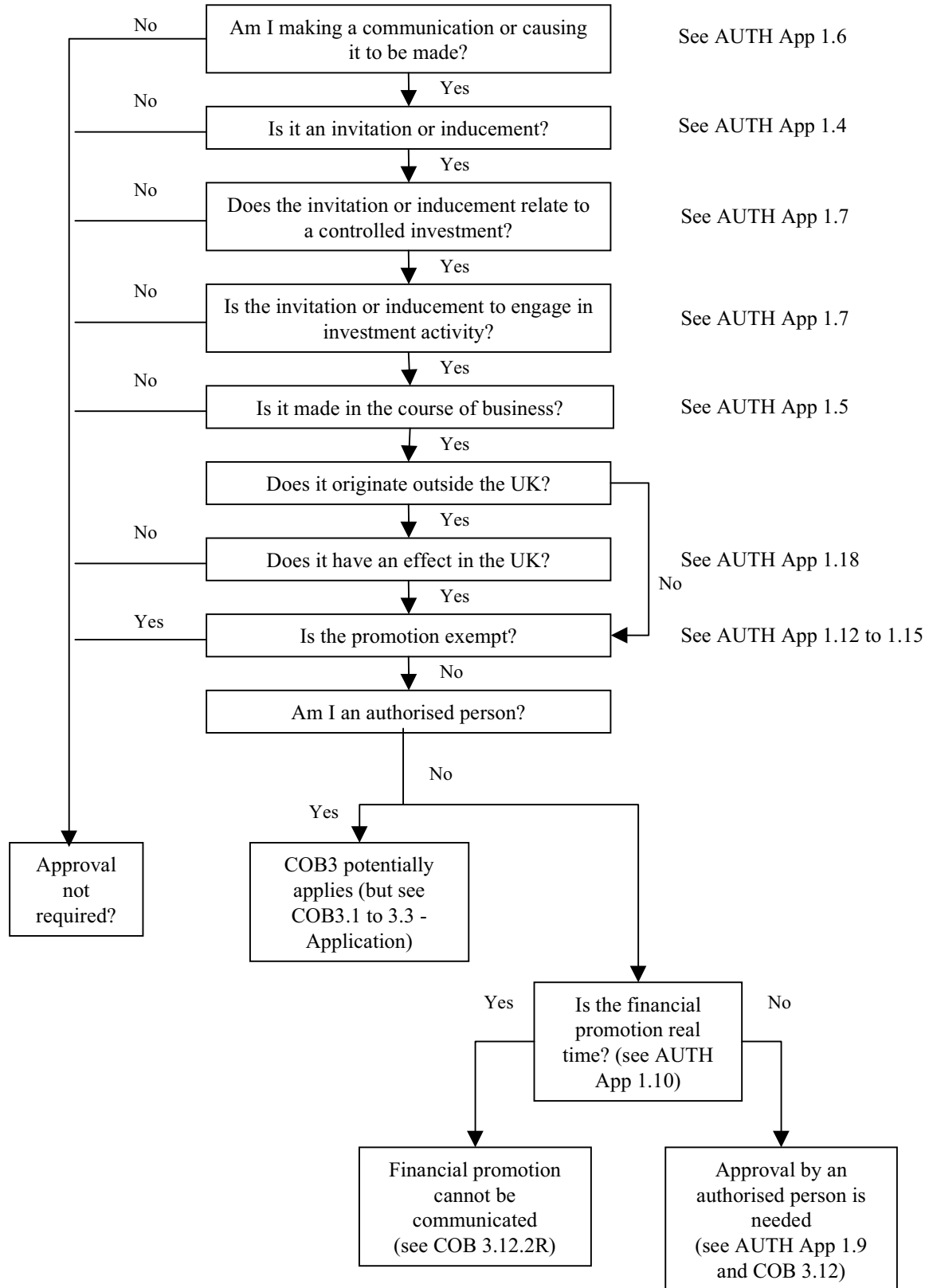
### Financial Promotions: flowchart

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- 1.36.1** G This flowchart sets out the matters which a *person* will need to consider to see if the restriction in section 21 of the *Act* applies to his communications. It is referred to in
- AUTH App 1.2.5G.

Financial promotions: flowchart

1.36.2 Financial Promotions - Flowchart



**Controlled activities and controlled investments**

1.36.3 **G** This table lists the activities that are *controlled activities* and the investments that  
/1 are *controlled investments* under the *Financial Promotion Order*. It is referred to in  
■ AUTH App 1.7.2G

1.36.4 **G** Table Controlled activities  
/1

1. Accepting deposits.
2. Effecting and carrying out contracts of insurance.
3. Dealing in securities and contractually based investments.
4. Arranging deals in investments
5. Managing investments.
6. Safeguarding and administering investments.
7. Advising on investments.
8. Advising on syndicate participation at Lloyd's.
9. Providing funeral plan contracts (with effect from 1 January 2002).
10. Providing qualifying credit (with effect from a date to be announced).
11. Agreeing to do anything in 3 to 10 above.

1.36.5 **G** Table Controlled investments  
/1

12. A deposit.
13. Rights under a contract of insurance.
14. Shares etc.
15. Instruments creating or acknowledging indebtedness (referred to in the Glossary as debentures).
16. Government and public securities.
17. Instruments giving entitlement to investments (referred to in the Glossary as warrants).
18. Certificates representing certain securities.
19. Units in a collective investment scheme.
20. Rights under a stakeholder pension scheme.
21. Options.
22. Futures.
23. Contracts for differences etc.
24. Lloyd's syndicate capacity and syndicate membership.
25. Funeral plan contracts (with effect from 1 January 2002).
26. Agreements for qualifying credit (with effect from a date to be announced).
27. Rights to or interests in anything falling under 12 to 25 above.

**Application of exemptions to forms of financial promotion**

1.36.6 **G** This table identifies the types of *financial promotion* to which each exemption in the  
/1 *Financial Promotions Order* applies. It is referred to in ■ AUTH App 1.11.2G and ■  
AUTH App 1.14.1G.

1.36.7 **G** Table Application of Exemptions to Forms of Promotions  
/1



Financial Promotion Order		Applies to		
Article No.	Title and AUTH App 1 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
12	Communications to overseas recipients (1.12.2G)	* 1	*	*
13	Communications from customers and potential customers (1.12.9G)	*	*	*
14	Follow up non-real time communications and solicited real time communications (1.12.10G)		*	*
15	Introductions (1.12.11G)	*	*	
16	Exempt persons (1.12.12G)	* 2	* 3	* 3
17	Generic promotions (1.12.14G and 1.21.4G)	*	*	*
18	Mere conduits (1.12.18G)	*	*	*
19	Investment professionals (1.12.21G and 1.21.5G)	*	*	*
20	Communications by journalists (1.12.23G)			*
20A	Promotion broadcast by company director etc (1.12.23G and 1.21.6G)	*	*	*
22	Deposits : non-real time communications (1.13)			*
23	Deposits : real time communications (1.13)	*	*	
24	Relevant insurance activity : non-real time communications (1.13)			*
25	Relevant insurance activity : non-real time communications : reinsurance and large risks (1.13)			*
26	Relevant insurance activity : real time communications (1.13)	*	*	

Article No.	Title and AUTH App 1 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
28	One-off non-real time communications and solicited real time communications (1.14.3G)		*	*
28A	One-off unsolicited real time communications (1.14.11G)	*		
29	Communications required or authorised by enactments	*	*	*
30	Overseas communicators: solicited real time communications (1.14.15G)		*	
31	Overseas communicators: non-real time communications to previously overseas customers (1.14.17G)			*
32	Overseas communicators: unsolicited real time communications to previously overseas customers (1.14.16G)	*		
33	Overseas communicators: unsolicited real time communications to knowledgeable customers (1.14.16G)	*		
34	Governments, central banks etc		*	*
35	Industrial and provident societies		*	*
36	Nationals of the EEA States other than United Kingdom (1.14.18G)		*	*
37	Financial markets		*	*
38	Persons in the business of placing promotional material	*	*	*
39	Joint enterprises (1.14.19G)	*	*	*
40	Participants in certain recognised collective investment schemes		*	*
41	Bearer instruments: promotions required or permitted by market rules (1.14.42G)		*	*

Article No.	Title and AUTH App 1 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
42	Bearer instruments: promotions to existing holders (1.14.42G)		*	*
43	Members and creditors of certain bodies corporate (1.14.41G and 1.21.8G)		*	*
44	Members and creditors of open-ended investment companies		*	*
45	Group companies	*	*	*
46	Qualifying credit to bodies corporate	*	*	*
47	Persons in the business of disseminating information (1.21.10G)	*	*	*
48	Certified high net worth individuals (1.14.21G)		*	*
49	High net worth companies, unincorporated associations etc (1.14.25G)	*	*	*
50	Sophisticated investors (1.14.27G)	*	*	*
51	Associations of high net worth or sophisticated investors (1.14.29G)		*	*
52	Common interest group of a company (1.14.30G)		*	*
53	Settlors, trustees and personal representatives	*	*	*
54	Beneficiaries of trust, will or intestacy	*	*	*
55	Communications by members of professions (1.15.1G)	*	*	
55A	Non-real time communication by members of the professions. (1.15.5G)			*
56	Remedy following report by Parliamentary Commissioner for Administration	*	*	*

Article No.	Title and AUTH App 1 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
57	Persons placing promotional material in particular publications	*	*	*
58	Acquisition of interest in premises run by management companies		*	*
59	Annual accounts and directors' report (1.21.11G)	*	*	*
60	Participation in employee shares schemes	*	*	*
61	Sale of goods and supply of services		*	*
62	Sale of body corporate (1.14.35G)	*	*	*
64	Takeovers of relevant unlisted companies	*	*	*
65	Takeovers of relevant unlisted companies: warrants etc	*	*	*
66	Takeovers of relevant unlisted companies: application forms	*	*	*
67	Promotions required or permitted by market rules (1.21.13G)		*	*
68	Promotions in connection with admission to certain EEA markets (1.21.16G)		*	*
69	Promotions of securities already admitted to certain markets (1.21.17G)		*	*
70	Promotions in connection with listing applications		*	*
71	Promotions included in listing particulars etc			*
72	Promotions included in prospectus for public offer of unlisted securities (1.21.20G)			*
73	Material relating to prospectus for public offer of unlisted securities			*

Article No.	Title and AUTH App 1 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
74	Approval of communication prior to Order coming into force	* 4	* 4	*

<sup>1</sup> in limited circumstances only – see article 12(2) of the Financial Promotion Order

<sup>2</sup> for the purpose of article 16 (2) only

<sup>3</sup> for the purpose of article 16 (1) only

<sup>4</sup> although article 74 applies to real time communications it may be unlikely to do so in practice. This is because it relates to advertisements which are approved under section 57 of the Financial Services Act 1986 or communications approved in accordance with COB3. Such advertisements and communications are likely to be non-real time communications.

## Annex B

### Amendments to the Conduct of Business sourcebook

In this Annex, underlining indicates new text and striking through indicates deleted text.

- COB 3.2.1  
G
- (1) ....*Guidance* on that restriction is contained in *AUTH* App ~~{1}~~ (Financial promotion and related activities) and that *guidance* will be relevant in interpreting these *rules*. In particular, *guidance* on the meaning of:
- (a) “*communicate*” is in *AUTH* App ~~{1.6}~~ (Communicate);
  - (b) “invitation or inducement” and “*engage in investment activity*” ... is in *AUTH* App ~~{1.4}~~ (Invitation and inducement) and *AUTH* App ~~{1.7}~~ (Engage in investment activity).
- COB  
3.2.7G
- (2) ... *Guidance* on certain exemptions is contained in *AUTH* App ~~{1}~~ (Financial promotion and related activities).
- (3)
- (a) ...Such mailshots must meet the requirements of this chapter. *AUTH* App 1.14.3G (One-off financial promotions (articles 28 and 28A)) provides further *guidance* on the scope of the exemption in article 28.
- (b) ...In addition, a *firm* may include its name, address and telephone number in accordance with items 5(a) and (c). *AUTH* App 1.4.20G (Image advertising) provides *guidance* on when image advertising may involve a *financial promotion*.
- (c) ...In addition, a *firm* may include its name, address and telephone number in accordance with items 5(a) and (c). *AUTH* App 1.4.13G (Publication or broadcast of prices of investments (historic or live)) provides *guidance* on when the display of prices may involve a *financial promotion*.
- (4) ...But this exemption does not extend to the report and accounts of *ICVCs*, other types of *OEIC*, and *unit trust schemes*. *AUTH* App 1.21.11G (Article 59 : Annual accounts and directors' report) provides further *guidance* on the scope of the exemption in article 59.

- (5) ...will be exempt provided that the financial promotion is not communicated to persons inside the *United Kingdom* (see *COB 3.3* and *AUTH App 1.12.2G (Financial promotions to overseas recipients (article 12))*).
- (6) ...section 238(1) of the *Act* (Restrictions on promotion of unregulated collective investment schemes) (see *COB 3.11.4R* and *AUTH App 1.20 (Additional restriction on the promotion of collective investment schemes)*).
- COB 3.3.2G* (2) ...In particular, the exemption for *financial promotions* originating outside the *United Kingdom* (section 21(3) of the *Act* (Restrictions on financial promotions)) (see *COB 3.2.5R(2)* and *AUTH App 1.12.2G (Financial promotions to overseas recipients (article 12))* and the exemptions for overseas communicators (see *COB 3.2.5R(3)* and *AUTH App 1.14.14.G (Overseas communications (articles 30 to 33))*).
- COB 3.4.1G* (3) ...See further *COB 3.11* (Unregulated collective investment schemes) and *AUTH App 1.20 (Additional restriction on the promotion of collective investment schemes)*.
- COB 3.4.2G* (1) ...*COB 3.5.2G* provides a guide to the topics covered in this chapter. *AUTH App 1 (Financial promotion and related activities)* provides further detailed *guidance on the financial promotion regime under section 21 of the Act (Financial promotion) which will be relevant in interpreting these rules*.
- COB 3.5.4G* ...*Guidance* on the meaning of those expressions, which are based on article 7 of the *Financial Promotion Order*, is contained in *AUTH App [1.10] (Types of ~~communication~~ financial promotion)*.
- COB 3.10.2G* ...*Guidance* on whether a *real time financial promotion* is solicited is contained in *AUTH App [1.10] (Types of ~~communication~~ financial promotion)*.
- COB 3.11.1G* (5) *AUTH App 1.20 (Additional restriction on the promotion of collective investment schemes)* provides further *guidance on the restriction under section 238(1) of the Act (Restrictions on promotion)*.

COB  
3.12.1G

- (1) ... (An overview of the main exemptions in the *Financial Promotion Order* is in COB 3 Ann 1: and further guidance is provided in AUTH App 1 (Financial promotion and related activities), in particular, AUTH App 1.9 (Circumstances where the restriction in section 21 does not apply).

COB  
3.14.2G

... See AUTH App ~~{1.22 }~~ (The Internet) for further *guidance on financial promotions* on the internet...



## Annex C

### Amendments to the Professional Firms sourcebook

In this Annex, underlining indicates new text.

1.1.7G      *Professional firms* should refer to *AUTH* App 1 (Financial promotion and related activities) for general *guidance* on financial promotion and to *AUTH* App 1.15 (Financial promotions by members of the professions (articles 55 and 55A)) for *guidance* on the exemptions which are specifically intended for *professional firms*.

## Annex D

### Amendments to the Glossary

In this Annex, underlining indicates new text and striking through indicates deleted text.

*non-real time financial promotion* (in accordance with article 7(2) of the *Financial Promotion Order*) (as more fully described in *COB 3.5.5R* (“Real time” and “non-real time” financial promotions and *AUTH App 1.10 (Types of financial promotion)*)) a *financial promotion* that is not a *real time financial promotion*.

*real time financial promotion* (in accordance with article 7(1) of the *Financial Promotion Order* (as more fully described in *COB 3.5.5R* (“Real time” and “non-real time” financial promotions) and *AUTH App 1.10 (Types of financial promotion)*)) a *financial promotion* made in the course of a personal visit, telephone conversation or other interactive dialogue.

*solicited real time financial promotion* (in accordance with article 8 of the *Financial Promotion Order*) as more fully described in *COB 3.10.1R* (Meaning of “solicited” and “unsolicited” real time financial promotion) and *AUTH App 1.10 (Types of financial promotion)*) a *real time financial promotion* which is solicited...

*unsolicited real time financial promotion* (in accordance with article 8 of the *Financial Promotion Order*) (as more fully described in *COB 3.10.1R* (Meaning of “solicited” and “unsolicited” real time financial promotion) and *AUTH App 1.10 (Types of financial promotion)*)) a *real time financial promotion* which is not a *solicited real time financial promotion*.