

Enterprise Scheme Exemption - (section 40 of the Financial Services and Markets Act 2000 (Exemption) Order 2001)

In this 'Fundamentals' explanatory guide, we provide an overview of the 'FSMA General Prohibition' and the application of a specific statutory exemption to the regulated activity of 'arranging deals in investments' known as the 'Enterprise Schemes' exemption (section 40 of the Financial Services and Markets Act 2000 (Exemption) Order 2001).

An overview of the General Prohibition

There is a fundamental prohibition at the heart of the UK regulatory regime whereby a person is prohibited from carrying out a "regulated activity" (or purport to do so) by way of business in the UK unless they are:

- (a) an authorised person (i.e., they are authorised by the UK Financial Conduct Authority ("**FCA**"));
- (b) they are an exempt person (e.g., an 'Appointed Representative' of an Authorised Person) (section 19 Financial Services and Markets Act 2000 ("**FSMA**")); or
- (c) a specific exclusion applies,

this is often referred to as the "General Prohibition". It should be noted that a breach of the General Prohibition is a criminal offence under FSMA and may render agreements unenforceable.

Regulated activities

Generally, an activity is a "regulated activity" if it is an activity of a *specified kind* which is carried on *by way of business* and relates to an *investment of a specified kind* (section 22 FSMA).

The activities regulated by the FCA are set out in the FSMA (Regulated Activities) Order 2001 (RAO) ("**RAO**"). Securities such as shares, debentures, bonds, loan notes and units in a collective investment scheme are all categories of 'investment[s] of a specified kind'. Part III of the RAO sets out the full list of 'specified investments'.

Part II of the RAO describes activities that are 'regulated activities' for the purposes of FSMA. These include activities such as:

- (a) arranging deals in investments (Article 25 RAO);
- (b) advising on investments (Articles 53 RAO); and
- (c) dealing in investments as principal or agent (Article 14).

It should be noted that agreeing to carry on most regulated activities is itself a regulated activity.

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When a specified activity is not carried on in relation to one of the specific investments listed in Part III of the RAO, it is not a regulated activity.

An activity will only be a regulated activity under section 22 of FSMA if it is carried on “*by way of business*”. This is often referred to as the “business test”. While the RAO does not define the “business test”, Chapter 2.3 of the FCA’s Perimeter Guidance manual (“**PERG**”) includes several factors to consider when determining if an activity is carried on by way of business. These include:

- (a) the degree of continuity of the activity (i.e., whether it is a “one off” or something undertaken regularly);
- (b) whether there is a commercial element to the activity (i.e., whether fees are charged);
- (c) the scale of activity (i.e., how large scale is it?);
- (d) the proportion which the activity bears to other unregulated activities carried on; (i.e., is it a small part of an unregulated business?) and
- (e) the nature of the relevant activity.

Considering PERG’s guidance, something that is done on a paid-for basis (beyond coverage for mere expenses) is likely to be strongly indicative that it is being carried on “*by way of business*”.

Enterprise Scheme Exemption

As mentioned above, regulated activities can only be carried out in the UK if the person is authorised, exempt or if a specific exclusion applies.

Exclusions (typically contained in the RAO) are conditions that turn normally regulated activities into unregulated ones. If a firm can rely on an exclusion, it will not need authorisation to carry on that regulated activity.

This explainer article looks at the specific exemption applicable to the regulated activity of ‘*arranging deals in investments*’ known as the ‘Enterprise Schemes’ exemption (section 40 Financial Services and Markets Act 2000 (Exemption) Order 2001).

The exemption states that any ‘body corporate’ (i.e., a private limited company) which has as its **principal object** (or one of its principal objects) either:

- (a) the **promotion or encouragement of industrial or commercial activity or enterprise** in the **United Kingdom** or in any particular area of it; or
- (b) the dissemination of information concerning persons engaged in such activity or enterprise or requiring capital to become so engaged,

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is **exempt** from the general prohibition as regards the *arranging deals in investments* regulated activity, so long as it does **not** carry on that activity for, or with the prospect of, direct or indirect **pecuniary gain**.

This exclusion is typically relied upon by arrangements that are involved in promoting commercial or enterprise activity in the UK and which is likely to have a beneficial impact on the local economy (e.g., a university arm or a regional or sector-specific angel networks led by non-profit organisations).

Whether the activity is carried on for direct or indirect pecuniary gain depends on the facts. PERG guidance confirms that sums reasonably regarded as necessary to meet the costs of carrying on the activity in question does not constitute a pecuniary gain for this purpose.

In order to avail the enterprise scheme exemption, we recommend that:

- a) the principal object of the entity is apparent (i.e., by setting it out in the relevant company's articles of association); and
- b) the entity does not directly or indirectly receive fees in respect of its activities which go beyond amounts necessary to meet its costs of activity so as to avoid being seen as making pecuniary gain.

Given the complexity of the regulation surrounding regulated activities and the variability of circumstances, we would recommend that advice is always sought if you are considering relying on the *Enterprise Scheme* exemption.

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10 September 2024