

Informal capital raising and high net worth and sophisticated investors:

A consultation document on proposed
changes to the Financial Promotion Order

January 2004



HM TREASURY

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INTRODUCTION

1.1 As part of the two-year review of the Financial Services and Markets Act 2000 (FSMA), the Government committed to reviewing the operation of the existing exemptions from the financial promotion restriction for high net worth individuals and sophisticated investors in the Financial Promotion Order. These exemptions are intended to strike an appropriate balance between consumer protection for those investors who are likely to be well-informed, experienced and in a position to obtain appropriate advice, and access to finance for innovative and growing businesses. Feedback to date has suggested that these exemptions are not working as intended, as levels of certification have been low, particularly for sophisticated investors. This undermines the intention of the exemptions, which is that they should allow investment in unlisted securities in order to facilitate relatively small levels of capital raising by smaller firms.

1.2 While the UK's well developed and sophisticated financial markets successfully meet the demands for capital of the vast majority of firms, a small proportion of businesses find it difficult to raise funds. These difficulties often affect start-up or innovative small businesses, without track records or assets to borrow against, and may affect some established businesses which are modernising or diversifying. Bank financing may be inappropriate for this small section of firms. Potentially high-growth but risky businesses are often more suitable for equity investment, and at an early stage they may be more suitable to informal equity investment. Informal equity investment can come from family members, friends and from a class of investors commonly referred to as business angels.

1.3 Business angels are a vital source of finance for many of these firms. Broad estimates suggest they provide between £500 million and £1 billion of investment per annum in around 3,000 to 6,000 businesses¹. They also often provide important further benefits in terms of offering expertise, management support and contacts to entrepreneurs. Equally, some investors in unlisted equity at this level prefer to take a more hands off approach.

1.4 Investing in unlisted securities can be a higher risk activity than investing in larger firms or diversified equity and debt funds. It may therefore be particularly suitable for those with diversified portfolios or a full understanding of the risks associated with this sector.

1.5 This consultation paper is concerned with how investments in these firms should be promoted to certain types of investors. It seeks views on how best to ensure that financial regulation in this area strikes the right balance between allowing firms to raise informal capital, contributing to enterprise, and the appropriate level of protection for those investing in a higher risk sector.

¹ Mason, C. and Harrison, R. *The size of the informal venture capital market in the UK*, Small Business Economics 2000

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INFORMAL CAPITAL RAISING

INTRODUCTION

2.1 Access to finance is essential for growing businesses to invest, to implement new technologies and strategies and to contribute to a more productive economy. UK firms benefit from the UK's highly-developed, efficient and well-regulated financial markets which enable the vast majority of UK firms to raise capital to fund investment and growth.

2.2 Nevertheless, a small but important minority of innovative, growth-oriented businesses continue to face difficulties attracting funding. Access to finance is an important part of the Government's strategy to reduce barriers to successful enterprise, ensuring that innovative and start-up firms can thrive.

Role of smaller firms in driving productivity

2.3 Small and medium-sized enterprises (SMEs) form a major part of our economy, employing over half the private-sector workforce and generating more than £1,000 billion of private-sector turnover each year. While only a small proportion of these firms are appropriate for equity finance¹, these potentially high-growth, innovative firms are likely to make an important contribution to increasing prosperity and boosting productivity in a dynamic economy. The Government is committed to building a more enterprising culture, creating the best possible environment in which to start and grow a business, and tackling specific barriers to successful SME formation and growth.

Access to finance for smaller firms

2.4 *Enterprise Britain* identified access to finance as a potential barrier for start-ups and smaller businesses. The greatest difficulties are typically faced by start-ups and by small businesses with significant growth potential seeking relatively modest sums of risk capital. Most recently, *Bridging the finance gap: next steps in improving access to growth capital for small businesses*, published alongside the 2003 Pre-Budget Report, examined the evidence on the availability of risk capital. This included an analysis of responses to the April 2003 consultation paper² on this topic. These responses and the accompanying economic analysis pointed to a shortfall of equity finance that is most acute for businesses seeking between £250,000 and £1 million, but which can also be severe for many seeking up to £2 million. This equity gap is a barrier to productivity growth, as it can stifle the development of innovative start-up and early-stage businesses, and can constrain the supply of capital for some established businesses that are seeking to modernise or diversify their activities.

¹ Equity finance accounts for only 8 per cent of all external finance for SMEs.

² HM Treasury and the Small Business Service, *Bridging the finance gap: a consultation on improving access to growth capital for small businesses*, April 2003

Government action on access to finance **2.5** The Government is already taking a series of actions to address the barriers which can prevent small businesses obtaining appropriate levels and types of finance. These include Venture Capital Trusts (VCTs) and the Enterprise Investment Scheme (EIS) which offer a number of tax reliefs to encourage private investors to invest in small companies affected by the equity gap. In addition, the Regional Venture Capital Funds, the UK High Technology Fund and the Early Growth Funding programme will collectively invest around £400 million in businesses otherwise affected by the equity gap. The Government announced in PBR 2003 a series of measures to build on this programme, which includes:

- a 'pathfinder' round of Enterprise Capital Funds, the UK variant of the successful US Small Business Investment Company (SBIC) model,
- from 2004/05, proposals to double the investment limit (to £200,000) that can be invested in VCTs and qualify for income tax relief in any tax year, with a corresponding increase in the income tax relief limit for the EIS; and
- proposals to reduce the cyclicity of VCT fundraising. These include a temporary enhancement of the income tax relief available under the scheme to address recent weakness in VCT fundraising, the form of which will be discussed with business.

Role of business angels

2.6 Business angel investment plays a vital role in many early-stage firms. Although quantification of the typical size of business angel investment is difficult because of its informal nature, one recent estimate suggested as much as £12.8 billion was invested in UK small businesses between 1999 and 2000 by friends and family of the business owners, or by individual investors previously unconnected with the entrepreneur, ie business angels.³ Just looking at business angels, the National Business Angel Network estimates that angels invest in 3,500 companies each year, while Mason and Harrison suggest the figure is between 3,000 and 6,000 annually.

2.7 Angels can bring not only equity investment to fund development and firm growth, but also management support, practical advice and other expertise, which can significantly enhance the performance of the recipient businesses. Studies of firm survival and growth suggest that the hands-on support provided by business angels can be a key factor contributing to both the longevity and growth of the businesses in which they invest.³

2.8 The evidence suggests that the size of each of these investments may be relatively small, with the majority of individual angel investments being below £50,000.⁴ This means that firms seeking larger amounts of capital informally may have to raise funds from and approach many investors.

³ Cowling, Murray and Harding, *The virtuous circle of informal investment activity: Evidence from the UK, 2003*.

⁴ The InvestorPulse 2003 Business Angel Survey showed that, in 2002, three quarters of business angels made investments averaging less than £50,000, and 40 per cent averaged less than £20,000 per investment. Cowling, Murray and Harding (*The virtuous circle of informal investment activity*, 2003) found that the median level of investment was £35,000 over a three-year period.

Access to finance and financial regulation

2.9 There is an interaction between the importance of business angel financing for smaller firms, the need for some of these firms to raise finance from several investors, particularly given the evidence about the equity gap faced by firms seeking to raise £250,000 and above, and the existing Financial Promotion Order. The next section looks in more detail at how the current regulatory system may not be operating as intended, and the amendments that could be made in order to make informal capital-raising from a number of investors easier for unlisted firms.

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THE HIGH NET WORTH INDIVIDUAL AND SOPHISTICATED INVESTOR EXEMPTIONS

3.1 The Financial Services and Markets Act 2000 (FSMA) imposes a restriction upon the ability of unauthorised persons (i.e. in very general terms, those not authorised by the FSA to carry on regulated activities) “to communicate an invitation or inducement to engage in investment activity” (the “financial promotion restriction”).¹ The restriction is broad in scope and covers a wide range of communications, including written advertisements (e.g. circulars), telephone calls, personal visits, e-mails and internet websites. Unauthorised persons are prohibited from “promoting” financial products and services unless:

- the content of the communication has been approved by an authorised person; or
- the communication falls within one of the exemptions specified in the Financial Promotion Order.²

3.2 The financial promotion regime provides the framework for the regulation of marketing financial services. It aims to address the asymmetry of information that exists between provider and customer and to ensure that customers are made aware of risks prior to making investments. More specifically, the involvement of an authorised person in the process means that individual investors may be able seek redress through the Financial Ombudsman Scheme, the Financial Services Compensation Scheme or the FSA, if something does go wrong.

3.3 In addition, FSMA makes provision for investors to seek compensation in cases involving communication in relation to which there has been a contravention of the financial promotion restriction.³

How the Financial Promotion Order affects small firms

3.4 Generally, firms wishing to raise informal equity capital would have to get their financial promotion approved by an authorised person if they wished to send this out to all classes of likely investors. The costs associated with approval are likely to be too high for firms seeking relatively modest sums of equity finance, for example, firms raising several hundred thousand pounds. Therefore the current regime allows unlisted firms to raise equity capital without the substantial costs of getting their financial promotion approved if the promotions are made to potential investors whom the promoter knows are certified as high net worth individuals or sophisticated investors.

3.5 The certified high net worth individual exemption requires investors to obtain a certificate signed by either their employer or their accountant, stating that they either earn at least £100,000, or have net assets worth at least £250,000 (excluding their primary residence, rights under certain contracts of insurance and certain benefits in the form of pensions or otherwise). The sophisticated investor exemption requires an authorised person to certify that the investor is sufficiently knowledgeable to understand the risks associated with the relevant description of investment.

¹ Section 21 FSMA

² S.I. 2001/1335

³ Section 30 FSMA

3.6 These exemptions from the Financial Promotion Order were designed to allow informal capital raising by unlisted small firms from experienced, wealthy individuals and groups, including business angels. Similar exemptions are used in the United States and Australia (see Annex A). As the 1999 consultation⁴ on this issue made clear, the Government attaches great importance to small and medium-sized firms gaining access to the investment funding they need to grow and succeed. The current exemptions were introduced in recognition of three important factors:

- private individuals are an important source of finance for early stage firms. Business angels also can provide additional benefits in terms of management expertise and guidance;
- the costs of approval of investment promotions by an authorised person are prohibitive in the case of smaller companies seeking relatively modest sums of money; and
- it is desirable to define categories of private investors of greater sophistication and resources for whom the degree of investor protection provided by the general financial promotion restriction may be disproportionate.

Feedback on current operation of exemptions

3.7 Although there are no central records of successful certification, feedback from stakeholders suggests that take up of both exemptions has been very low. This is particularly the case for the sophisticated exemption. It has been suggested that this is partly due to authorised persons being reluctant to certify investors as sophisticated because of the subjective nature of the test, leading to concerns that they themselves may be liable if investors make bad investment decisions. Certifications that do take place are reportedly expensive, reflecting the due diligence that authorised persons wish to undertake to avoid certifying someone incorrectly.

3.8 Take up of the high net worth exemption has also reportedly been poor, despite this test being more straightforward. Certification from an employer may not be available or appropriate to many in this investor class. For example, business angels may be serial entrepreneurs rather than being in regular employment.

Q1: Are the current exemptions allowing appropriate numbers of high net worth and sophisticated investors to become certificated?

Q2: If no to question 1, is this posing a problem for smaller firms seeking to raise capital via unlisted equity and for investors? Please give examples where appropriate.

⁴ HM Treasury, *Financial Services and Markets Bill: Financial Promotion – a consultation document*, March 1999

4

OPTIONS FOR CHANGE

Allowing promotions on the basis of reasonable belief that the investor is high net worth or sophisticated

4.1 The Government is minded to support this proposal which would make it easier to promote to high net worth individual or sophisticated investors. The practical effect of the high net worth and sophisticated exemptions in the Financial Promotion Order is that an unlisted firm must see a certificate before it can send its business plan or other information to a would-be investor. Allowing promotions where the person making the communication has a reasonable belief that the investor is a certified high net worth individual (HNWI) or a sophisticated investor (that is, that the investor qualifies as high net worth or sophisticated **and** has signed the requisite statement) would overcome the problems associated with this. This is not a dramatic change from current practice as marketing on this basis is already permitted for associations of high net worth and sophisticated investors. This proposal is incorporated in all three of the sets of draft statutory instruments included as Annex B in this paper. Introducing reasonable belief addresses the risk that those who may fit the criteria but do not wish to receive unapproved promotions will receive unwanted promotions.

Q3: Do you agree that promotions should be allowed on the basis of a reasonable belief that an individual is either a certified high net worth individual or a certified sophisticated investor?

Introduction of self-certification

4.2 The Government is in favour of reducing requirements in this area to address the problems reported with the current regime. This consultation exposes three potential models of self-certification to replace or sit alongside the current exemptions. All three would apply solely to investment in unlisted equity. All three models of self-certification as drafted would contain a provision that investments made as a self-certified high net worth or sophisticated investor cannot lead to the investor losing more money than he/she invested. In addition, investors would be required to sign a statement enabling them to receive promotions.

4.3 Nevertheless, self-certification would be a substantial change to existing policy on financial regulation. Investors currently can seek to become exempt under the Financial Promotion Order, but this requires certification by either an accountant or employer for HNWI, or an authorised person for sophisticated investors. Self-certification would be a step change as it would allow the investor him or herself to decide whether to have regulatory protection.

Model 1: allow self-certification as a high net worth individual and continue the current certification process for sophisticated investors

4.4 At the moment HNWI's require an accountant or their employer to sign a statement that they meet the relevant criteria. Under this proposal HNWI's would be allowed to self-certify that they meet the net worth criteria. Self-certification would reduce the costs of becoming exempt in terms of professional fees, time and inconvenience. It is acceptable in other spheres, such as personal tax self-assessment, to allow individuals to make their own income and wealth statements.

4.5 Allowing self-certification for HNWI's but not sophisticated investors may be more attractive due to there being objective criteria for high net worth. It may be that when moving to a self-certification regime, it is more appropriate to base this on tests which are entirely objective, such as income and assets.

4.6 This option would be most attractive if there was a well-established and complete overlap between sophisticated investors and those who meet the high net worth test. This would simplify the regulatory regime in this area, and would allow the new test to be based on an objective set of criteria. However, it is very difficult to satisfactorily define and therefore collect data on 'sophisticated' investors.

4.7 Individuals who would meet the HNWI test appear to make the substantial majority of investments in unlisted smaller firms. Inland Revenue data on investments via the Enterprise Investment Scheme (EIS) provides an approximate measure of business angel investment. The EIS provides tax incentives for direct investments by individuals into unlisted firms which have gross assets below £16 million after the investment. EIS data suggests that while only around half of the individuals using the EIS tax relief would meet the HNWI test, those who would pass the HNWI test provided 80 per cent of total EIS investment. This supports the idea that there are a substantial number of friends and family investing relatively small amounts into small firms. Meanwhile, the large injections of funding appear to be coming from investors who would meet the present HNWI test.

4.8 It should be noted that this data is only an approximate estimate of business angel activity. As it is drawn from self-assessment data it excludes those who only qualify for the capital gains tax deferral element of the EIS incentives, who may be a wealthier group and invest larger amounts in EIS-qualifying firms. Constraints on data collection also mean it underestimates wealth because SA data does not and the returns will not fully capture the total amount invested by wealthy individuals. Taken together, these factors suggest that the above analysis may, if anything, underestimate how much of EIS investment comes from those who would already meet the high net worth test.

4.9 Respondents who believe that a significant number of sophisticated investors would not fall within the proposed HNWI test will want to look in more detail at models 2 and 3.

Replacing the current HNWI test

4.10 The draft statutory instruments (see Annex B) replace the existing HNWI exemption (Article 48) with the model proposed here. Respondents are welcome to comment on whether the existing exemption should be maintained alongside any new self-certified HNWI exemption. Some investors may be more comfortable with the current regime and not wish to move wholly to a self-certify regime for the high net worth individual exemption.

Q4a: Should potential investors be able to self-certify that they qualify as high-net worth individuals?

Q4b: Do the majority of sophisticated investors already meet the high net worth criteria?

Q4c: If yes to Q4a, should the self-certification exemption replace or be introduced alongside the current high net worth exemption?

Changing the net assets test

4.11 Redrafting the statutory instruments also allows for a review of whether the levels of the net asset and income tests are appropriate. Consultation respondents may believe that a change to self-certification requires further safeguards in terms of a higher net assets test, for example to £500,000, excluding the value of the individual’s primary property, pensions etc and insurance.

4.12 Inland Revenue data suggest that the current HNW test, which includes a net asset test of £250,000, would exclude 45 per cent of EIS investors¹. Changing the net asset test to £500,000 would exclude 52 per cent of current EIS investors. Although these excluded proportions look large, many of those who would fail a £250,000 or £500,000 test are likely to be family or friends. EIS data suggests that those investors who would meet a £500,000 HNW test currently provide 74 per cent of total investment.

Q5: Should the net assets test for self-certification by high net worth investors be increased to £500,000, remain at £250,000 or be set at another level? Please give reasons and evidence for your choice.

Model 2: allow self-certification for high net worth investors and self-certification on the basis of a test for sophisticated investors

4.13 This option proposes to introduce the same test as described in model 1 for high net worth investors alongside an additional new test for sophisticated investors. The existing sophisticated test would remain as at present for those wishing to be certified in respect of a wider set of investment products.

4.14 As discussed above, most of the current reported difficulties are associated with becoming certified as sophisticated. This change would allow investors to self-certify that they meet at least one of a number of criteria, which are reasonably objective tests for sophistication. The proposed test that individuals must meet in order to self-certify as a sophisticated investor is to fulfil at least one of the following criteria:

- being a member of one of the bodies in the FSMA Designated Professional Bodies Order. These are the Law Society; the Law Society of Scotland; the Law Society of Northern Ireland; the Institute of Chartered Accountants in England and Wales; the Institute of Chartered Accountants of Scotland; the

¹ This is based on 2001/02 data and the current test of HNW which is based on either income of £100,000 or above or net assets of £250,000 or above. 55 per cent of EIS investors meet both tests.

Institute of Chartered Accountants in Ireland; the Association of Chartered Certified Accountants and the Institute of Actuaries;

- to work, or have worked, for at least 12 months in the financial services and markets sector in a position which requires knowledge of one or more financial instruments²;
- the investor has carried out transactions on securities markets at an average frequency of 10 per quarter over the previous four quarters **and** the size of the investor's securities portfolio exceeds £100,000.

4.15 The Government welcomes further suggestions, where possible supported by evidence, on other potential tests of sophistication. The above proposals concentrate on evidence of financial experience and knowledge. This is because sophisticated investors forego the protection of having had a financial promotion approved before they receive it and the potential protection of being able to seek redress via, for example, the Financial Ombudsman Service or the FSA that results from the involvement of an authorised person in the promotion. There may be a case for introducing broader tests of sophistication, for example, allowing an investor to qualify if he or she is experienced in the sector that the investment is to be made in.

4.16 The Government also welcomes views on the appropriateness of the tests proposed above. Respondents may wish to consider the details of these tests, including whether and how the tests capture the discretionary investment activity that one would associate with sophisticated investors.

4.17 The main concern with allowing individuals to self-certify is that it could allow some individuals who are not sufficiently knowledgeable or experienced to invest in higher risk unlisted and illiquid securities.

4.18 The Government is minded to keep the current sophisticated investor exemption alongside any new self-certified sophisticated investor exemption in respect of unlisted investments. The current sophisticated investor exemption is used for a wider range of investments than unlisted equities, and the Government intends to maintain this option for investors in those instruments, as well as in unlisted equities.

Q6: Do you think a test for self-certifying as a sophisticated investor should be introduced alongside the current regime?

Q7: Do you agree with the proposed criteria for sophistication? What changes do you suggest and why?

² See for example proposed Article 50A(4)(b) in Schedule 1 to the Model 2 draft SI, at Annex B.

Model 3: allow self-certification for both high net worth investors and sophisticated investors

4.19 This model, as with model 2, would include self-certification for high net worth investors, as described in model 1. The existing sophisticated test would remain as at present for those wishing to be certified in respect of a wider set of investment products. Model 3 proposes an additional test for self-certified sophisticated investors, which is less prescriptive than the test for self-certification as a sophisticated investor outlined in model 2.

4.20 This model would allow anyone who regards him or herself as sufficiently knowledgeable to self-certify as a sophisticated investor in respect of investment into unlisted firms, without detailed criteria to judge him or herself against. This would be the most radical change. It represents a significant decrease in regulation and would avoid the problem of excluding any investors who don't meet either the high net worth or the self-certified sophisticated test as set out in model 2.

4.21 The draft statutory instruments for model 3 at Annex B provide that investors would have to certify that they have the requisite knowledge and experience to know that engaging in investment activity in respect of such investments may expose them to a significant risk of losing all of the property invested. This provides only a very broad test for investors to judge themselves against. It may therefore not act as effectively as the more detailed test in model 2 to discourage inappropriate potential investors from self-certifying.

4.22 Self-certifying under this model may introduce significant risks that could outweigh the potential benefits. Allowing self-certification without detailed criteria for sophistication effectively allows any individual to self-certify, therefore foregoing the protections of having had the promotion approved by an authorised person. There may be the potential for abuse, if investors are led to sign away their rights by unscrupulous advisors.

Q8: Do you think self-certifying as a sophisticated investor without detailed criteria to test against should be introduced?

Q9: Out of models 1, 2 and 3, which do you think provides the most appropriate balance between investor protection and facilitating investment in SMEs, and why? Please provide examples or supply evidence where appropriate.

Transitional arrangements **4.23** All of the draft statutory instruments at Annex B include transitional provisions which would allow all those with existing certificates issued under the statutory instruments prior to amendment to use them for their remaining duration.

Implications for and changes to other regulations

4.24 The Official Listing of Securities Regulations and the Insolvency Act 1986 include references to sophisticated and HNW investors. The Government intends that any changes to these definitions within the Financial Promotion Order will be reflected in these regulations as well, ensuring consistency.

4.25 The FSMA 2000 (Promotion of Collective Investment Schemes)(Exemptions) Order 2001 (the 'CIS' Order) also contains exemptions for high net worth individuals and sophisticated investors. Both for reasons of consistency between the two Orders and because ECFs and other collective investment schemes that invest in unlisted firms may be subject to the CIS Order, the draft statutory instruments at Annex B also include equivalent amendments to the CIS Order for all the models discussed above.

Q10: Should amendments equivalent to those made to the Financial Promotion Order be made to the CIS Order?

5

LINKS WITH THE WIDER REGULATORY CONTEXT

5.1 The proposals in this paper relate only to the exemptions in the Financial Promotion Order and the Promotion of Collective Investment Schemes Order for high net worth individuals and sophisticated investors. A wider review of the Financial Promotion Order will form part of a later consultation as part of the two year review of FSMA.

FSMA 5.2 As indicated above, creating self-certifying exemptions for these types of investor may lead to loss of potential access to the Financial Ombudsman Scheme, the Financial Services Compensation Scheme and the FSA, in the same way as the current exemptions do, because of the lack of involvement of an authorised person in the process.

EU perspective 5.3 Our proposals are not intended to remove or cut across investor protections required in EU legislation such as the Investment Services directive (ISD), Prospectus directive or the Distance Marketing directive.

Regulation of the different stages of fund-raising 5.4 Business angel investment typically follows funding from entrepreneurs' own funds, personal borrowing and family and friends. In a simplified version of the funding escalator, this is then followed by formal venture capital funding, which as discussed above is increasingly provided in initial sums of £1 million or £2 million. This in turn may be followed by an initial public offering or a trade sale.

5.5 Different degrees of regulation are appropriate at different stages of fund-raising. This consultation is concerned with a relatively early stage of enterprise financing. More specifically, it relates to the appropriate level of regulation of offers of equity in unlisted firms when these are aimed at private investors and are raising relatively modest sums of risk capital. At a later stage of the fund-raising process, where the Public Offers of Securities (POS) Regulations require the production of a prospectus in connection with a public offer of equity, the financial promotion restriction in section 21(1) of FSMA does not apply to any financial promotion in the prospectus or in any material related to the prospectus.

Prospectus Directive 5.6 The European Prospectus Directive will apply to securities included in an offer to the public where the total consideration of the offer is €2.5m (approximately £1.7 million) or more in a twelve-month period, unless the offer complies with certain exemptions. The Financial Promotion Order currently provides exemptions from the financial promotion restriction in FSMA for a financial promotion communicated in connection with admission to certain securities markets, listing applications and listing particulars (and prospectuses prepared under the POS Regulations as mentioned above). When the Prospectus Directive is implemented, the Financial Promotion Order will be reviewed to ensure that the financial promotion restriction does not apply to prospectuses required under the Prospectus Directive. Member States have until 1 July 2005 to implement the Prospectus Directive.

6

WIDER REGULATORY CONSTRAINTS ON BUSINESS ANGEL ACTIVITY

6.1 Business angels fulfil important roles in terms of both financing and offering practical advice and management support to growing and innovative firms. Looking at the experience of the UK to date and of the US suggests that there could be further scope for angel investment and involvement, including through syndication, in the dynamic SME sector throughout the UK.

Syndication 6.2 Syndication can have many benefits. Syndicates can diversify in a way that individuals cannot, they can allow inexperienced investors to gain exposure to an unfamiliar asset class, can facilitate the exchange of information and expertise and can provide a larger pool of finance for investment into SMEs. This is particularly important given the analysis in *Bridging the finance gap: next steps in improving access to growth capital for small businesses* of a growing 'equity gap'.

Inter-mediation 6.3 One difference between the UK and US market is in the number of private sector intermediaries operating. Fewer private sector intermediaries in the UK market may be a factor affecting the ease and cost of raising small amounts of equity finance. Intermediaries match investors with small businesses and provide advice on types of investment to entrepreneurial firms. The Government is interested in what drives the provision of private sector intermediation services and what, if any, barriers are preventing greater activity in this sector. The Government also welcomes views on whether intermediation is always suitable. Some markets may not require a large private intermediation sector, where for example investors and small firms can interact relatively easily and cheaply.

6.4 Responses to the *Bridging the finance gap* consultation paper¹ suggested that allowing the incidental costs of raising equity to be tax deductible would have a limited impact on the intended target SMEs. The Government will therefore not at this stage take this proposal further. However, it was clear from responses that cost is only one barrier facing firms considering whether or not to seek equity funding. Some of these barriers are due to the complexities of the process involved, and so the Government is committed to examining the scope to reduce these barriers.

6.5 As announced in the PBR, the Small Business Investment Taskforce (SBIT) is examining these issues as they affect access to finance for high-growth SMEs, in advance of Budget 2004. SBIT is looking at the barriers that prevent those firms which could benefit from early-stage equity or mezzanine finance receiving appropriate investment. The Government is particularly interested in the taskforce's views on the barriers facing small high-growth SMEs when raising early-stage and second round finance, and whether there are barriers that:

- inhibit new entrants to the private sector intermediary market, and whether there are indications that there is under-provision of this service;
- raise the costs of raising small amounts of equity or mezzanine finance; and
- prevent or discourage individuals and syndicates of business angels from providing finance directly to SMEs.

¹ HM Treasury and the Small Business Service, *Bridging the finance gap: a consultation on improving access to growth capital for small businesses*, April 2003

6.6 The Government would also welcome respondents' views on the wider issues of potential regulatory constraints currently affecting the market for small firm formal and informal equity and mezzanine finance. Views from this consultation paper will be made available to the SBIT as they examine these and related issues.

Q11: What other regulatory issues are proving a constraint on business angel investment?

Q12: Are there particular regulatory barriers preventing angel syndication?

Q13: What regulatory constraints or costs impact on access to equity finance for growing firms?

Q14: Is there an under-provision of private sector intermediation in this area and if so, what are the causes?

7

TIMETABLE FOR RESPONSES

The Government welcomes responses to the issues and questions raised in this paper by 19 April 2004.

All responses received may be made public unless specifically requested otherwise. In the case of electronic responses, general confidentiality disclaimers that often appear at the end of the emails will be disregarded for the purposes of publishing responses unless an explicit request otherwise is made in the body of the response.

Responses should be sent to:

Informal capital-raising consultation responses
Enterprise Team (4/N2)
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

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8

CONSULTATION QUESTIONS SUMMARY

Q1: Are the current exemptions allowing appropriate numbers of high net worth and sophisticated investors to become certificated?

Q2: If no to question 1, is this posing a problem for smaller firms seeking to raise capital via unlisted equity and for investors? Please give examples where appropriate.

Q3: Do you agree that promotions should be allowed on the basis of a reasonable belief that an individual is either a certified high net worth investor or a certified sophisticated investor?

Q4a: Should potential investors be able to self-certify that they qualify as high-net worth individuals?

Q4b: Do the majority of sophisticated investors already meet the high net worth criteria?

Q4c: If yes to Q4a, should the self-certification exemption replace or be introduced alongside the current high net worth exemption?

Q5: Should the net assets test for self-certification by high net worth investors be increased to £500,000, remain at £250,000 or be set at another level? Please give reasons and evidence for your choice.

Q6: Do you think a test for self-certifying as a sophisticated investor should be introduced alongside the current regime?

Q7: Do you agree with the proposed criteria for sophistication? What changes do you suggest and why?

Q8: Do you think self-certifying as a sophisticated investor without detailed criteria to test against should be introduced?

Q9: Out of models 1, 2 and 3, which do you think provides the most appropriate balance between investor protection and facilitating investment in SMEs, and why? Please provide examples or supply evidence where appropriate.

Q10: Should amendments equivalent to those made to the Financial Promotion Order be made to the CIS Order?

Q11: What other regulatory issues are proving a constraint on business angel investment?

Q12: Are there particular regulatory barriers preventing angel syndication?

Q13: What regulatory constraints or costs impact on access to equity finance for growing firms?

Q14: Is there an under-provision of private sector intermediation in this area and if so, what are the causes?

A

US AND AUSTRALIAN SYSTEMS

A.1 In the US, there is an exemption for ‘accredited investors’ similar to a mixture of the UK high net worth and sophisticated exemptions. An accredited person must either have an individual net worth, or a joint net worth with their spouse, which exceeds \$1,000,000, or they must have had an individual income in excess of \$200,000 in the last two years or joint income with their spouse in excess of \$300,000 in those years with a reasonable expectation of reaching the same income level in the current year. In addition to these net worth tests, an accredited investor must also meet one of the following criteria:

- the investor or his/her professional advisor can be reasonably assumed to have the capacity to protect his/her own interests in connection with the transaction by reason of his/her business experience or the business or financial experience of his/her advisor;
- the investor can reasonably be assumed to be capable of bearing the economic risk and can reasonably be assumed to not require immediate liquidity in relation to his investment in the securities; and
- it can reasonably be assumed that the investment in the securities does not exceed ten percent of the investor's net worth.

A.2 US financial regulation prevents firms undertaking a ‘general solicitation’ without being registered with and meeting the appropriate regulations of the Securities and Exchange Commission (SEC). Companies are exempt from having to register with the SEC if they offer their securities to accredited investors or to any person who they reasonably believe comes within the definition.

A.3 In Australia there are similar exemptions to prevent firms from taking on the significant costs of preparing a prospectus to the standards required for general promotions. One of these is the ‘sophisticated investor exemption’ which applies where one of the following apply:

- each person receiving the offer or invitation is invited to subscribe or pay at least AUS\$500,000 for the relevant securities;
- the investor has net assets of at least AUS\$2.5 million;
- the investor has a gross income for each of last two financial years of AUS\$250,000; or
- the offer is made through a licensed securities dealer and that dealer is satisfied that the investor has experience in investing that allows them to assess the merits of the offer and the risks involved.

A.4 Both schemes rely in part on the ability of dealers to ascertain that investors do meet the relevant criteria.

B

DRAFT STATUTORY INSTRUMENTS

STATUTORY INSTRUMENTS

2004 No.

FINANCIAL SERVICES AND MARKETS

**The Financial Services and Markets Act 2000 (Miscellaneous
Amendments) Order 2004**

<i>Made</i> - - - -	<i>2004</i>
<i>Laid before Parliament</i>	<i>2004</i>
<i>Coming into force</i> - -	<i>2004</i>

The Treasury, in exercise of the powers conferred upon them by sections 21(5) and (6), 238(6) and (7) and 428(3) of the Financial Services and Markets Act 2000^(a) hereby make the following Order:

Citation and commencement

1. This Order may be cited as the Financial Services and Markets Act 2000 (Miscellaneous Amendments) Order 2004 and comes into force on [enter date].

Amendment to the Financial Promotion Order

2. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001^(b) is amended in accordance with the Schedule to this Order.

Amendment to the Promotion of Collective Investment Schemes Exemption Order

3. The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001^(c) is amended in accordance with Schedule 2 to this Order.

Transitional provisions

4.—(1) Paragraph (2) applies where, immediately before the coming into force of this Order, an individual is a certified high net worth individual within the meaning of article 48 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.

(2) That individual shall, for so long as he holds a certificate of high net worth, be treated as a certified high net worth individual for the purpose of article 48 of the Financial

(a) 2000 c.8.

(b) S.I. 2001/1335, amended by S.I. 2001/2633, S.I. 2001/3650, S.I. 2001/3800, S.I. 2002/1310, S.I. 2002/1777, S.I. 2002/2157 and S.I. 2003/1676.

(c) S.I. 2001/1060, amended by S.I. 2001/3538, S.I. 2002/1310, S.I. 2002/2157, S.I. 2003/2067

Services and Markets Act 2000 (Financial Promotion) Order 2001 as it is substituted by this Order.

(3) In this article “certificate of high net worth” means a certificate of high net worth which, immediately before the coming into force of this Order, satisfies the criteria in article 48(3) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.

5.—(1) Paragraph (2) applies where, immediately before the coming into force of this Order an individual is a certified high net worth individual within the meaning of article 21 of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001.

(2) That individual shall, for so long as he holds a certificate of high net worth, be treated as a certified high net worth individual for the purpose of article 21 of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 as it is substituted by this Order.

(3) In this article “certificate of high net worth” means a certificate of high net worth which, immediately before the coming into force of this Order, satisfies the criteria in article 21(3) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001.

Signatory text

Two of the Lords Commissioners of Her Majesty’s Treasury

Address

Date

Amendment to Financial Promotion Order

1.—(1) The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 is amended as follows.

(2) For article 48 (certified high net worth individuals) there is substituted—

“**48.**—(1) If the requirements of paragraph (6) are met, the financial promotion restriction does not apply to any communication which—

- (a) is a non-real time communication or a solicited real time communication;
- (b) is made only to an individual whom the person making the communication believes on reasonable grounds to be a certified high net worth individual.
- (c) relates only to one or more investments falling within paragraph (7).

(2) “Certified high net worth individual” means an individual—

- (a) who qualifies as a high net worth individual within the meaning of paragraph (5); and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions which are exempt from the restriction on financial promotion in section 21 of the Financial Services and Markets Act 2000. The exemption relates to high net worth individuals and I declare that I qualify as such. I accept that the content of promotions and other material that I receive may not have been approved by a person who is authorised under that Act and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I am aware that it is open to me to seek advice from someone who is authorised under that Act and who specialises in advising in this kind of investment. I am also aware that engaging in any investment activity as a result of a promotion made to me may expose me to significant risk of losing all of the property I have invested.

(3) The validity of a statement signed in accordance with paragraph (2)(b) is not affected by a defect in the wording of the statement.

(4) An individual may only sign a statement in accordance with paragraph (2)(b) if he qualifies as a high net worth individual.

(5) An individual qualifies as a high net worth individual if he satisfies one or more of the following conditions—

- (a) he had, during the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, an annual income to the value of £100,000 or more;
- (b) he held, throughout the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, net assets to the value of £250,000 or more.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the financial promotion restriction on the ground that it is made to a certified high net worth individual;
 - (b) of the requirements that must be met for an individual to be a certified high net worth individual;
 - (c) that the content of the communication has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required by section 21 of the Act;
 - (d) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of losing all of the property invested;
 - (e) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.
- (7) An investment falls within this paragraph if—
- (a) it is an investment falling within paragraph 14 of Schedule 1 being stock or shares in an unlisted company;
 - (b) it is an investment falling within paragraph 15 of Schedule 1 being an investment acknowledging the indebtedness of an unlisted company;
 - (c) it is an investment falling within paragraph 17 or 18 of Schedule 1 conferring entitlement or rights with respect to investments falling within sub-paragraph (a) or (b);
 - (d) it comprises units in a collective investment scheme being a scheme which invests wholly or predominantly in investments falling within sub-paragraph (a) or (b);
 - (e) it is an investment falling within paragraph 21 of Schedule 1 to acquire or dispose of an investment falling within sub-paragraph (a), (b) or (c);
 - (f) it is an investment falling within paragraph 22 of Schedule 1 being rights under a contract for the sale of an investment falling within sub-paragraph (a), (b) or (c);
 - (g) it is an investment falling within paragraph 23 of Schedule 1 being a contract relating to, or to fluctuations in value or price of, an investment falling within sub-paragraph (a), (b) or (c),

provided in each case that it is an investment under the terms of which the investor cannot incur a liability or obligation to pay or contribute more than he commits by way of investment.

- (8) In calculating an individual's "net assets" no account is to be taken of—
- (a) the property which is his primary residence or any loan secured on that residence;
 - (b) any rights of his under a qualifying contract of insurance; or
 - (c) any benefits (in the form of pensions or otherwise) which are payable on the termination of his service or on his death or retirement and to which he is (or his dependants are), or may be, entitled."

Amendment to the Promotion of Collective Investments Schemes Exemption Order

1.—(1) The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 is amended as follows.

(2) For article 21 (certified high net worth individuals) there is substituted—

“21.—(1) If the requirements of paragraph (6) are met, the scheme promotion restriction does not apply to any communication which—

- (a) is a non-real time communication or a solicited real time communication;
- (b) is made only to an individual whom the person making the communication believes on reasonable grounds to be a certified high net worth individual;
- (c) relates only to units falling within paragraph (6);
- (d) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment.

(2) “Certified high net worth individual” means an individual—

- (a) who qualifies as a high net worth individual within the meaning of paragraph (5); and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions of units in unregulated collective investment schemes where such promotions are exempt from the restriction in section 238 of the Financial Services and Markets Act 2000. The exemption relates to high net-worth individuals and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from someone who is authorised under that Act and who specialises in advising in this kind of investment. I am also aware that entering into an agreement as a result of a promotion made to me may expose me to significant risk of losing all of the property I have invested.”

(3) The validity of a statement signed in accordance with paragraph (2)(b) is not affected by a defect in the wording of the statement.

(4) An individual may only sign a statement in accordance with paragraph (2)(b) if he qualifies as a high net worth individual.

(5) An individual qualifies as a high net worth individual if he satisfies one or more of the following conditions—

- (a) he had, during the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, an annual income to the value of £100,000 or more;
- (b) he held, throughout the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, net assets to the value of £250,000 or more.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the scheme promotion restriction on the ground that the communication is made to a certified high net worth individual;

- (b) of the requirements that must be met for a person to be a certified high net-worth individual;
 - (c) that buying the units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;
 - (d) that any individual who is in any doubt about the units to which the communication relates should consult an authorised person specialising in advising on participation in unregulated schemes.
- (7) In determining an individual's "net assets", no account is to be taken of—
- (a) the property which is his primary residence or of any loan secured on that residence;
 - (b) any rights of his under a qualifying contract of insurance; or
 - (c) any benefits (in the form of pensions or otherwise) which are payable on the termination of his service or on his death or retirement and to which he is (or his dependants are), or may be, entitled.
- (8) A unit falls within this paragraph if it is an unregulated scheme which invests wholly or predominantly in the shares in or debentures of an unlisted company.
- (9) "Unlisted company" has the meaning given in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001."

EXPLANATORY NOTE
(This note is not part of the Order)

This Order amends the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (S.I. 2001/1335) and the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (S.I. 2001/1060).

STATUTORY INSTRUMENTS

2004 No.

FINANCIAL SERVICES AND MARKETS

**The Financial Services and Markets Act 2000 (Miscellaneous
Amendments) Order 2004**

<i>Made</i> - - - -	<i>2004</i>
<i>Laid before Parliament</i>	<i>2004</i>
<i>Coming into force</i> - -	<i>2004</i>

The Treasury, in exercise of the powers conferred upon them by sections 21(5) and (6), 238(6) and (7) and 428(3) of the Financial Services and Markets Act 2000^(a) hereby make the following Order:

Citation and commencement

1. This Order may be cited as the Financial Services and Markets Act 2000 (Miscellaneous Amendments) Order 2004 and comes into force on [enter date].

Amendments to the Financial Promotion Order

2. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001^(b) is amended in accordance with Schedule 1 to this Order.

Amendments to the Promotion of Collective Investment Schemes Exemption Order

3. The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001^(c) is amended in accordance with Schedule 2 to this Order.

Transitional provisions

4.—(1) Paragraph (2) applies where, immediately before the coming into force of this Order an individual is a certified high net worth individual within the meaning of article 48 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.

(2) That individual shall, for so long as he holds a certificate of high net worth, be treated as a certified high net worth individual for the purpose of article 48 of the Financial

^(a) 2000 c.8.

^(b) S.I. 2001/1335, amended by S.I. 2001/2633, S.I. 2001/3650, S.I. 2001/3800, S.I. 2002/1310, S.I. 2002/1777, S.I. 2002/2157 and S.I. 2003/1676.

^(c) S.I. 2001/1060, amended by S.I. 2001/3538, S.I. 2002/1310, S.I. 2002/2157, S.I. 2003/2067

Services and Markets Act 2000 (Financial Promotion) Order 2001 as it is substituted by this Order.

(3) Any current certificate signed in accordance with article 50(1)(a) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 before the coming into force of this Order, shall, on the coming into force of this Order, be treated as if it was signed in accordance with article 50(1)(a) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 as it is substituted by this Order.

(4) In this article “certificate of high net worth” means a certificate of high net worth which, immediately before the coming into force of this Order, satisfies the criteria in article 48(3) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.

5.—(1) Paragraph (2) applies where, immediately before the coming into force of this Order an individual is a certified high net worth individual within the meaning of article 21 of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001.

(2) That individual shall, for so long as he holds a certificate of high net worth, be treated as a certified high net worth individual for the purpose of article 21 of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 as it is substituted by this Order.

(3) Any current certificate signed in accordance with article 23(1)(a) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 before the coming into force of this Order, shall, on the coming into force of this Order, be treated as if it was signed in accordance with article 23(1)(a) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 as it is substituted by this Order.

(3) In this article “certificate of high net worth” means a certificate of high net worth which, immediately before the coming into force of this Order, satisfies the criteria in article 21(3) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001.

Signatory text

Two of the Lords Commissioners of Her Majesty’s Treasury

Address

Date

Amendments to Financial Promotion Order

1.—(1) The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 is amended as follows.

(2) For article 48 (certified high net worth individuals) there is substituted—

“48.—(1) If the requirements of paragraph (6) are met, the financial promotion restriction does not apply to any communication which—

- (a) is a non-real time communication or a solicited real time communication;
- (b) is made only to an individual whom the person making the communication believes on reasonable grounds to be a certified high net worth individual; and
- (c) relates only to one or more investments falling within paragraph (7).

(2) “Certified high net worth individual” means an individual—

- (a) who qualifies as a high net worth individual within the meaning of paragraph (5); and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions which are exempt from the restriction on financial promotion in section 21 of the Financial Services and Markets Act 2000. The exemption relates to high net worth individuals and I declare that I qualify as such. I accept that the content of promotions and other material that I receive may not have been approved by a person who is authorised under that Act and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I am aware that it is open to me to seek advice from someone who is authorised under that Act and who specialises in advising in this kind of investment. I am also aware that engaging in any investment activity as a result of a promotion made to me may expose me to significant risk of losing all of the property I have invested.”

(3) The validity of a statement signed in accordance with paragraph (2)(b) is not affected by a defect in the wording of the statement.

(4) An individual may only sign a statement in accordance with paragraph (2)(b) if he qualifies as a high net worth individual.

(5) An individual qualifies as a high net worth individual if he satisfies one or more of the following conditions—

- (a) he had, during the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, an annual income to the value of £100,000 or more;
- (b) he held, throughout the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, net assets to the value of £250,000 or more.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the financial promotion restriction on the ground that it is made to a certified high net worth individual;

- (b) of the requirements that must be met for an individual to be a certified high net worth individual;
 - (c) that the content of the communication has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required by section 21 of the Act;
 - (d) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of losing all of the property invested;
 - (e) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.
- (7) An investment falls within this paragraph if—
- (a) it is an investment falling within paragraph 14 of Schedule 1 being stock or shares in an unlisted company;
 - (b) it is an investment falling within paragraph 15 of Schedule 1 being an investment acknowledging the indebtedness of an unlisted company;
 - (c) it is an investment falling within paragraph 17 or 18 of Schedule 1 conferring entitlement or rights with respect to investments falling within sub-paragraph (a) or (b);
 - (d) it comprises units in a collective investment scheme being a scheme which invests wholly or predominantly in investments falling within sub-paragraph (a) or (b);
 - (e) it is an investment falling within paragraph 21 of Schedule 1 to acquire or dispose of an investment falling within sub-paragraph (a), (b) or (c);
 - (f) it is an investment falling within paragraph 22 of Schedule 1 being rights under a contract for the sale of an investment falling within sub-paragraph (a), (b) or (c);
 - (g) it is an investment falling within paragraph 23 of Schedule 1 being a contract relating to, or to fluctuations in value or price of, an investment falling within sub-paragraph (a), (b) or (c),

provided in each case that it is an investment under the terms of which the investor cannot incur a liability or obligation to pay or contribute more than he commits by way of investment.

- (8) In calculating an individual's "net assets" no account is to be taken of—
- (a) the property which is his primary residence or any loan secured on that residence;
 - (b) any rights of his under a qualifying contract of insurance; or
 - (c) any benefits (in the form of pensions or otherwise) which are payable on the termination of his service or on his death or retirement and to which he is (or his dependants are), or may be, entitled."

(3) For article 50 (sophisticated investors) there is substituted—

"50.—(1) "Certified sophisticated investor", in relation to any description of investment, means an individual—

- (a) who has a current certificate in writing or other legible form signed by an authorised person to the effect that he is sufficiently knowledgeable to understand the risks associated with that description of investment; and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

"I make this statement so that I am able to receive promotions which are exempt from the restriction on financial promotion in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I declare that I qualify as such in relation to investments of the following kind [list them]. I accept that the contents of

promotions and other material that I receive may not have been approved by an authorised person and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment.”

(2) The validity of a statement signed in accordance with paragraph (1)(b) is not affected by a defect in the wording of the statement.

(3) If the requirements of paragraph (4) are met, the financial promotion restriction does not apply to any communication which—

- (a) is made to a certified sophisticated investor;
- (b) does not invite or induce the recipient to engage in investment activity with the authorised person who has signed the certificate referred to in paragraph (1)(a); and
- (c) relates only to a description of investment in respect of which that investor is certified.

(4) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the financial promotion restriction on the ground that it is made to a certified sophisticated investor;
- (b) of the requirements that must be met for an individual to qualify as a certified sophisticated investor;
- (c) that the content of the communication has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required by section 21 of the Act;
- (d) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of losing all of the property invested;
- (e) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of incurring additional liability;
- (f) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.

(5) For the purposes of paragraph (1)(a), a certificate is current if it is signed and dated not more than three years before the date on which the communication is made.”

(3) After article 50 (sophisticated investors) there is inserted—

“**50A.**—(1) “Self-certified sophisticated investor”, means an individual—

- (a) who has sufficient knowledge of the risks associated with investments falling within paragraph (7); and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions which are exempt from the restriction on financial promotion in the Financial Services and Markets Act 2000. The exemption relates to self-certified sophisticated investors and I declare that I am such an investor. I accept that the contents of promotions and other material that I receive may not have been approved by an authorised person and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment.”

(2) The validity of a statement signed in accordance with paragraph (1)(b) is not affected by a defect in the wording of the statement.

(3) An individual may only sign a statement in accordance with paragraph (1)(b) if he has sufficient knowledge of the risks associated with investments falling within paragraph (7).

(4) An individual has sufficient knowledge of the risks associated with investments falling within paragraph (7) if he satisfies one or more of the following conditions—

(a) he is a member of a body designated in the Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001(a);

(b) he works, or has worked, in the field of financial services and markets, for at least 12 months, in a position which requires knowledge of one or more of the investments falling within paragraph (8);

(c) he—

(i) holds investments falling within paragraph (14) of Schedule 1 to the value of £100,000 or more; and

(ii) has, during the financial year immediately preceding the date on which the statement in paragraph (1)(b) was signed, entered into ten or more transactions every three months involving investments falling within paragraph (7).

(5) If the requirements of paragraph (6) are met, the financial promotion restriction does not apply to any communication which—

(a) is made only to an individual whom the person making the communication believes on reasonable grounds to be a self-certified sophisticated investor; and

(b) relates only to investments falling within paragraph (7) under the terms of which the investor cannot incur a liability or obligation to pay or contribute more than he commits by way of investment.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

(a) that it is exempt from the financial promotion restriction on the ground that it is made to a self-certified sophisticated investor;

(b) of the requirements that must be met for an individual to be a self-certified sophisticated investor;

(c) that the content of the communication has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required by section 21 of the Act;

(d) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of losing all of the property invested;

(e) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.

(7) An investment falls within this paragraph if—

(a) it is an investment falling within paragraph 14 of Schedule 1 being stock or shares in an unlisted company;

(b) it is an investment falling within paragraph 15 of Schedule 1 being an investment acknowledging the indebtedness of an unlisted company;

(c) it is an investment falling within paragraph 17 or 18 of Schedule 1 conferring entitlement or rights with respect to investments falling within sub-paragraph (a) or (b);

(a) S.I. 2001/1226

- (d) it comprises units in a collective investment scheme being a scheme which invests wholly or predominantly in investments falling within sub-paragraph (a) or (b);
- (e) it is an investment falling within paragraph 21 of Schedule 1 to acquire or dispose of an investment falling within sub-paragraph (a), (b) or (c);
- (f) it is an investment falling within paragraph 22 of Schedule 1 being rights under a contract for the sale of an investment falling within sub-paragraph (a), (b) or (c);
- (g) it is an investment falling within paragraph 23 of Schedule 1 being a contract relating to, or to fluctuations in value or price of, an investment falling within sub-paragraph (a), (b) or (c),

provided in each case that it is an investment under the terms of which the investor cannot incur a liability or obligation to pay or contribute more than he commits by way of investment.”

(8) An investment falls within this paragraph if—

- (a) it is an investment falling within paragraph 14 of Schedule 1;
- (b) it is an investment falling within paragraph 15 of Schedule 1;
- (c) it is an investment falling within paragraph 16 of Schedule 1;
- (d) it is an investment falling within paragraph 17 of Schedule 1;
- (e) it is an investment falling within paragraph 19 of Schedule 1;
- (f) it is an investment falling within paragraph 21 of Schedule 1;
- (g) it is an investment falling within paragraph 22 of Schedule 1;
- (h) it is an investment falling within paragraph 23 of Schedule 1.

Amendments to the Promotion of Collective Investments Schemes Exemption Order

1.—(1) The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 is amended as follows.

(2) For article 21 (certified high net worth individuals) there is substituted—

“21.—(1) If the requirements of paragraph (6) are met, the scheme promotion restriction does not apply to any communication which—

- (a) is a non-real time communication or a solicited real time communication;
- (b) is made only to an individual whom the person making the communication believes on reasonable grounds to be a certified high net worth individual;
- (c) relates only to units falling within paragraph (6);
- (d) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment.

(2) “Certified high net worth individual” means an individual—

- (a) who qualifies as a high net worth individual within the meaning of paragraph (5); and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions of units in unregulated collective investment schemes where such promotions are exempt from the restriction in section 238 of the Financial Services and Markets Act 2000. The exemption relates to high net-worth individuals and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from someone who is authorised under that Act and who specialises in advising in this kind of investment. I am also aware that entering into an agreement as a result of a promotion made to me may expose me to significant risk of losing all of the property I have invested.”

(3) The validity of a statement signed in accordance with paragraph (2)(b) is not affected by a defect in the wording of the statement.

(4) An individual may only sign a statement in accordance with paragraph (2)(b) if he qualifies as a high net worth individual.

(5) An individual qualifies as a high net worth individual if he satisfies one or more of the following conditions—

- (a) he had, during the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, an annual income to the value of £100,000 or more;
- (b) he held, throughout the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, net assets to the value of £250,000 or more.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the scheme promotion restriction on the ground that the communication is made to a certified high net worth individual;

- (b) of the requirements that must be met for a person to be a certified high net-worth individual;
 - (c) that buying the units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;
 - (d) that any individual who is in any doubt about the units to which the communication relates should consult an authorised person specialising in advising on participation in unregulated schemes.
- (7) In calculating an individual's "net assets", no account is to be taken of—
- (a) the property which is his primary residence or of any loan secured on that residence;
 - (b) any rights of his under a qualifying contract of insurance; or
 - (c) any benefits (in the form of pensions or otherwise) which are payable on the termination of his service or on his death or retirement and to which he is (or his dependants are), or may be, entitled.
- (8) A unit falls within this paragraph if it is an unregulated scheme which invests wholly or predominantly in the shares in or debentures of an unlisted company.
- (9) "Unlisted company" has the meaning given in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001."
- (3) For article 23 (sophisticated investors) there is substituted—
- "23.—**(1) "Certified sophisticated investor", in relation to any description of investment, means an individual—
- (a) who has a current certificate in writing or other legible form signed by an authorised person to the effect that he is sufficiently knowledgeable to understand the risks associated with participating in unregulated schemes; and
 - (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:
- "I make this statement so that I am able to receive promotions which are exempt from the restriction on promotion of unregulated schemes in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment."
- (2) The validity of a statement signed in accordance with paragraph (1)(b) is not affected by a defect in the wording of the statement.
- (3) If the requirements of paragraph (4) are met, the financial promotion restriction does not apply to any communication which—
- (a) is made to a certified sophisticated investor; and
 - (b) does not invite or induce the recipient to participate in an unregulated scheme operated by the authorised person who has signed the certificate referred to in paragraph (1)(a) or to acquire units from that person.
- (4) The requirements of this paragraph are that the communication is accompanied by an indication—
- (a) that it is exempt from the scheme promotion restriction on the ground that it is made to a certified sophisticated investor;
 - (b) of the requirements that must be met for an individual to qualify as a certified sophisticated investor;
 - (c) that buying units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;

- (d) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.

(5) For the purposes of paragraph (1)(a), a certificate is current if it is signed and dated not more than three years before the date on which the communication is made.”

(3) After article 23 (sophisticated investors) there is inserted—

“**23A.**—(1) “Self-certified sophisticated investor”, means an individual—

- (a) who has sufficient knowledge of the risks associated with participating in unregulated schemes; and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions which are exempt from the restriction on promotions of unregulated schemes in the Financial Services and Markets Act 2000. The exemption relates to self-certified sophisticated investors and I declare that I am such an investor. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment.”

(2) The validity of a statement signed in accordance with paragraph (1)(b) is not affected by a defect in the wording of the statement.

(3) An individual may only sign a statement in accordance with paragraph (1)(b) if he has sufficient knowledge of the risks associated with participating in unregulated schemes.

(4) An individual has sufficient knowledge of the risks associated with participating in unregulated schemes if he satisfies one or more of the following conditions—

- (a) he is a the member of a body designated in the Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001(a);
- (b) he works, or has worked, in the field of financial services and markets, for at least 12 months, in a position which requires knowledge of one or more of the investments falling within paragraph (7);
- (c) he—
 - (i) holds investments in unregulated schemes to the value of £100,000 or more; and
 - (ii) he has, during the financial year immediately preceding the date on which the statement in paragraph (1)(b) was signed, entered into 10 transactions involving unregulated schemes.

(5) If the requirements of paragraph (5) are met, the scheme promotion restriction does not apply to any communication which—

- (a) is made only to an individual whom the person making the communication believes on reasonable grounds to be a self-certified sophisticated investor; and
- (b) relates only to unregulated schemes.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the scheme promotion restriction on the ground that it is made to a self-certified sophisticated investor;
- (b) of the requirements that must be met for an individual to qualify as a self-certified sophisticated investor;

(a) S.I. 2001/1226

- (c) that buying units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;
 - (d) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.
- (7) An investment falls within this paragraph if—
- (a) it is an investment falling within paragraph 14 of Schedule 1 to The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001^(a);
 - (b) it is an investment falling within paragraph 15 of Schedule 1 to The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001;
 - (c) it is an investment falling within paragraph 16 of Schedule 1 to The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001;
 - (d) it is an investment falling within paragraph 17 of Schedule 1 to The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001;
 - (e) it is an investment falling within paragraph 19 of Schedule 1 to The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001;
 - (f) it is an investment falling within paragraph 21 of Schedule 1 to The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001;
 - (g) it is an investment falling within paragraph 22 of Schedule 1 to The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001;
 - (h) it is an investment falling within paragraph 23 of Schedule 1 to The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.”

^(a) S.I. 2001/1335, to which there are amendments not relevant to this Order.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (S.I. 2001/1335) and the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (S.I. 2001/1060).

STATUTORY INSTRUMENTS

2004 No.

FINANCIAL SERVICES AND MARKETS

**The Financial Services and Markets Act 2000 (Miscellaneous
Amendments) Order 2004**

<i>Made</i> - - - -	<i>2004</i>
<i>Laid before Parliament</i>	<i>2004</i>
<i>Coming into force</i> - -	<i>2004</i>

The Treasury, in exercise of the powers conferred upon them by sections 21(5) and (6), 238(6) and (7) and 428(3) of the Financial Services and Markets Act 2000^(a) hereby make the following Order:

Citation and commencement

1. This Order may be cited as the Financial Services and Markets Act 2000 (Miscellaneous Amendments) Order 2004 and comes into force on [enter date].

Amendments to the Financial Promotion Order

2. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001^(b) is amended in accordance with Schedule 1 to this Order.

Amendments to the Promotion of Collective Investment Schemes Exemption Order

3. The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001^(c) is amended in accordance with Schedule 2 to this Order.

Transitional provisions

4.—(1) Paragraph (2) applies where, immediately before the coming into force of this Order an individual is a certified high net worth individual within the meaning of article 48 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.

(2) That individual shall, for so long as he holds a certificate of high net worth, be treated as a certified high net worth individual for the purpose of article 48 of the Financial

^(a) 2000 c.8.

^(b) S.I. 2001/1335, amended by S.I. 2001/2633, S.I. 2001/3650, S.I. 2001/3800, S.I. 2002/1310, S.I. 2002/1777, S.I. 2002/2157 and S.I. 2003/1676.

^(c) S.I. 2001/1060, amended by S.I. 2001/3538, S.I. 2002/1310, S.I. 2002/2157, S.I. 2003/2067

Services and Markets Act 2000 (Financial Promotion) Order 2001 as it is substituted by this Order.

(3) Any current certificate signed in accordance with article 50(1)(a) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 before the coming into force of this Order, shall, on the coming into force of this Order, be treated as if it was signed in accordance with article 50(1)(a) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 as it is substituted by this Order.

(4) In this article “certificate of high net worth” means a certificate of high net worth which, immediately before the coming into force of this Order, satisfies the criteria in article 48(3) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.

5.—(1) Paragraph (2) applies where, immediately before the coming into force of this Order an individual is a certified high net worth individual within the meaning of article 21 of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001.

(2) That individual shall, for so long as he holds a certificate of high net worth, be treated as a certified high net worth individual for the purpose of article 21 of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 as it is substituted by this Order.

(3) Any current certificate signed in accordance with article 23(1)(a) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 before the coming into force of this Order, shall, on the coming into force of this Order, be treated as if it was signed in accordance with article 23(1)(a) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 as it is substituted by this Order.

(3) In this article “certificate of high net worth” means a certificate of high net worth which, immediately before the coming into force of this Order, satisfies the criteria in article 21(3) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001.

Signatory text

Two of the Lords Commissioners of Her Majesty’s Treasury

Address

Date

Amendments to Financial Promotion Order

1.—(1) The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 is amended as follows.

(2) For article 48 (certified high net worth individuals) there is substituted—

“48.—(1) If the requirements of paragraph (6) are met, the financial promotion restriction does not apply to any communication which—

- (a) is a non-real time communication or a solicited real time communication;
- (b) is made only to an individual whom the person making the communication believes on reasonable grounds to be a certified high net worth individual; and
- (c) relates only to one or more investments falling within paragraph (7).

(2) “Certified high net worth individual” means an individual—

- (a) who qualifies as a high net worth individual within the meaning of paragraph (5); and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions which are exempt from the restriction on financial promotion in section 21 of the Financial Services and Markets Act 2000. The exemption relates to high net worth individuals and I declare that I qualify as such. I accept that the content of promotions and other material that I receive may not have been approved by a person who is authorised under that Act and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I am aware that it is open to me to seek advice from someone who is authorised under that Act and who specialises in advising in this kind of investment. I am also aware that engaging in any investment activity as a result of a promotion made to me may expose me to significant risk of losing all of the property I have invested.”

(3) The validity of a statement signed in accordance with paragraph (2)(b) is not affected by a defect in the wording of the statement.

(4) An individual may only sign a statement in accordance with paragraph (2)(b) if he qualifies as a high net worth individual.

(5) An individual qualifies as a high net worth individual if he satisfies one or more of the following conditions—

- (a) he had, during the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, an annual income to the value of £100,000 or more;
- (b) he held, throughout the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, net assets to the value of £250,000 or more.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the financial promotion restriction on the ground that it is made to a certified high net worth individual;

- (b) of the requirements that must be met for an individual to be a certified high net worth individual;
 - (c) that the content of the communication has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required by section 21 of the Act;
 - (d) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of losing all of the property invested;
 - (e) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.
- (7) An investment falls within this paragraph if—
- (a) it is an investment falling within paragraph 14 of Schedule 1 being stock or shares in an unlisted company;
 - (b) it is an investment falling within paragraph 15 of Schedule 1 being an investment acknowledging the indebtedness of an unlisted company;
 - (c) it is an investment falling within paragraph 17 or 18 of Schedule 1 conferring entitlement or rights with respect to investments falling within sub-paragraph (a) or (b);
 - (d) it comprises units in a collective investment scheme being a scheme which invests wholly or predominantly in investments falling within sub-paragraph (a) or (b);
 - (e) it is an investment falling within paragraph 21 of Schedule 1 to acquire or dispose of an investment falling within sub-paragraph (a), (b) or (c);
 - (f) it is an investment falling within paragraph 22 of Schedule 1 being rights under a contract for the sale of an investment falling within sub-paragraph (a), (b) or (c);
 - (g) it is an investment falling within paragraph 23 of Schedule 1 being a contract relating to, or to fluctuations in value or price of, an investment falling within sub-paragraph (a), (b) or (c),

provided in each case that it is an investment under the terms of which the investor cannot incur a liability or obligation to pay or contribute more than he commits by way of investment.

- (8) In calculating an individual’s “net assets” no account is to be taken of—
- (a) the property which is his primary residence or any loan secured on that residence;
 - (b) any rights of his under a qualifying contract of insurance; or
 - (c) any benefits (in the form of pensions or otherwise) which are payable on the termination of his service or on his death or retirement and to which he is (or his dependants are), or may be, entitled.”

(3) For article 50 (sophisticated investors) there is substituted—

“50.—(1) “Certified sophisticated investor”, in relation to any description of investment, means an individual—

- (a) who has a current certificate in writing or other legible form signed by an authorised person to the effect that he is sufficiently knowledgeable to understand the risks associated with that description of investment; and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions which are exempt from the restriction on financial promotion in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I declare that I qualify as such in relation to investments of the following kind [list them]. I accept that the contents of

promotions and other material that I receive may not have been approved by an authorised person and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment.”

(2) The validity of a statement signed in accordance with paragraph (1)(b) is not affected by a defect in the wording of the statement.

(3) If the requirements of paragraph (4) are met, the financial promotion restriction does not apply to any communication which—

- (a) is made to a certified sophisticated investor;
- (b) does not invite or induce the recipient to engage in investment activity with the authorised person who has signed the certificate referred to in paragraph (1)(a); and
- (b) relates only to a description of investment in respect of which that investor is certified.

(4) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the financial promotion restriction on the ground that it is made to a certified sophisticated investor;
- (b) of the requirements that must be met for an individual to qualify as a certified sophisticated investor;
- (c) that the content of the communication has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required by section 21 of the Act;
- (d) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of losing all of the property invested;
- (e) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of incurring additional liability;
- (f) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.

(5) For the purposes of paragraph (1)(a), a certificate is current if it is signed and dated not more than three years before the date on which the communication is made.”

(3) After article 50 (sophisticated investors) there is inserted—

“**50A.**—(1) “Self-certified sophisticated investor”, means an individual—

- (a) who has sufficient knowledge of the risks associated with investments falling within paragraph (7); and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions which are exempt from the restriction on financial promotion in the Financial Services and Markets Act 2000. The exemption relates to self-certified sophisticated investors and I declare that I am such an investor. I accept that the contents of promotions and other material that I receive may not have been approved by an authorised person and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment.”

(2) The validity of a statement signed in accordance with paragraph (1)(b) is not affected by a defect in the wording of the statement.

(3) An individual may only sign a statement in accordance with paragraph (1)(b) if he has sufficient knowledge of the risks associated with investments falling within paragraph (7).

(4) An individual has sufficient knowledge of the risks associated with investments falling within paragraph (7) if he has the requisite knowledge and experience to know that engaging in investment activity in respect of such investments may expose him to a significant risk of losing all of the property invested.

(5) If the requirements of paragraph (6) are met, the financial promotion restriction does not apply to any communication which—

- (a) is made only to an individual whom the person making the communication believes on reasonable grounds to be a self-certified sophisticated investor; and
- (b) relates only to investments falling within paragraph (7) under the terms of which the investor cannot incur a liability or obligation to pay or contribute more than he commits by way of investment.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the financial promotion restriction on the ground that it is made to a self-certified sophisticated investor;
- (b) of the requirements that must be met for an individual to be a self-certified sophisticated investor;
- (c) that the content of the communication has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required by section 21 of the Act;
- (d) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of losing all of the property invested;
- (e) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.

(7) An investment falls within this paragraph if—

- (a) it is an investment falling within paragraph 14 of Schedule 1 being stock or shares in an unlisted company;
- (b) it is an investment falling within paragraph 15 of Schedule 1 being an investment acknowledging the indebtedness of an unlisted company;
- (c) it is an investment falling within paragraph 17 or 18 of Schedule 1 conferring entitlement or rights with respect to investments falling within sub-paragraph (a) or (b);
- (d) it comprises units in a collective investment scheme being a scheme which invests wholly or predominantly in investments falling within sub-paragraph (a) or (b);
- (e) it is an investment falling within paragraph 21 of Schedule 1 to acquire or dispose of an investment falling within sub-paragraph (a), (b) or (c);
- (f) it is an investment falling within paragraph 22 of Schedule 1 being rights under a contract for the sale of an investment falling within sub-paragraph (a), (b) or (c);
- (g) it is an investment falling within paragraph 23 of Schedule 1 being a contract relating to, or to fluctuations in value or price of, an investment falling within sub-paragraph (a), (b) or (c),

provided in each case that it is an investment under the terms of which the investor cannot incur a liability or obligation to pay or contribute more than he commits by way of investment.”

Amendments to the Promotion of Collective Investments Schemes Exemption Order

1.—(1) The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 is amended as follows.

(2) For article 21 (certified high net worth individuals) there is substituted—

“21.—(1) If the requirements of paragraph (6) are met, the scheme promotion restriction does not apply to any communication which—

- (a) is a non-real time communication or a solicited real time communication;
- (b) is made only to an individual whom the person making the communication believes on reasonable grounds to be a certified high net worth individual;
- (c) relates only to units falling within paragraph (6);
- (d) does not invite or induce the recipient to enter into an agreement under the terms of which he can incur a liability or obligation to pay or contribute more than he commits by way of investment.

(2) “Certified high net worth individual” means an individual—

- (a) who qualifies as a high net worth individual within the meaning of paragraph (5); and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions of units in unregulated collective investment schemes where such promotions are exempt from the restriction in section 238 of the Financial Services and Markets Act 2000. The exemption relates to high net-worth individuals and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from someone who is authorised under that Act and who specialises in advising in this kind of investment. I am also aware that entering into an agreement as a result of a promotion made to me may expose me to significant risk of losing all of the property I have invested.”

(3) The validity of a statement signed in accordance with paragraph (2)(b) is not affected by a defect in the wording of the statement.

(4) An individual may only sign a statement in accordance with paragraph (2)(b) if he qualifies as a high net worth individual.

(5) An individual qualifies as a high net worth individual if he satisfies one or more of the following conditions—

- (a) he had, during the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, an annual income to the value of £100,000 or more;
- (b) he held, throughout the financial year immediately preceding the date on which the statement in paragraph (2)(b) was signed, net assets to the value of £250,000 or more.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the scheme promotion restriction on the ground that the communication is made to a certified high net worth individual;

- (b) of the requirements that must be met for a person to be a certified high net-worth individual;
 - (c) that buying the units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;
 - (d) that any individual who is in any doubt about the units to which the communication relates should consult an authorised person specialising in advising on participation in unregulated schemes.
- (7) In calculating an individual's "net assets", no account is to be taken of—
- (a) the property which is his primary residence or of any loan secured on that residence;
 - (b) any rights of his under a qualifying contract of insurance; or
 - (c) any benefits (in the form of pensions or otherwise) which are payable on the termination of his service or on his death or retirement and to which he is (or his dependants are), or may be, entitled.
- (8) A unit falls within this paragraph if it is an unregulated scheme which invests wholly or predominantly in the shares in or debentures of an unlisted company.
- (9) "Unlisted company" has the meaning given in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001."
- (3) For article 23 (sophisticated investors) there is substituted—
- "23.—**(1) "Certified sophisticated investor", in relation to any description of investment, means an individual—
- (a) who has a current certificate in writing or other legible form signed by an authorised person to the effect that he is sufficiently knowledgeable to understand the risks associated with participating in unregulated schemes; and
 - (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:
- "I make this statement so that I am able to receive promotions which are exempt from the restriction on promotion of unregulated schemes in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I declare that I qualify as such. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment."
- (2) The validity of a statement signed in accordance with paragraph (1)(b) is not affected by a defect in the wording of the statement.
- (3) If the requirements of paragraph (4) are met, the financial promotion restriction does not apply to any communication which—
- (a) is made to a certified sophisticated investor; and
 - (b) does not invite or induce the recipient to participate in an unregulated scheme operated by the authorised person who has signed the certificate referred to in paragraph (1)(a) or to acquire units from that person.
- (4) The requirements of this paragraph are that the communication is accompanied by an indication—
- (a) that it is exempt from the scheme promotion restriction on the ground that it is made to a certified sophisticated investor;
 - (b) of the requirements that must be met for an individual to qualify as a certified sophisticated investor;
 - (c) that buying units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;

- (d) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.

(5) For the purposes of paragraph (1)(a), a certificate is current if it is signed and dated not more than three years before the date on which the communication is made.”

(3) After article 23 (sophisticated investors) there is inserted—

“**23A.**—(1) “Self-certified sophisticated investor”, means an individual—

- (a) who has sufficient knowledge of the risks associated with participating in unregulated schemes; and
- (b) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“I make this statement so that I am able to receive promotions which are exempt from the restriction on promotions of unregulated schemes in the Financial Services and Markets Act 2000. The exemption relates to self-certified sophisticated investors and I declare that I am such an investor. I accept that the schemes to which the promotions will relate are not authorised or recognised for the purposes of that Act. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment.”

(2) The validity of a statement signed in accordance with paragraph (1)(b) is not affected by a defect in the wording of the statement.

(3) An individual may only sign a statement in accordance with paragraph (1)(b) if he has sufficient knowledge of the risks associated with participating in unregulated schemes.

(4) An individual has sufficient knowledge of the risks associated with participating in unregulated schemes if he has the requisite knowledge and experience to know that engaging in investment activity in respect of such investments may expose him to a significant risk of losing all of the property invested.

(5) If the requirements of paragraph (6) are met, the scheme promotion restriction does not apply to any communication which—

- (a) is made only to an individual whom the person making the communication believes on reasonable grounds to be a self-certified sophisticated investor; and
- (b) relates only to unregulated schemes.

(6) The requirements of this paragraph are that the communication is accompanied by an indication—

- (a) that it is exempt from the scheme promotion restriction on the ground that it is made to a self-certified sophisticated investor;
- (b) of the requirements that must be met for an individual to qualify as a self-certified sophisticated investor;
- (c) that buying units to which the communication relates may expose the individual to a significant risk of losing all of the property invested;
- (d) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question.”

EXPLANATORY NOTE
(This note is not part of the Order)

This Order amends the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (S.I. 2001/1335) and the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (S.I. 2001/1060).