

PERIMETER GUIDANCE (AMENDMENT) INSTRUMENT 2005

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of its powers under section 157(1) (Guidance) of the Financial Services and Markets Act 2000.

Commencement

- B. This instrument comes into force on 1 October 2005.

Amendments to Perimeter guidance

- C. General guidance on FSA regulatory perimeter issues, amending the Perimeter Guidance manual, is made in the form set out in the Annex to this instrument. This general guidance does not form part of the FSA Handbook.

Citation

- D. This instrument may be cited as the Perimeter Guidance (Amendment) Instrument 2005.

By order of the Board
15 September 2005

Annex

Amendments to the Perimeter Guidance manual

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

2.6.17 G ...The effect is that an *open-ended investment company* will, in issuing its *shares*, be subject to the restrictions on promotion of *collective investment schemes* in section 238 of the *Act* (rather than to restrictions, ~~such as those in the Public Offers of Securities Regulations 1995~~, that apply to other forms of body corporate). For exclusions...

...

2.8.8 G ...
(2A) Trustees are excluded from arranging for another person to safeguard and administer assets where that other person is either:

(a) an authorised person who has permission to safeguard and administer investments; or

(b) an exempt person whose exemption permits him to safeguard and administer investments; or

(c) a person to whom (1) applies.

...

...

2.8.10 G There ~~is only one~~ are two exclusions from the range of activities specified as being regulated in relation to *collective investment schemes*. ~~This~~ These exclusions relates to *incoming ECA providers* (see *PERG 2.9.18G*) and to business angel-led enterprise capital funds (see *PERG 2.9.20G*). In other cases, the key issue is whether or not what is being done relates to something that is a *collective investment scheme*. Exclusions exist in relation to that issue (see *PERG 2.6.18G*).

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2.9 Regulated activities: exclusions applicable in certain circumstances

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2.9.12A G The Treasury, in its consultative document “Financial Services and Markets Act two year review: Changes to secondary legislation Proposals for change, February 2004” proposed changes to these exclusions aimed primarily at limiting their scope in relation to the objective test referred to in PERG 2.9.12G(2). In its response to the comments received during the consultation, the Treasury announced, in its document “Financial Services and Markets Act two year review: Changes to secondary legislation Government response, November 2004”, that it intends to make certain changes to the exclusions in due course.

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Business angel-led enterprise capital funds

2.9.20 G This group of exclusions applies, in specified circumstances, to the regulated activities of:

- (1) *dealing in investments as agent;*
- (2) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
- (3) *managing investments;*
- (4) *safeguarding and administering investments;*
- (5) *establishing, operating or winding up a collective investment scheme; and*
- (6) *advising on investments.*

2.9.21 G The exclusions apply, in general terms:

- (1) *to a body corporate with limited liability:*
 - (a) *that is formed in accordance with the law of, and having its registered office, central administration or principal place of business in, an EEA State;*
 - (b) *that operates a business angel-led enterprise capital fund, being a fund that invests only in securities of unlisted companies and whose participants are made up solely of*

persons of a specified kind; and

(c) whose members are limited to persons of a specified kind.

...

8.4.22 G ...

(7) Article 15 (Introductions) may apply ~~where the introduction is a real time financial promotion~~ provided certain conditions are met (see PERG 8.12.11G). In addition, ...

...

8.4.34 G ... 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. Employers who promote pension products to their employees will be able to use the exemption in article 72 (Pension products offered by employers) provided certain conditions are met. These conditions are explained in PERG 8.14.40AG (Pension products offered by employers (article 72)). Any *financial promotion* made by an employer for the purpose of meeting his obligations under the Welfare Reform and Pensions Act 1999 ...

...

8.6.7 G A general point arises about causing and *communicating* on whether a particular exemption that applies to a communication made by a specified *person* also applies to a *person* who is causing that communication to be made. For example, article ~~43~~ 55 of the *Financial Promotion Order* (~~Members and creditors of certain bodies corporate~~ Communications by members of professions) applies only to a communication by ~~a body corporate to its own shareholders or creditors about its own securities~~ an exempt professional firm. This exemption may apply where a ~~company~~ person ('P') requests an exempt professional firm ('E') ~~to wishes to acquire another company ('C') for cash and arranges for C to communicate its~~ offer to C's shareholders a client of E. In this case, where P causes ~~C~~ E to *communicate*, it is the FSA's view that the exemption that applies to ~~C~~ E 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~~ E.

8.6.7A G The position of an unauthorised person ('U') who, in the course of business, causes an authorised person to communicate a financial promotion is somewhat different. This is because the authorised person ('A') is not

subject to section 21 of the Act and so will not necessarily be communicating the financial promotion in circumstances in which an exemption would apply. To avoid any doubt about the application of section 21 to U, a specific exemption is provided in article 17A of the Financial Promotion Order (Communications caused to be made or directed by unauthorised persons). This exemption applies where U causes A to make or direct a real time financial promotion. It also applies to a non-real time financial promotion but only where the content is prepared by A. This means that U will remain subject to section 21 where, for example, he provides A with copies of a financial promotion for the purpose of A distributing them to other persons or where he is placing an advertisement in a publication issued by A.

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- 8.8.3 G ...The Treasury has given effect to this through ~~changes made in the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002 (SI 2002/2157) the Financial Promotion Order (see This is explained more fully in PERG 8.12.38G).~~ ...

...

- 8.9.5 G The restriction in section 21 is also disapplied by means of an order made 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 PERG 8.12 to PERG 8.15, PERG 8.17 and PERG 8.21 . 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);~~
- (3) ~~the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment No2) Order 2001 (SI 2001/3800);~~
- (4) ~~the Financial Services and Markets Act 2000 (Financial Promotion and Miscellaneous Amendments) Order 2002 (SI 2002/1310);~~
- (5) ~~the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002 (SI 2002/2157);~~
- (6) ~~the Financial Services and Markets Act 2000 (Financial Promotion)~~

~~(Amendment) Order 2003 (SI 2003/1676);~~

- (7) ~~the Financial Services and Markets Act 2000 (Financial Promotion and Promotion of Collective Investment Schemes) (Miscellaneous Amendments) Order 2005 (SI 2005/270).~~

~~A consolidated version of the *Financial Promotion Order* is available on the Treasury website www.hm-treasury.gov.uk under Documents/Financial Services/Regulating Financial Services/FSMA/ Secondary legislation ordered by date of laying.~~

...

8.11.3 G 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 overall effect of article 11 is that any relevant exemptions may be combined except where the conditions applicable to an exemption prevent this (see PERG 8.11.4G). ~~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.~~

...

8.11.6 G ...

- (3) in the case of a *person* claiming to be a certified high net worth individual or a sophisticated or self-certified sophisticated investor, asking to see a copy of the current certificate ~~or the signed statement or both.~~

...

8.12.5 G ...

- (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~~ the overseas person who is directing it; and

...

...

8.12.8 G ... 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~~
- (3) previously overseas customers of overseas *communicators* (article 31); or
- (4) any combination of (1), (2) and (3).

Where a *financial promotion* is also directed at such *persons* ...

...

8.12.11 G This exemption applies ~~only to a *real time*~~ any *financial promotion* that is made with a view to or for the purposes of introducing ...

...

8.12.18 G The purpose of ~~this~~ these exemptions 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. *PERG* 1.6.5G explains that such *persons* may not be regarded as *communicating a financial promotion* simply because they have distributed it. Article 18 (Mere conduits) does not apply to the person who causes the mere conduit to make the communication. Neither does it ~~does not~~ apply where the *financial promotion* is an *outgoing electronic commerce communication*. A *person*

...

...

8.12.20 G The conditions in article 18 also require that the *person* acting as the mere conduit must *communicate* in the course of ~~a business~~ an activity 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~~ an activity which has the required principal purpose. Such ~~a business~~ an activity might represent but a part of a *person*'s overall business activities (however small), so long as it represents a discrete ~~business~~ activity. A discrete ~~business~~ activity is an activity whose principal purpose is to receive and transmit other *persons*' communications and which is not simply an activity ~~a service provided that is carried on~~ incidentally or as an adjunct to another activity ~~service~~. For example ...

...

8.12.25 G 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 ...

...

8.12.27 G 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; or
 - (b) the ~~Programme~~ OFCOM Broadcasting Code of the ~~Radio Authority~~; or
 - (c) the Producers' Guidelines issued by the British Broadcasting Corporation; ~~or~~ .
 - (d) ~~the Programme Code of the Independent Television~~

Commission.

...

- 8.12.32 G 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 ...

...

- 8.13.1 G 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~~ and Part VI (see PERG 8.11.3G (Types of exemption under the Financial Promotion Order)).

...

- 8.14.11 G 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* ...

...

- 8.14.25 G ... A high net worth company, unincorporated association or trust is a *person* who satisfies the conditions in article 49(2)(a) to (e ~~d~~) which, for the most part, involve the amount of assets held. In addition, the exemption allows a *financial promotion* that is made to, or directed at, *persons coming under article 49(2)(a) to (d)* also to be made to, or directed at, any other *persons* to whom it may lawfully be made (article 49(2)(e)). This would include *persons* such as overseas recipients (article 12 (Communications to overseas recipients)) and investment professionals (article 19 (Investment professionals)).

...

- 8.14.29 G (1) 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 made up of certified high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified 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 certified

high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified 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.~~

- (2) The exemption extends to *financial promotions* made to persons who are members of an association with a particular membership and not simply to *financial promotions* made to the operator or secretariat of the association. It would appear that this includes members who are not themselves certified high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified sophisticated investors.

...

Pension products offered by employers (article 72)

8.14.40 A G Article 72 exempts any *financial promotion* made by an employer to an employee in relation to a *group personal pension scheme* or a *stakeholder pension scheme*. This is subject to certain requirements as follows:

- (1) the *financial promotion* must inform the employee that the employer will make a contribution to the pension that the employee will receive from the pension scheme to which the *financial promotion* relates in the event of the employee becoming a member;
- (2) the employer must not receive or have received any direct financial benefit from that scheme (such as commission from, or a reduction in the amount of the premium payable by the employer in respect of any insurance policy issued to the employer by, the provider of the scheme);
- (3) the employer must notify the employee in writing, prior to the employee becoming a member, of the amount of the contribution that the employer will make to the scheme in respect of that employee; and
- (4) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek independent advice from an *authorised person* or an *appointed representative*.

This exemption should enable employers to promote pension schemes to their employees without undue concern that they may be breaching the restriction in section 21 of the Act. PERG 8.4.34G (Communications by employers to their employees) has further guidance about the application of section 21 to employers generally.

Advice centres (article 73)

8.14.40B G Article 73 exempts any financial promotion made by a person in the course of carrying out his duties as an adviser for, or employee of, an advice centre. This is provided the financial promotion relates to:

- (1) qualifying credit; or
- (2) rights under, or rights to or interests in rights under, a life policy; or
- (3) a child trust fund within the meaning of section 1(2) of the Child Trust Funds Act 2004.

8.14.40C G An advice centre is defined in article 73 as a body which:

- (1) gives advice which is free and in respect of which it does not receive any fee, commission or other reward;
- (2) provides debt advice as its principal financial services activity; and
- (3) in the case of a body which is not part of a local authority, holds adequate professional indemnity insurance or a guarantee providing comparable cover.

This exemption should be of particular use to bodies such as Citizens Advice Bureaux.

...

8.15.5 G ~~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 ...~~

8.15.6 G A financial promotion made under article 55A must contain a statement in the following terms: “The [firm/company] is not authorised ... 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. The exemption also provides that a defect in the wording

of the statement does not affect its validity. This is provided that the defect does not alter the meaning of the communication. 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.

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8.17.11 G ~~[Article 28(4) (One off non-real time communications and solicited real time communications) sets aside the general rule that exemptions in Parts V and VI of the *Financial Promotion Order* cannot be combined by permitting the combination of Article 28 and Article 23 (Deposits: real time communications) where the *financial promotion*:~~

~~(1) is a one-off *solicited real time financial promotion*; and~~

~~(2) is about *providing qualifying credit*.~~

...

8.20.3 G 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 2001/2633) and by articles 7 to 10 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002, (SI 2002/2157) and by article 3 of the Financial Services and Markets Act 2000 (Financial Promotion and Promotion of Collective Investment Schemes) (Miscellaneous Amendments) Order 2005 (SI 2005/270) ('the CIS Financial Promotion Order'). The overall effect ...

...

8.21.8 G Article 43 applies to *non-real time* and *solicited real time financial promotions* made by, or on behalf of, a company ('C') to persons who ...

8.21.9 G A 'relevant investment' in article 43 means:

(1) ...

(2) ...

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*.~~

...

8.21.12 G Article 59 imposes certain conditions.

(1) ...

(2) The inducement must not relate to any *investment* other than *shares* or *debentures* ~~of issued, or to be issued, by~~ the *company* making the *financial promotion* (or a member of its *group*) or *warrants* relating to or certificates representing such *shares* or *debentures*.

(3) ...

...

8.21.16 G Article 68 applies where the *financial promotion* relates to *securities* ... 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~~ prospectus rules made under Part VI of the *Act*, ~~(or, where it is an *outgoing electronic commerce communication*, provisions corresponding to that Part under the law of another *EEA State*),~~ would be required to be *communicated* by those ~~rules-Regulations (or other provisions);~~ and

(2) which is not accompanied by any information other than information which is required or permitted to be published by the rules of the relevant *EEA* market.

8.21.17 G Article 69 is somewhat similar to article 59 in the conditions it imposes (see *PERG* 8.21.12G). ~~These~~ There 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 another body corporate in its group (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 PERG 8.21.13G).

8.21.18 G ~~[deleted]~~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':

8.21.19 G 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 or is accompanied by an inducement about certain investments issued, or to be 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) ...

8.21.20 G Article 74 ~~70~~: Promotions included in listing particulars, etc

(1) ~~listing particulars~~ listing particulars;

(2) ~~supplementary listing particulars~~ supplementary listing particulars;

(3) a prospectus ~~approved under listing rules~~ under section 84 or 87 of ~~the Act~~;

~~(4)~~ a or supplementary prospectus approved under listing rules in line with Prospectus 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 or Prospectus Rules under part VI of the Act.

The comments in *PERG* 8.21.14G about when something is required or permitted to be published apply also to ~~(5)~~ (4).

8.21.21 G A requirement common to the exemptions in articles 69, 67 and 69 is that the *financial promotions* must not relate to *investments* other than those issued, or to be issued, by the *company* or a member of its *group* ...

...

8.36.6 G Application of Exemptions to Forms of Promotions

Financial Promotion Order		Applies to		
Article No.	Title and <i>PERG</i> 8 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
...				
15	Introductions (8.12.11G)	*	*	* —
...				
<u>17A</u>	<u>Communications caused to be made or directed by unauthorised persons (8.6.7AG)</u>	* —	* —	* —
...				
18A	Outgoing electronic commerce communications: mere conduits, caching and hosting (8.12.18G)	*	*	*
...				
<u>28B</u>	<u>Real time communications: introductions in connection with qualifying credit (8.17.12G)</u>	* —	* —	
...				

Financial Promotion Order		Applies to		
Article No.	Title and <i>PERG</i> 8 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
46	Qualifying credit to bodies corporate (<u>8.17.10G</u>)	*	*	*
...				
70	Promotions in connection with listing applications		*	*
71 <u>70</u>	Promotions included in listing particulars etc. (<u>8.21.20G</u>)			*
72	Promotions included in prospectus for public offer of unlisted securities (8.21.20G)			*
73 <u>71</u>	Material relating to prospectus for public offer of unlisted securities			*
74	Approval of communication prior to Order coming into force	* ⁴	* ⁴	*
<u>72</u>	<u>Pension products offered by employers (8.14.40A)</u>	<u>*</u>	<u>*</u>	<u>*</u>
<u>73</u>	<u>Advice centres (8.14.40B)</u>	<u>*</u>	<u>*</u>	<u>*</u>
<u>1</u> in limited circumstances only - see article 12(2) of the Financial Promotion Order				
<u>2</u> for the purpose of article 16 (2) only				
<u>3</u> for the purpose of article 16 (1) only				
4 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				

Financial Promotion Order		Applies to		
Article No.	Title and <i>PERG</i> 8 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
accordance with COB 3. Such advertisements and communications are likely to be non-real time communications.				

...

9.10.1 G ...

- (1) the requirements of ~~the Public Offers of Securities Regulations 1995~~ will *Prospectus Rules* relating to the publication of an approved prospectus may apply if its *securities* are offered to the public in the *United Kingdom*; and
- (2) ...

...