



If you have questions or would like additional information on the material covered in this Alert, please contact a member of the Reed Smith Advertising Compliance Team or the Reed Smith lawyer with whom you regularly work:

**Marina Palomba**

Partner, London

+44(0)20 3116 2811

mpalomba@reedsmith.com

**Christopher Hackford**

Associate, London

+44(0)20 3116 2880

chackford@reedsmith.com

**Huw Morris**

Associate, London

+44(0)20 3116 2816

hmorris@reedsmith.com

## Financial Promotions

### Introduction

The ever increasing number of financial services and products coming to the market presents a big opportunity for advertisers. There are, however, numerous legal issues which advertisers should consider when promoting the financial products or services. This guidance note sets out the important points for advertisers to consider in order to help navigate their way around this complex legal area.

### The Financial Promotion Restriction

Section 21 of the UK's Financial Services and Markets Act 2000<sup>1</sup> contains a restriction on the making of financial promotions (the "**Financial Promotion Restriction**"). However, this Financial Promotion Restriction (i) does not apply to entities which have been authorised by the Financial Services Authority (the "**FSA**")<sup>2</sup>; and (ii) is subject to numerous exemptions, the most relevant of which for advertisers are looked at later in this note.

Advertisers will have to consider, initially, whether any of their advertisements are caught by this prohibition and, if so, whether they can utilise one of the exemptions or have the advertisements 'signed off' by an authorised person.

This Financial Promotion Restriction should not be taken lightly, as those who breach this restriction will be liable to criminal penalties including a fine and up to two years' imprisonment. Any agreements entered into with a customer as a result of an unlawful financial promotion may also be rendered unenforceable by the court. In addition, an advertiser who breaches the financial promotion regime is likely to face reputational damage.

This is an area that is being actively enforced by the FSA, who are particularly concerned about repeat breaches of the FSA rules. In January 2010, the FSA handed Standard Life Assurance Limited a fine of almost £2.5million<sup>3</sup> for using misleading marketing material and having inadequate systems and controls relating to the production of such material.

Outside of the financial promotion regime, an inaccurate or misleading advertisement in relation to financial products or services may also result in claims in misrepresentation, criminal liability under insider dealing legislation, civil action under the market abuse regime and actions under the Consumer Protection from Unfair Trading Regulations 2008<sup>4</sup>, depending on the nature and type of advertisement.

### What is caught by the financial promotion restriction?

The Financial Promotion Restriction states that a person must not: (i) in the course of business; (ii) communicate; (iii) an invitation or inducement to; (iv) engage in an investment activity. This note looks at each element of this restriction in turn. If a promotion falls outside of one of these criteria, the promotion will be outside the scope of the financial promotion regime.

- **In the course of business:** This requires an advertiser to have a '*commercial interest*' in the advertisement (which would not necessarily have to be monetary), which will generally be the case for commercial advertisers. However, care needs to be taken to check whether communications made outside of an advertisers main line of business will also be caught – for example internal communications to employees of an advertiser to enter into a firm pension scheme.
- **Communicate:** A person is communicating where either (i) he gives material to the recipient; or (ii) he is responsible for transmitting the material on behalf of another person. This captures both the generator of the communication, and people who distribute the communication (subject to some notable exception which are mentioned below). Publishers,

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1. [http://www.opsi.gov.uk/acts/acts2000/ukpga\\_20000008\\_en\\_1](http://www.opsi.gov.uk/acts/acts2000/ukpga_20000008_en_1)  
 2. <http://www.fsa.gov.uk/>  
 3. <http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/010.shtml>  
 4. [http://www.opsi.gov.uk/si/si2008/draft/ukdsi\\_9780110811574\\_en\\_1](http://www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_1)

broadcasters and websites which carry advertisements will be communicating. However, advertising agencies will not be captured when they are designing advertising material for originators, or those who print or produce material for others to use as advertisements.

- **Invitation or inducements:** Invitation and inducement are meant to capture those communications which have a promotional element. The communication must therefore contain a degree of incitement, rather than the mere presentation of factual information. A communication will be regarded as an invitation or inducement where its purpose or intent is to lead a person to engage in investment activity, rather than just provide factual information. Invitations include direct offer advertisements and internet promotions where the response by the recipient initiates the activity (e.g. such as “register with us now and begin dealing online”). Inducements refer to significant links in the chain of persuading or inciting, or seeking to persuade or incite someone to engage in investment activity. The FSA gives the example of an advertisement which states what a recipient should do to make his fortune is to invest in shares, and that the advertiser can provide him with the services to achieve that objective.
- **Engage in Investment Activity:** This relates to the entering into of a ‘controlled investment’ or performing a ‘controlled activity’. The precise scope of these terms is contained in the financial promotion regime, but would capture financial promotions which sought to encourage recipients to subscribe for shares or insurance, or to receive investment advice or investment management services. However, the key element is that the engagement must be positive – encouraging recipients not to subscribe for a product would not be caught.

### Territorial scope

A promotion that is capable of ‘having an effect’ in the UK will be caught by the financial promotion regime, whether it originates within or from outside the UK. This gives the UK’s financial promotion regime a very broad scope – for example, financial promotions communicated by overseas companies into the UK will be caught, as will promotions accessible over the internet which can have an effect in the UK.

### Useful Exemptions

There are a number of exemptions which may be of use to advertisers when a promotion is caught by the Financial Promotion Restriction, which are summarised below.

- **Communications to overseas recipients:** The financial promotion regime will not apply to any communication made to, or directed at, people who are outside of the UK. However, the communication must be accompanied with an indication that it is only directed at persons outside the UK and that it must not be relied upon by persons in the UK. The communication must not be referred to in, or be directly accessible from, any other communication made to, or directed at, persons in the UK, and there must be proper systems and procedures in place to prevent UK persons from engaging in the investment. This would be of use to UK based advertisers preparing material for use overseas, although care would need to be taken to ascertain whether the rules of any overseas jurisdiction would apply. Despite this ‘bright-line’ test, even if a promotion did not comply with all the requirements above, this exemption may still apply if the FSA can be satisfied that a promotion was aimed or intended to be accessed by a non-UK market. This would be of particular use to websites, which may have difficulty in ensuring UK customers are blocked from accessing it, although this would have to be argued with the FSA on a case by case basis.
- **Generic promotions:** Advertisements which do not disclose who is providing a particular financial service or financial product would be exempt from the financial promotion regime. This may apply, for example, to those that wish to promote the virtues of a certain type of product over others (such as shares over ISAs), as opposed to marketing a particular investment. Such communications must not identify any particular brand or authorised person.

In addition, pure brand advertising without mentioning any financial product or service would not be caught by the financial promotion regime.

- **Mere conduits:** This exemption applies to advertisements made by passive communication providers such as Internet Service Providers and telecommunications companies. The person communicating the advert must be doing so in the course of their principal business, the purpose of which is transmitting and receiving material. The content of the advert must be wholly devised by another person, and the nature of the service provided is such that the transmitter does not select, modify or otherwise exercise control over its content prior to its transmission or receipt.

The FSA is of the view that the control usually exercised by newspaper publishers or broadcasters over advertisements carried on by them is likely to be enough for the exemption not to be applicable. However, a banner on a website which merely acts as a provider of news and information, and where the banner is displayed as is without any amendment may be able to rely on this exemption.

Additional exemptions are also available under the Financial Services and Markets Act 2000 (Financial Promotions) Order 2005 (“**FPO**”), but are likely to be of less use to an advertiser. However, these can always be reviewed on an ad hoc basis depending on the type of advertisement.

## **Authorised Person Approval**

If an advert is caught by the Financial Promotion Restriction and cannot use one of the exemptions in the FPO, it would not be in breach of the financial promotion regime if it was approved by and FSA authorised person. An FSA authorised person must ensure that any financial promotions are, *‘fair, clear and not misleading’*, and responsibility for ensuring this would ultimately rest with the compliance department of an authorised firm. Once an advertisement has been approved, responsibility for the advertisement and its contents rests with the authorised person.

This option is likely to be especially useful to an advertiser with is working with FSA authorised clients.

## **Final thoughts**

Advertisers may not always consider the implications of the financial promotion regime when accepting instructions. However, this is an area that the FSA is focusing on, and so advertisers must be more aware of their obligations and potential liability if these are not followed.

However, it is not always obvious whether an advert will be caught by the Financial Promotion Restriction or be able to use a particular exclusion. Red flags to look out for when working out whether an advert would be caught by the Financial Promotion Restriction, and how concerned the FSA would be over it, would be:

- advertisements targeted at retail customers;
- advertisements which encourage customers to deposit or invest money; and
- advertisements which purport to provide investment advice which is not impartial.

Should any advertiser become involved in communicating financial promotions, the Reed Smith Financial Regulation Team can help navigate their way around the complexities.

### **Jacqui Hatfield**

+44 (0)20 3116 2971  
jhatfield@reedsmith.com

### **Sebastian Barling**

+44 (0)20 3116 2817  
sbarling@reedsmith.com

### **Gil Cohen**

+44 (0)20 3116 2874  
gcohen@reedsmith.com

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