

A GENERAL GUIDE TO THE UK FINANCIAL PROMOTION REGIME IN RESPECT OF UNAPPROVED PROMOTIONS

Who is this guide for?

This guide is intended for UK small and medium-sized enterprises (SMEs) when examining their options and responsibilities when it comes to raising money from investors.

Essentially all SMEs will, at some point, wish to raise outside investment and it is important that when promoting their business to potential investors – be they individuals, corporates or funds – they adhere to the UK's regulatory regime which governs the making of "financial promotions".

The guidance provided herein is high level and non-exhaustive and a specific list of topics which are not covered (and on which you may wish to seek further guidance) is set out at the end of the note.

What is a financial promotion?

A financial promotion is any communication that either **invites** or **induces** a person to engage in **investment activity** that is communicated in the **course of a business**.

Financial promotions can take many forms, including information posted on websites or shared on social media channels, pitch events, statements made in meetings, or in online videos or via email, so you should err on the side of caution.

Perhaps the most classic example of a financial promotion is an Offer Document (sometimes called an 'Information Memorandum', 'Investment Memorandum' or 'Pitch Deck') which describes a business in the context of that business seeking to raise fresh capital from investors.

Looking briefly at the highlighted words in the definition in a bit more detail:

- "*invite*" is relatively clear, meaning asking someone, or explicitly offering them the opportunity, to invest¹
- "*induce*" is more complicated, and would typically exclude purely factual communications and require some sort of persuasive/promotional element²
- "*investment activity*" is broadly defined and would, for example include an investment in shares or debt issued by an SME

¹ An example of an invitation might be: "Invest in XYZ Ltd's share now by completing an application form".

² An example of an inducement might be: "XYZ Ltd's growth to date has been meteoric and that growth is all set to continue"

- “*course of business*” requires a commercial interest, but essentially operates to exclude 'friends chatting in the pub' from falling within the regulatory regime.

So is everything that might describe my company in positive terms going to be caught by this?

If you are an unlisted SME and not currently fundraising, a 'good news' story on your website about a recent win for your business will not be a financial promotion simply because it shows your company in a positive light.

Similarly, 'capacity' information which simply gives an overview of your business, team and experience would be considered too general in nature so long as it does not include reference to any specific opportunity.

During any fundraising period however (including in the run up to such a period), care should be taken that any communications you make about the company either (i) fall short of being a financial promotion, based on the definition above or (ii) are a compliant financial promotion (being either approved or exempt) as described in the remainder of this guide.

How are financial promotions restricted?

Under UK law, there is general prohibition on the communication of financial promotions unless they are either:

- issued or approved by a firm which is authorised by the Financial Conduct Authority (“**FCA**”); or
- permitted thanks to an exemption (provided the terms of that exemption are adhered to).

This guide is focused on the latter category, but we will first briefly discuss the former.

Financial promotions approved by third party FCA-authorised firms

It is open to SMEs to approach an FCA-authorised firm³ with a view to having them approve the SME's financial promotions. You may hear this described as a "section 21" approval⁴.

There are advantages to having a promotion approved rather than relying on an exemption. Approved promotions can potentially be more widely disseminated to ordinary investors (e.g. in a crowdfunding campaign) than is permitted by any exemption. Additional comfort might also be taken by potential investors from a third-party approval granted by a regulated firm.

There are also disadvantages: the FCA-authorised firm's approval will come at a cost, the contents of the promotion may be more restricted and extensive additional regulatory considerations and processes, including greater frictions in the investor application process, are brought into play.

³ As of 7 February 2024, only FCA authorised firms which have applied to the FCA for permission to act as an approver of financial promotions will be permitted to continue to approve promotions (pursuant to a parallel set of changes being implemented by the FCA).

⁴ This refers to section 21 of the Financial Services and Markets Act 2000 which contains the financial promotion general restriction.

Perhaps most importantly, for SMEs who are content to raise privately from angel investors, syndicates and funds, an approval is unlikely to be necessary and the disadvantages are likely to outweigh the advantages in most cases.

It is important to note, however, that if you don't have your financial promotions approved by an FCA authorised firm, you will need to ensure your dissemination of those promotions is carefully restricted. You will not be able to simply publish them on your website for instance, at least not without putting in place firewalls, or post them on social media where they can be accessed by the world at large.

So which exemptions are likely to be most relevant to a fundraising SME?

The most common categories of potentially exempt individual recipients of a financial promotion are:

- high net worth individuals (“**HNWI**”)
- sophisticated investors (“**SI**”)
- investment professionals.

Persons who fall into these categories can receive invitations or inducements to engage in investment activity *without* such promotions requiring the prior approval of an FCA-authorised firm – subject to those promotions containing certain specific wording described below.

Making use of these exemptions is popular with companies looking to promote themselves to angel investors and investment funds with incurring disproportionate cost and the regulatory burden when seeking prior approval of their promotions from an FCA-authorised firm.

There are other, less commonly used, exemptions described briefly under the *Other Information* heading at the end of this note.

How do I compliantly make use of, in particular, the HNWI and SI exemptions?

In order for these exemptions to apply, the following are required:

- you must ensure that a validly completed and signed investor statement has been obtained from the recipient who you intend to communicate the unapproved financial promotion to (in reliance on either one of these two exemptions)⁵;
- you must ensure that a prescribed risk warning and explanatory note precedes the promotion in the manner summarised in the Appendix to this guide.

Template forms of the latest investor statements are also contained in the Appendix to this guide.

What about the "investment professionals" exemption?

As you might imagine, the financial promotion regime is light touch when it comes to communicators to experienced, professional investors such as fund managers.

All that is required if you are an SME wishing to send your investor pitch deck to a well-known venture capital fund manager, for instance, is that you have a reasonable belief that the recipient is indeed an FCA authorised firm (or otherwise someone whose ordinary business

⁵ The technical requirement of the Financial Promotion Order is that the communicator has a "reasonable belief" that the recipient has completed the relevant investor statement within the last 12 months. However, we would recommend that the safest way to obtain that belief is to request that they sign the statement afresh (or produce a recently signed statement) before the financial promotion is communicated to them.

is SME investing) with professional experience in matters relating to investments and that the communication indicates that it is only targeted at, and may only be relied upon by and the investment opportunity participated in by, such persons (in addition to other exempt categories of person). The template wording in the Appendix to this guide caters for this (please download the PDF version if reading via the website).

It should be noted that the regulations required that there are "proper systems and procedures" in place to prevent non-eligible recipients making investments. So as a fundraising company, you should ensure that you check, before any investment round is completed, that all the investors are either investment professionals or have provided signed investors statements confirming their HNWI or SI status.

What about the remaining content of the promotion?

The Financial Promotion Order 2005, which requires the above-mentioned risk warning and explanatory note to be included, does not further prescribe that you need to include (or exclude) any particular information in your unapproved promotions.

That does not mean that you can be cavalier as to what you say about your company.

If someone invests in your company on the strength of claims made in your Pitch Deck for instance, even if this contains the necessary risk warning and other regulatory wording, they might still be able to bring civil proceedings against you if the claims turn out to be unsubstantiated or false and they end up losing money. In more serious cases, you open yourself up to criminal liability if the claims are fraudulent.

It is worth bearing in mind the FCA's overarching standard for financial promotions which applies to those promotions approved by authorised firms – that they must be "fair, clear and not misleading".

I'm familiar with the HNWI and SI financial promotion exemptions but I've heard these have recently been changed. What's the current position?

The previous eligibility thresholds for each exemption have been reinstated (see appended templates to this guide). The changes to be reversed can be summarised as:

- (a) reducing the financial thresholds to be eligible for the HNWI exemption to:
 - (i) income of at least £100,000 in the last financial year; or
 - (ii) net assets of at least £250,000 throughout the last financial year; and
- (b) amending the criteria to be eligible for the self-certified sophisticated investor exemption by:
 - (i) reinstating the criterion of having made two or more investments in an unlisted company in the previous two years; and
 - (ii) reducing the company turnover required to satisfy the "company director" criterion to £1 million (i.e. individuals who have been directors of companies with at least £1 million turnover in the last two years will remain eligible for the self-certified sophisticated investor exemption).

The updated format of the investor statements has been retained and continues to require individuals to interact with the relevant statement by selecting which condition(s) apply to them and providing some basic information before signing.

Any communication which relies on the two exemptions must also include (e.g. in footer text) the communicator's address, company registration number and contact information (where the communicator is a business or incorporated association) so that recipients can perform basic due diligence on the communicator if needed.

Any investor statements which were signed before 26 March 2024 in compliance with the January 2024 changes will remain valid until (and including) 30 January 2025.

What does this guide not cover and what else should I be aware of?

As a general point, this guide is not intended to replace legal advice that is tailored to your particular situation. There will be other issues you might need to seek assistance with.

By way of a brief summary of some other points of note:

- There is a parallel financial promotion restriction and exemption scheme where the investment in question is a "collective investment scheme" rather than a more typical equity investment.
- There are other potentially relevant exemptions in the Financial Promotion Order including but not limited to communications (i) to existing members or creditors of the company making the promotion (ii) made within a company's annual accounts (iii) made to high-net-worth companies and unincorporated associations (iv) made during a sale or takeover process (v) made in an approved prospectus.

Each of these come with their own stipulations and nuances and professional guidance should be sought before relying on these

- Generally speaking, where one is making use of the exemptions in the Financial Promotion Order, it is not advisable to import concepts and wording from the world of the FCA Handbook which governs approved promotions. While often well-meaning, this can create confusion and give false impressions.

Examples include using the FCA's prescribed risk warnings for approved promotions but in the context of an unapproved promotion or referring to your abiding by "FCA rules". Do remember that the Financial Promotion Order is national legislation which applies to everyone in the UK whereas the FCA Rules only apply to firms authorised and regulated by the FCA.

Investor appropriateness assessments also form part of the FCA rules and are not required in the context of unapproved promotions. If you wish to use a version of an appropriateness assessment for investors in the name of best practice, that is fine provided care is taken and advice is sought to ensure there is no confusion as to the regulatory position.

This guide does not constitute legal advice and is non-exhaustive and summary in nature. If you are in any doubt as to a specific scenario, then feel free to contact us on enquiries@blears.com and we would be happy to assist.

APPENDIX
RISK WARNING, EXPLANATORY NOTE AND FOOTER
TEMPLATE INVESTOR STATEMENTS

PART ONE – OVERVIEW

To compliantly communicate an unapproved financial promotion to a HNWI or SI, the following steps must be taken prior to receipt of the communication (in respect of the investor statement) and/or as part of the communication (in respect of the risk warning (so long as it is displayed before any other written or pictorial information) and the disclaimer).

The following are summary descriptions of a HNWI or a self-certified sophisticated investor which may be used in a covering email to an intended recipient to explain the classification criteria or as part of a portal or registration gateway to a closed online environment (such as an online platform or restricted web forum for business angels).

High Net Worth Investor

An individual who, in the last financial year, either (i) earned £100,000 or more, or (ii) had net assets of £250,000 or more (not counting pension or home equity).

Self-certified Sophisticated Investor

An individual who has either (i) worked in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises, in the last two years, (ii) been a director of a company with an annual turnover of at least £1 million in the last two years, (iii) made two or more investments in an unlisted company in the last two years, or (iv) been a member of a network or syndicate of business angels for more than six months, and is still a member.

PART TWO

PRESCRIBED RISK WARNING, EXPLANATORY NOTE AND FOOTER

Risk warning

Prior to the unapproved financial promotion being communicated in reliance on the relevant exemption (i.e. to either a HNWI or a self-certified sophisticated investor) the following risk warning needs to appear in this exact format (i.e. black bordered, suitably prominent and unobscured) before any other written or pictorial information to be properly compliant. The words in square brackets are examples of what you might put as the risk warning is supposed to describe the medium in which the promotion is contained.

The content of this [brochure/IM/document/email] has not been approved by an authorised person within the meaning of the Financial Services and Markets Act 2000. Reliance on this promotion for the purposes of engaging in any investment activity may expose an individual to significant risk of losing all of the property or other assets involved.

Explanatory Note

The unapproved financial promotion must also include words (on the same page as or preceding the main body of the promotion) to the following effect. Please note those words in square brackets which will need to be tailored as relevant to the specific promotion.

"This [brochure/IM/document/email] is exempt from the general restriction in section 21 of the Financial Services and Markets Act 2000 on the communication of invitations or inducements to engage in investment activity on the grounds it is made exclusively to persons believed on reasonable grounds to be either (i) 'high net worth individuals' within the meaning of Article 48 of the Financial Services and Markets Act (Financial Promotion) Order 2005 ('FinProm') (ii) 'self-certified sophisticated investors' within the meaning of Article 50A FinProm or (iii) investment professionals within the meaning of Article 19 of FinProm who have professional experience in matters relating to investments.

If you are in any doubt about the investment to which this [brochure/IM/document/email] relates, you are strongly recommended to consult an appropriately authorised financial adviser qualified to give advice in relation to an investment in [unquoted shares issued by single companies]. An investment in [name of company] will not necessarily be suitable for all recipients of this [brochure/IM/document/email] and is only available to persons who fall into one or more of the categories above. Persons who receive this [brochure/IM/document/email] who do not fall into one of the above categories should not rely on it and take no further action."

Footer

Any communication which relies on the two exemptions must also include (e.g. in footer text) the communicator's address, company registration number and contact information (where the communicator is a business or incorporated association) so that recipients can perform basic due diligence on the communicator if needed.

PART THREE

TEMPLATE INVESTOR STATEMENTS (AS FROM 27 MARCH 2024)

[TEMPLATE INVESTOR STATEMENTS FOLLOW ON NEXT PAGE]

HIGH NET WORTH INDIVIDUAL INVESTOR STATEMENT

If you meet **condition A or B below**, you may choose to be classified as a high net worth individual for the purposes of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005.

In the last financial year, did you have:

A) An annual **income of £100,000 or more**? Income does NOT include any one-off pension withdrawals.

- No
 Yes

If yes, please specify your income (as defined above) to the nearest £10,000 in the last financial year
[£

AND/OR

B) **Net assets of £250,000 or more**? Net assets do NOT include: your home (primary residence), any loan secured on it or any equity released from it; your pension (or any pension withdrawals) or any rights under insurance contracts. Net assets are total assets minus any debts you owe.

- No
 Yes

If yes, please specify your net assets (as defined above) to the nearest £100,000 in the last financial year
[£

OR

C) None of these apply to me.

- Yes

I declare that I have answered yes to A and/or B and wish to be treated as a high net worth individual.

I understand that this means:

- a) I can receive financial promotions where the contents may not comply with rules made by the Financial Conduct Authority (FCA); and
- b) I can expect **no protection** from the FCA, the Financial Ombudsman Service or the Financial Services Compensation Scheme.

I am aware that it is open to me to seek advice from someone who specialises in advising on investments.

I accept that I could lose all of the money I invest.

Signature:

Date:

SELF-CERTIFIED SOPHISTICATED INVESTOR STATEMENT

If you meet **condition A, B, C or D below**, you may choose to be classified as a self-certified sophisticated investor for the purposes of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005.

Have you:

A) Worked in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises, in the last two years?

- No
 Yes

If yes, what is/was the name of the business/organisation? [REDACTED]

B) Been the director of a company with an annual turnover of at least £1 million, in the last two years?

- No
 Yes

If yes, what is/was the name of the company, and its Companies House number (or international equivalent)?

[REDACTED]

C) Made two or more investments in an unlisted company, in the last two years

- No
 Yes

If yes, how many investments in unlisted companies have you made in the last two years? [REDACTED]

D) Been a member of a network or syndicate of business angels for more than six months, and are still a member?

- No
 Yes

If yes, what is the name of the network or syndicate? [REDACTED]

OR

E) None of these apply to me.

- Yes

I declare that I have answered yes to A and/or B and/or C and/or D and wish to be treated as a self-certified sophisticated investor.

I understand that this means:

- a) I can receive financial promotions where the contents may not comply with rules made by the Financial Conduct Authority (FCA); and
- b) I can expect **no protection** from the FCA, the Financial Ombudsman Service or the Financial Services Compensation Scheme.

I am aware that it is open to me to seek advice from someone who specialises in advising on investments.

I accept that I could lose all of the money I invest.

Signature: [REDACTED] Date: [REDACTED]