

Chapter 8

Financial promotion and related activities



8.6 Communicate

8.6.1

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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 FCA that a *person* is *communicating* where he gives material to the recipient or where, in certain circumstances (see ■ PERG 8.6.5 G), 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 FCA'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 ■ PERG 8.5)). 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

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Apart from the originators of a *financial promotion*, the FCA 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

8.6.3

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In the FCA'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

8.6.4 G The FCA 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.

8.6.5 G 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 ■ PERG 8.12.18 G).

Website operators

8.6.6 G 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 ■ PERG 8.22.

Application of exemptions to persons causing a communication

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 55 of the *Financial Promotion Order* (Communications by members of professions) applies only to a communication by an *exempt professional firm*. This exemption may apply where a *person* ('P') requests an *exempt professional firm* ('E') to *communicate* an offer to a client of E. In this case, where P causes E to *communicate*, it is the FCA's view that the exemption that applies to 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 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.

Application of exemptions to persons who communicate on behalf of others

8.6.8 **G** 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 FCA'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'

8.6.9 **G** 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.

8.6.10

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- (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 ■ PERG 8.10.2 G 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 *FCA'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*.