

H M TREASURY

**FINANCIAL SERVICES AND
MARKETS BILL**

**FINANCIAL PROMOTION - SECOND CONSULTATION
DOCUMENT**

A NEW APPROACH FOR THE INFORMATION AGE

OCTOBER 1999

PREFACE

This Consultation Document seeks views on the draft order relating to financial promotion to be made by the Treasury under clause 19 of the Financial Services and Markets Bill.

Background

The Financial Services and Markets Bill (“FSM Bill”) is designed to rationalise, reform and modernise the regulatory landscape for the UK’s financial services industry. It creates the Financial Services Authority (“FSA”) as the UK’s single statutory regulator for financial services - a modern regulator for the new millennium.

The Government’s innovative new approach to financial services regulation is underpinned by a desire to ensure light touch regulation wherever possible, but protection for consumers where necessary. In seeking to deliver these objectives, the Government has shown its commitment to consulting widely, not only on the FSM Bill, but also on the key pieces of secondary legislation to be made under it⁽¹⁾.

The FSM Bill was published in draft for consultation in the Summer of 1998⁽²⁾ and, following changes resulting from the consultation exercise and also consideration of the draft Bill by the Treasury Select Committee and a Joint Committee of the Lords and Commons, the Bill was introduced into Parliament in June 1999. One of the key pieces of secondary legislation to be made under the FSM Bill will be the order concerning exemptions from the basic prohibition on unlawful financial promotion set out in clause 19. That order is the subject of this consultation document.

(1) Consultation papers include: Financial Services and Markets Bill: Regulated Activities - A Consultation Document (February 1999)
Financial Services and Markets Bill: Financial Promotion - A Consultation Document (March 1999)
Financial Services and Markets Bill: Draft Recognition Requirements for Investment Exchanges and Clearing Houses

(2) Financial Services and Markets Bill: A Consultation Document (July 1998)

Process and rationale

The Treasury is consulting on the proposed financial promotion regime under the FSM Bill in stages. In March 1999, it published a consultation document setting out, in broad terms, the proposed approach to the draft order containing exemptions from the basic prohibition on unauthorised persons promoting financial services. A large number of constructive comments were received on the March consultation document, and the response to those comments is in two parts.

- S First, significant amendments have been made to the basic prohibition in clause 19 of the Bill. These are outlined further in Part One.

- S Second, the Treasury is publishing this further consultation paper for further comments on the approach to the supporting secondary legislation, including a draft Financial Promotion (Exemptions) Order.

We believe that this process will enable a fully considered approach to the proposed new financial promotion regime and the exemptions from it.

The Government hopes that the Bill will complete its Parliamentary passage next Spring and that the financial promotion order will be laid before Parliament some time after that.

Contents

This consultation document is in four parts:

PART ONE contains a brief overview of the financial promotion regime under the FSM Bill and discusses clause 19 of the Bill as amended in Commons Committee in July 1999.

PART TWO provides feedback on the consultation responses received on the March 1999 consultation paper, and indicates how the Treasury is responding to these consultation responses.

PART **THREE** sets out a brief commentary on the draft Financial Promotion (Exemptions) Order.

PART **FOUR** contains the draft Financial Promotion (Exemptions) Order.

ANNEX **A** sets out the full text of clause 19 of the FSM Bill as amended in Commons Committee in July 1999.

ANNEX **B** lists organisations and individuals who responded to the March 1999 financial promotion consultation document and who did not request that their responses were kept confidential.

ANNEX **C** contains a draft regulatory impact assessment (“RIA”) for the draft order contained at Part Four.

ANNEX **D** contains a table showing the destinations in the draft Order of the current financial promotion exemptions under the Financial Services Act 1986.

Responses to this document

We would welcome comments on the proposed approach and on all of the issues raised in this consultation document, including the RIA.

The draft Order is closely related to the draft Regulated Activities Order and other statutory instruments which the Treasury published for comment in February 1999. The Treasury will continue to consider the detailed responses to that consultation exercise alongside the responses we receive on financial promotion.

Responses should be sent to the address below by **28 January 2000**.

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Respondents should give details of any organisation whose views they represent. In addition, unless respondents indicate to the contrary, it will be assumed that they have no objection to their response being made available to the public.

Further copies of this document can be accessed on the Treasury's website (<http://www.hm-treasury.gov.uk>). Paper copies, including copies of the other Treasury consultation documents referred to, are available, free of charge, by telephoning 0171 270 4848 or 0171 270 5493.

PART ONE - OVERVIEW

1. Introduction

- 1.1 The new financial promotion regime to be established under clause 19 of the FSM Bill modernises and streamlines the legislative framework currently applying to financial promotion in the UK. There are presently three broad legislative regimes concerning the advertising and marketing of deposits, insurance and financial services in the UK. Under the FSM Bill, these will be updated and consolidated into a single new legislative regime.
- 1.2 One of the Government's key aims in modernising the regulation of financial services is to ensure that the UK system is best placed to reflect, and to continue to reflect, the opportunities of new and rapidly evolving communications technology. The growing use of the internet and other developing forms of technology in the financial services marketplace is of vital importance. The Government intends that the legislation should be able fully to cope with technological change as and when it occurs, so that businesses and consumers can take full advantage of the benefits it brings, whilst at the same time ensuring that proper standards of consumer protection are maintained.
- 1.3 The Government's vision for building a modern, knowledge - driven, economy in the UK and the key role which e-commerce plays in achieving that vision, are discussed further in "e-commerce@its.best.uk", a recent publication by the Performance and Innovation Unit of the Cabinet Office (the "PIU Report")⁽³⁾.

2. Current Regime Applying to Financial Promotion in the UK

- 2.1 The March 1999 consultation document explained that the Financial Services Act 1986 currently permits three types of investment advertisements: first, advertisements issued by an

(3) September 1999. On-line copies are available from www.cabinet-office.gov.uk/innovations.

authorised person (and subject to any rules which the FSA, Self Regulating Organisations (“SROs”) or Recognised Professional Bodies (“RPBs”) make to ensure that an advertisement is fair and not misleading); second, advertisements issued by an unauthorised person, but approved by an authorised person; and third, advertisements issued by an unauthorised person but which benefit from an exemption from the basic prohibition on unauthorised persons issuing investment advertisements.

2.2 Under the Financial Services Act, it is a criminal offence for an unauthorised person to issue an unapproved investment advertisement unless the advertisement falls within an exemption made under that Act. In addition, contracts entered into as a result of an unapproved advertisement which does not also fall within the scope of an exemption, are not generally enforceable against the customer. Exemptions for investment advertisements issued by unauthorised persons are set out in the Financial Services Act and also in various subsequent Orders made by the Treasury⁽⁴⁾.

2.3 The Financial Services Act also prevents dealing in the course of, or in consequence of, an unsolicited call (such as a telephone call or personal visit made without express invitation), and provides that investment agreements entered into as a result of an unsolicited call are generally unenforceable against the customer. This prohibition on “cold-calling” applies equally to both authorised, and unauthorised, persons, and exemptions from it are set out in regulations made by the FSA⁽⁵⁾. There are at present no restrictions on solicited calls made by unauthorised persons, except where those communications are of such a nature that they might also be considered to be an investment advertisement.

(4) The current orders under the Financial Services Act are the Financial Services Act 1986 (Investment Advertisements)(Exemptions) (No 2) order 1985 (SI 1995/1536) (the “1995 Order”) and the Financial Services Act 1986 (Investment Advertisements) (Exemptions) Order 1996 (SI 1996/1586) as amended by the Financial Services Act 1986 (Investment Advertisements) (Exemptions) Order 1997 (SI 1997/963) (the “1996 Order”)

(5) The Common Unsolicited Calls Regulations 1991 (Release 101 (the “CUC Regulations”)).

- 2.4 The Financial Services Act also contains provision (at section 130) restricting the persons who may issue advertisements for contracts for long-term insurance.
- 2.5 Separate legislative provision also currently exists in relation to advertisements concerning deposits and general insurance, respectively.

3. The Proposed Regime under the Financial Services and Markets Bill

Promotions concerning activities currently subject to the Financial Services Act 1986

- 3.1 The new approach proposed by the FSM Bill envisages a single financial promotion exemptions order, doing away with the three current sets of regulations under the Financial Services Act, and also replacing those under the present banking and insurance legislation. The draft order appears at Part Four of this document, with an accompanying commentary at Part Three.
- 3.2 The approach set out in the Bill maintains the current distinction under the Financial Services Act between investment advertisements issued by authorised persons, and those issued by unauthorised persons. It also maintains the criminal offence of unauthorised persons advertising investments without the approval of an authorised person in the absence of an exemption under the legislation.
- 3.3 However, the regime specified in clause 19 of the Bill moves away from the existing classifications of *advertisement* and *unsolicited call*, introducing instead the more media-neutral concept of an “invitation or inducement” to engage in investment activity. In addition, the basic prohibition on unapproved financial promotions under the Bill will include both solicited and unsolicited calls, thereby bringing them both potentially within the ambit of the criminal offence.
- 3.4 It is intended that the controlled activities which are to be subject to the financial promotion

regime should be broadly the same as those activities contained in the order setting out the scope of regulated activities under the Bill (but before any exclusions to those activities are applied). For the purposes of consultation, references in this document to the Regulated Activities Order are to the draft order published by the Treasury in February 1999, although that is without prejudice to the anticipated need to amend this in a number of ways in response to comments received as a result of consultation.

- 3.5 Some of the main provisions of the Regulated Activities Order as published in February are reproduced in the draft order contained in Part Four. Copies of the draft Regulated Activities Order and consultation document can be obtained from the sources on page 5. A further discussion of what constitutes a “controlled activity” and the types of “investment” to which the basic clause 19 prohibition will apply appears in Part Three.

Promotions concerning deposits and general insurance

- 3.6 We propose broadly to maintain the current position concerning deposit and general insurance advertisements issued by unauthorised (overseas) persons. However, there may be a case for aligning these provisions more closely to those applying to UK and other EEA authorised persons. Under the FSM Bill, promotions by authorised persons are to be covered by FSA rules.
- 3.7 Clause 116(3) of the FSM Bill will enable the Treasury to limit the FSA’s rule-making powers in relation to deposit and general insurance advertisements where the Treasury considers it to be appropriate.

Long-term insurance

- 3.8 We intend to continue the substance of the prohibition in section 130 of the Financial Services Act.

4. Clause 19 of the Financial Services and Markets Bill, as amended

4.1 The Financial Services and Markets Bill was introduced into Parliament on 17 June 1999.

4.2 In its consideration of clause 19, which contains the basic prohibition on financial promotion by unauthorised persons, the House of Commons Standing Committee voted to accept Government amendments which give a narrower focus to the basic scope of the primary legislation. In tabling the amendments, the Government was responding to the numerous constructive replies it received to the July 1998 and March 1999 consultation documents.

4.3 Many commentators were concerned that the scope of the financial promotion regime as originally set out in clause 19 was too wide, observing that the number of exemptions which the Treasury would need to set out in secondary legislation could be reduced if the scope of the primary legislation was narrowed. In particular, consultation respondents indicated their concerns that the basic financial promotion prohibition could catch material which was insufficiently “promotional”, and many considered that the financial promotion regime should apply only to communications made in the course of business, and that reliance on exemptions for certain types of “personal” communications such as informal conversations and communications between close relatives had potentially significant drawbacks.

4.4 These concerns have now been addressed by amending clause 19 in two main respects:

C First, to address the lack of a “promotional” element in the basic prohibition, the wording of clause 19 has been changed so that the clause now applies only to those communications which amount to an “invitation or inducement” to engage in investment activity. It is intended that the clause 19 prohibition should therefore apply only to communications containing a degree of “incitement”, and not to communications comprising purely factual information where the facts are presented in such a way that they do not also amount to an invitation or inducement.

C Second, as regards the approach to exempting informal or so-called “personal” communications, clause 19 now relates only to persons acting “in the course of business”. This means that an exemption for personal communications will no longer be necessary.

4.5 Clause 19 now also provides that the Treasury may, by order, specify circumstances which do, or do not, amount to a person acting “in the course of business” for the purposes of the basic financial promotion prohibition. In the absence of the Treasury exercising that power, it is intended that the phrase “in the course of business” will be given its ordinary meaning, and that it will be for the Courts to determine whether or not a person has been acting in the course of business in the light of the relevant circumstances.

4.6 The Treasury does not presently intend to make an order specifying circumstances which do, or do not, amount to acting “in the course of business” for the purposes of clause 19, but consultees’ views are sought as to whether there are particular circumstances which should be covered by the concept. In particular, Part Two discusses a proposed exemption for solicited calls and other solicited real-time interactions which do not form part of a co-ordinated promotional strategy. Views are sought on the extent to which such an approach is desirable, and if it is, whether it might also be desirable in a wider context.

4.7 The full text of clause 19 as amended in the Commons Standing Committee is set out in Annex A. The change in the primary legislative provisions has had a significant impact on the need for various exemptions canvassed in the earlier consultation document. This is discussed further in Part Two.

5. Collective Investment Schemes

5.1 The Government is considering the extent to which similar changes to those made to clause 19

should be proposed in relation to the provisions of clauses 208-210 of the FSM Bill, concerning the promotion of collective investment schemes such as unit trusts and open-ended investment companies (“oeics”).

- 5.2 Under the Financial Services Act, the basic position is that collective investment schemes can generally only be advertised by unauthorised persons with the approval of an authorised person, unless a specific exemption from the basic prohibition in section 57 applies. Beyond that, authorised persons can generally only approve or issue an advertisement for a collective investment scheme for release to the general public if the advertisement concerns an approved scheme, such as an authorised unit trust or an authorised oeic. FSA Regulations then set out various exemptions from that basic position.
- 5.3 The Government intends that this broad framework will be carried forward under the FSM Bill, although the terms of the basic prohibition on marketing collective investment schemes has been updated in line with the original proposals under clause 19 for other kinds of financial promotion. In addition, and in the light of the changes to clause 19 as passed in the Commons Committee in July, the Government proposes in due course to lay amendments to the collective investment scheme provisions of the FSM Bill to:
- C apply the basic marketing prohibition to “invitations or inducements” concerning collective investment schemes; and
 - C enable the Treasury, by way of secondary legislation, to restrict the territorial application of the basic prohibition, so that in relation to communications originating overseas, the prohibition should only apply to communications which are “directed at” the UK. This would be consistent with the approach taken in respect of clause 19.
- 5.4 The Government does not consider that it would be appropriate to include a “business test”

provision in clauses 208-210. This is because the marketing restriction in clause 208 applies only to authorised firms, which will, in any event, be acting in the course of business in issuing or approving a collective investment scheme promotion.

6. Financial promotion by professional firms

- 6.1 On 13 October 1999, the Government announced proposals which would have the effect of excluding certain types of non-mainstream financial services activities carried on by professionals (such as solicitors, accountants and actuaries) from the scope of direct FSA regulation.
- 6.2 One of the effects of the Government's proposals is that professionals who benefit from the proposed exclusion from the scope of regulation will not be authorised persons under the FSM Bill, and so they will not be able to issue financial promotions except in circumstances where an exemption from the basic financial promotion prohibition applies.
- 6.3 It would not be appropriate to set out in detail the Government's proposed approach to financial promotions issued by excluded professionals in advance of publication of the more general proposals regarding the proposed exclusion. However, it is not proposed that a generalised exemption from the financial promotion prohibition should apply to professional firms which benefit from the proposed exclusion (and it is not intended that they will benefit from the proposed exemptions for "exempted persons" which are contained in the draft Order). Views are nevertheless sought on the extent to which the exemptions proposed in the draft order in Part Four are likely to be adequate in relation to excluded firms' professional business, or whether certain additional exemptions may be desirable.

PART TWO - RESPONSES TO THE FINANCIAL PROMOTION CONSULTATION DOCUMENT PUBLISHED IN MARCH 1999

Introduction

- 2.1 The Government received a many constructive responses to the Treasury's March 1999 consultation document on financial promotion, which focused in particular on possible exemptions from the basic prohibition contained in clause 19 of the FSM Bill.
- 2.2 This part sets out the principal issues raised in the consultation document and outlines the main themes emerging from the responses. The issues include: the impact of clause 19 of the Bill on the general FSA regulatory regime; the territorial scope of the financial promotion regime; and the form, content, context, source and target of communications to be covered by the prohibition.

Impact of clause 19 on financial promotion by authorised persons

- 2.3 The financial promotion regime set out in clause 19 of the FSM Bill is essentially concerned with defining those promotional activities which should not generally be carried on by unauthorised persons without potentially being subject to some kind of direct control. The regime established by clause 19 has no direct impact on the large volume and variety of promotional activity carried out in the financial services sector by firms who will need to be authorised and regulated by the FSA in order to carry on their businesses. Their promotional activities will instead be subject to FSA rules.
- 2.4 Many respondents were nevertheless concerned about the possible implications which the clause 19 regime might have for the financial promotion rules to be made by the FSA in respect of authorised persons under clause 116 (originally 76) of the FSM Bill. Although the FSA will, of course, be aware of the Financial Promotion (Exemptions) Order when making its own financial promotion rules for authorised persons, those rules do not necessarily need to adopt

the same approach as that Order. Indeed, that is the current basic position under the Financial Services Act, and it is not intended that the basic position should change under the FSM Bill.

- 2.5 In making new rules under the FSM Bill, clause 125 requires the FSA to undergo extensive consultation procedures. The FSA has indicated that it intends to consult on its draft financial promotion rules in due course, in advance of clause 125 coming into effect.

Territorial scope

Outward promotion

- 2.6 The proposed scope of the financial promotion regime aroused considerable interest from commentators, given, in particular, the increasing use of the Internet as a tool for marketing and providing cross-border financial services in Europe and internationally. Paragraphs 2.7 to 2.21 of this part deal with the territorial scope of the financial promotion regime in greater detail. Essentially there are two main questions to consider: first, the extent to which clause 19 should catch promotions made *from* the UK solely into other countries; and second, the circumstances when promotions made from other countries *into* the UK should be caught by the UK regulatory regime. Related to both of these questions is the issue of “home-state” or “country of origin” regulation of financial marketing as potentially envisaged in other contexts and for other industries, by for example, the draft European E-Commerce Directive⁽⁶⁾.
- 2.7 The March consultation document proposed that there should be no generalised exemption for financial promotions which are made by unauthorised persons in the UK only to persons based outside it. Under the current Financial Services Act regime, the regulatory bodies regulate investment advertisements issued by authorised persons only to persons outside the UK, but the position is open to differing views with respect to investment advertisements issued by unauthorised persons only to persons outside the UK.

(6) The Commission proposal for a Directive on certain legal aspects of electronic commerce in the internal market.

- 2.8 Consultation responses contained a variety of views on this subject. The largest portion were concerned about the potential for burdensome dual regulation of financial promotions out of the UK into other jurisdictions which impose their own requirements on incoming promotional material. There was, however, more support for the FSA to be able to take action to support an overseas regulator which was facing inappropriate incoming promotions. Some respondents considered that it was both desirable, and expected, that regulation of cross-border financial services should move on to a so-called “home-state” regime, and that the UK should regulate outward financial promotions both to take a lead in this area, and to protect the reputation of the UK as an attractive place to do business.
- 2.9 The Government therefore continues to propose that “outward bound” financial promotions by unauthorised persons originating in the UK should potentially fall within the clause 19 prohibition.

Inward promotion

- 2.10 The March consultation document proposed an exemption for financial promotions which, while available in the UK (for example over an electronic system), are not directed at persons here. This approach is broadly consistent with internationally recommended regulatory best practice, including that proposed by the International Organisation of Securities Commissions (“IOSCO”)⁽⁷⁾, and the approaches adopted by other major international regulators such as the US Securities and Exchange Commission.
- 2.11 The proposed “directed at” approach was largely supported by consultation respondents, as was the proposal for evidential indicators to assist the Court in deciding whether or not a promotion is directed at the UK. However, some respondents supported putting the so-called “directed at” test on the face of the FSM Bill, rather than in secondary legislation. Others

(7) “Securities Activity on the Internet - a Report by the Technical Commission”, September 1998.

requested that the evidential indicators used to support the exemption for promotions not directed at the UK should be supplemented by a clear “safe harbour”.

- 2.12 The draft Order contained in Part Four takes the two-tier approach favoured by those consultees who both supported the use of evidential indicators and sought some form of safe harbour. It is proposed that there should be a non-exhaustive list of factors to be taken into account in determining whether the communication is directed at the UK. Two of these relate to indications accompanying the communication: that it is not addressed to persons in the UK and that it should not be relied on in the UK. The other two factors are that the communication is not referred to in, or directly accessible from, another communication directed at the UK and that the person making the communication has in place effective systems and procedures to prevent people in the UK from engaging in investment activity to which the communication relates.
- 2.13 In addition, and in response to consultees’ desire for a safe harbour, it is proposed that where all four of these conditions are met, that should be conclusive proof that a communication is not directed at the UK.
- 2.14 The Government is considering carefully the proposal of some consultation respondents to place the “directed at” test on the face of the Bill. The Government’s inclination has been that it would not be appropriate to do this. This is an area where it is vital to maintain flexibility. As paragraphs 2.15 to 2.21 below indicate, the Government agrees fully with those from industry who argue that the UK must be prepared to relinquish regulation of inward promotions in favour of a move to “home-state” regulation when the latter is provided for in the future by EC legislation or other multilateral agreements. It would, in our view, be a mistake to entrench in the primary legislation provisions which we might wish to amend quickly in the future to reflect agreements at the EU or international level. This is an area where EU law and international regulatory best practice is developing rapidly: we must be able to react quickly to those

developments. We believe that EU and international partners could doubt the UK's willingness to react if we were to include detailed rules reflecting the current position in primary legislation.

- 2.15 On the other hand, some respondents have argued that for the UK to include such a wide scope for regulation of inward promotions on the face of the Bill sends the wrong message to EU and international partners. They suggest that our proposed approach would misrepresent our position and be taken as evidence that the UK does not want to see a move towards home-state control. The Government is not yet convinced that these presentational difficulties outweigh the desirability for flexibility. Nevertheless, it would welcome further views on this question.

Country of origin approach to regulation

- 2.16 Some consultation respondents suggested that there should be an exemption for financial promotions originating in other EEA member states (and other states that have adequate regulatory standards) which are directed at the UK. These consultation responses often commented that the draft European E-Commerce Directive which is currently under discussion, would, if adopted, introduce this "home-state" or "country-of-origin" approach to electronic commerce more generally in Europe, and urged the Treasury to give a lead by exempting financial promotions into the UK from other European member states through electronic systems such as the Internet.
- 2.17 Under the current legislation, it is already possible for persons in other EEA states (or other jurisdictions) to make financial promotions to UK persons in certain circumstances without being subject to direct UK regulation. However, in essence, the current financial promotion regime in the UK and Europe reflects the idea of "host-state" regulatory control, so that financial promotions made from overseas to persons in the UK will need to comply with the UK standards.

- 2.18 The Draft E-Commerce Directive adopts as a starting point a “home-state” control system, so that the Member State from whose jurisdiction the promotional material is sent would be able to regulate the material’s content and use, and would oblige disclosure of the country of origin. The underlying premise of the E-Commerce Directive is that without adopting this regulatory approach, European business will not be able to make full use of the opportunities provided by the Internet (and indeed any other technologies with similar characteristics).
- 2.19 The Government supports the basic idea of home state control which the E-Commerce Directive proposes, and indeed, it is very keen to ensure that the UK and Europe play a leading role in the revolution which electronic commerce is bringing to consumer choice and business opportunities. The Government’s broad policy in this area is discussed further in the PIU report, which sets out the Government’s aim of ensuring that the UK plays a full part in EU regulatory developments, and that the EU legal framework encourages, rather than discourages, the development of e-commerce.
- 2.20 Whilst the PIU report endorses the home-state regulatory principle under the E-Commerce Directive, it is currently thought that, on balance, the argument has not yet been made for moving to a system of home-state control for financial promotions in advance of appropriate European legislation. In taking that view, the Government has considered various relevant factors, including consumer protection, common regulatory standards for authorised persons and whether or not particular types of investment or activity are yet regulated consistently in member states. Additionally, the E-Commerce Directive has a limited application in the field of financial services, and, for example, collective investment schemes and insurance are currently outside the scope of its home-state principle.
- 2.21 It is worth noting in this context that the proposal for a Distance Marketing Directive for

Financial Services⁽⁸⁾, which would apply rules to sales of financial services at a distance, is still at an early stage of discussion within the EU. As with the E-Commerce Directive, the final shape of the Distance Marketing Directive could affect the detail of the regulation that we would need to apply to inward financial promotions. Although the Government does not consider that the time is right for a move to home-state control of financial promotion at this stage, it fully recognises the importance of the issue and intends to keep it under review. If a decision were to be taken to move the regulation of financial promotion onto a fully home-state basis, it would be important for the relevant legislation to be flexible enough to cope. We therefore continue to intend that the primary legislation should be drafted in a way which allows subsequent modifications to matters concerning the territorial scope of the financial promotion regime.

Form of communications

Internet hypertext and other similar links

- 2.22 The March 1999 consultation document proposed an exemption for certain hypertext links. In particular, it was proposed to exempt persons (A) whose websites contain link entry material to another person's website (B), provided that the relevant hypertext link contained nothing more than B's name. It was proposed that link entry material should otherwise be the responsibility of the person (B) whose site is connected by the hypertext link, where that link has been established with the approval of B. Otherwise, the responsibility for the link entry material was proposed to rest with the Web site on which it appears.
- 2.23 While almost all consultation respondents favoured an exemption for hypertext links of one sort or another, there were disagreements about how responsibilities for those links should be allocated. Some respondents suggested that the exemption should be available for all such linking processes rather than hypertext links in particular.

(8) Proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/6/9/EEC and Directives 97/7/EC and 98/27/EC

- 2.24 However, the decision for wider reasons to limit the application of clause 19 of the Bill to “invitations or inducements” appears to dispose of the need for a specific exemption for hypertext and other similar links. Where the material in a hypertext link amounts to an invitation or inducement, it should be subject to the provisions of the FSM Bill, and the person communicating the link or causing it to be communicated, will be subject to the restriction in clause 19. For links of the kind which might more normally be used - for example, links which simply contain the name or logo of another person or site - no exemption will be needed.
- 2.25 The discussion in paragraphs 2.22 to 2.24 relates only to the treatment of material contained in an actual link, and not to the material appearing on a site which is connected by that link. So, for example, using the scenario in paragraph 2.22, if A’s Web-site contains a simple (not of itself promotional) link to B’s Web-site, A may, nevertheless, breach the clause 19 prohibition if B’s Web-site contains material amounting to an unlawful financial promotion if A has in fact “caused” the unlawful financial promotion on B’s Web-site to be communicated.
- 2.26 The effect is that persons who establish hypertext links from their Web-sites will need to exercise some degree of caution or “due-diligence” in establishing those links. The question of whether a person has “caused” a communication to be made will ultimately depend on the circumstances in issue in any given case (something which is ultimately a matter for the Courts to determine).

Oral and other “real time” communications (including solicited and unsolicited calls)

- 2.27 The March consultation document proposed no generalised exemption for oral communications or for other real time communications (such as Internet “chat rooms”). In particular, the consultation document did not propose a generalised exemption for solicited real-time communications (broadly speaking, oral or other real time promotions made by one person (C) to another person (D), at C’s request or invitation). Instead, it was proposed that in

appropriate circumstances, certain oral communications would be permitted under specific exemptions.

2.28 Consultees expressed concern that any approach based on the presumption that oral or real time communications by unauthorised persons should be prohibited was likely to run into significant difficulties, not least because there is little practical possibility of pre-approving many of those kinds of communications.

2.29 We agree that this is a valid concern, but believe that much of the difficulty has been removed by the introduction of the “business test” and the introduction of a more clearly promotional element to the basic prohibition described in Part One. Following these changes to clause 19, the only oral and real time promotions which will be caught by the financial promotion prohibition will be invitations or inducements made “in the course of business”.

2.30 We do, however, consider that certain further exemptions may be required in relation to certain oral and other real time communications made in a business context. The main further exemptions we propose are outlined below and described in more detail in Part Three.

2.31 The basic approach we propose is as follows:

C Solicited real-time interactions: solicited real-time communications (including oral communications) which are not part of a co-ordinated promotional strategy should benefit from an exemption. The intention behind this is broadly to allow certain solicited real-time communications to be made but nevertheless to ensure protection for the recipient of such a communication where he is being subjected to what might amount to a canvassing campaign, or an “advertisement”, or a “hard sell”.

In those circumstances (for example, where a call is being made from a special call centre, or

as part of a campaign to promote investments or raise capital), we propose that there should be no generalised exemption for the communication. However, we also propose that in those circumstances, the promoter should be able to take advantage of any other specific exemption applying to the investment activity in question (for example, the exemption relating to certain communications made to expert investors). In many cases, the other exemptions contained in the draft Order require the person making the promotion to give certain required indications or statements to the customer. We propose that in the case of solicited real-time interactions, these requirements will not need to be met each and every time a solicited call is made, so long as the indications or statements have been provided within the previous twelve months. However, if a solicited real-time communication fails to come within the scope of any of the other exemptions we propose, then it will need to be approved by an authorised person.

The draft Order does not currently define a “co-ordinated promotional strategy”. We believe that seeking to provide a “bright line” definition could have drawbacks in terms of the ability of the legislation to keep pace with new or developing promotional technologies and techniques. However, we recognise that on the other hand, greater certainty may be desired. We are therefore considering further whether it would be possible, or desirable, to amplify the meaning of the term “co-ordinated promotional strategy” by providing in the legislation for examples of activities or techniques which would or would not amount to a co-ordinated promotional campaign.

We would welcome views on not only the broad approach proposed, but also on the concept, and question of definition, of, a “co-ordinated promotional strategy”.

- C Unsolicited real-time communications (including oral ones):* we broadly propose to allow certain unsolicited calls to be made, generally in the circumstances currently contemplated in the Common Unsolicited Calls Regulations. Those regulations apply to both authorised, and unauthorised, persons alike, and they specify circumstances where it is permissible for one

person to call or visit another regarding investment activity, without the call or visit being made at the recipient's invitation.

We consider that in addition to the exemptions contained in the CUC Regulations, it may be appropriate to extend some of the other exemptions currently applying to other forms of communication, to unsolicited calls. This is discussed further in Part Three.

However, we consider that some of the exemptions currently contained in the CUC Regulations should properly apply only to the business of authorised persons, and as such, these should fall to be considered under the FSA's rules, and not included in the draft Financial Promotion (Exemptions) Order.

There are two main areas where we consider that specific exemptions under the CUC Regulations should not be continued for unauthorised persons. First, in relation to existing customers. The exemption in the CUC Regulations applies where the customer relationship is such that the customer envisages calls regarding controlled activities being made on him. With the exception of existing customers of overseas persons (discussed below), it is difficult to see how, or why, unauthorised persons should properly fall within this exemption, since unauthorised persons generally ought not to be dealing in financial services with their customers. Second, we have slightly narrowed the generalised range of sophisticated persons (referred to in the CUC Regulations as "non-private investors") on whom unsolicited real-time communications can be made. Here, we propose that the current general exemption should not be continued in relation to calls made on smaller companies, on the basis that in many cases, smaller companies may not be sufficiently expert to appreciate the risks.

In addition, we propose that the definition of an unsolicited call is slightly broadened from the definition in section 56 of the Financial Services Act. We broadly propose that calls which are not made on the initiative of the person being called, are deemed to be unsolicited. It is

intended that, for example, the mere failure by a person to tick a box which says “tick here if you do not wish to receive further promotions” will not be sufficient to indicate that that person has consented to further calls being made on him.

We would welcome comments on the broad proposals outlined above, and also on the question of whether or not different tests of “solicitation” should be applied to different sorts of customer (for example, for certain, more sophisticated, types of customer, an omission to tick the box might be considered to be an acceptable justification for calling that customer, but for other types of customer, such as ordinary retail investors, it might not).

We would also welcome views on the question of extending any of the other exemptions contained in the draft Order more generally to unsolicited calls.

- C *Overseas persons:* we propose that the broad position under the current legislation permitting overseas persons such as foreign brokers, to contact their existing UK customers, and to make, or receive, certain calls at a customer’s instigation, should be maintained. We also consider that the general nature of overseas persons’ dealings in the UK calls for a slightly different approach from that generally applying to solicited and unsolicited calls made by other unauthorised persons.

We therefore propose an exemption for promotions made by overseas persons in response to calls made on them, even where the overseas person is acting in the context of a co-ordinated promotional strategy. We also propose two exemptions for unsolicited calls made by unauthorised persons: first, we propose that overseas persons may make unsolicited calls on their existing customers where the customer would reasonably expect to be contacted by the overseas person, and where the overseas person has previously given a risk warning. Second, we propose an exemption for unsolicited calls made on persons sufficiently knowledgeable to understand the risks, and who have also been given a risk warning and acknowledged their acceptance of the risk.

Consideration of the detail of these proposals may be further informed by the FSA's consultation exercise on the regime applying to financial promotions by authorised persons, expected in due course.

- C *Warm up communications*: we propose to introduce a new exemption for certain solicited and unsolicited communications which are of a "warm up" nature. The sorts of circumstances where this exemption might apply would include where a businessman makes an initial "warm up" telephone call, or sends a preliminary letter, to another businessman regarding a possible business venture or opportunity. However, we do not propose that the exemption should be available to communications which are made in the course of a co-ordinated promotional strategy.

Content of communications

Generic promotions

- 2.32 The March 1999 consultation document proposed an exemption for so-called "generic" promotions, which relate to a type or category of investment (eg, shares or bonds as a whole but not to any specific investment in particular, such as "shares or bonds in XYZ plc"). There was broad support for this exemption, although some respondents were concerned about the dangers of consumers being misled by generic promotional material and questioned the need for consistency with the exemption for providing generic investment advice proposed in the February 1999 consultation document on regulated activities under the FSM Bill. On the other hand, it seems disproportionate, for example, to prohibit a trade association from publishing generic material about the type of products provided by its members, the purpose of which is to promote their general benefits.
- 2.33 The draft Order therefore proposes an exemption for communications which do not relate to a particular investment or identify particular firms.

Methods of satisfying contents requirements in different media

- 2.34 Certain of the exemptions from the current investment advertisement regime require the exempt advertisement to contain certain statements or make certain disclosures. This approach will be continued under the financial promotion regime. The earlier consultation document proposed the following methods of complying:
- C For oral and other real time communications (including telephone calls and meetings), a copy of all the required information should be given or sent to those receiving the promotion for the first time and before any investment contract is entered into (but not subsequently, unless the information required has altered).
 - C For Web pages on the Internet, all pages containing promotional material must contain the required information or be clearly connected to such information (for example, by a prominent hypertext link).
 - C For more clearly identifiable units of communication, such as written advertisements or electronic mail, each unit should contain all such information.
- 2.35 Many consultation comments were made containing suggestions on achieving a media neutral approach. Several submissions suggested that the need to ensure necessary information is provided to consumers should not delay or prevent telephone sales of products. There was also questioning in some quarters of the effectiveness of current contents requirements in terms of investor protection.
- 2.36 In keeping with the policy of trying to establish, as far as possible, a media-neutral approach, we have proposed in the draft Order a requirement that required statements are generally disclosed in the way best calculated to bring the matter to the attention of the person to whom the communication is addressed, taking account of the particular medium. This seeks to avoid

on one hand, an over prescriptive and technology-specific regime, but on the other, to ensure that matters such as risk warnings, have been properly drawn to investors' attention.

- 2.37 However, views are sought on whether there is a case for distinguishing real time communications more generally, and requiring that for those communications, required contents and risk warnings are sent (and received) in writing, before any investment activity occurs.

Context of communications

Personal communications

2.38 The March 1999 consultation document proposed an exemption for certain types of “personal” or informal communications. This attracted considerable comment and, as discussed in Part One, the issue has also been addressed by way of amendment to clause 19. We do not therefore consider that a specific exemption for personal communications is required any longer.

Source of communications

Passive communications providers or “mere conduits”

2.39 The consultation document proposed an exemption for certain passive communications providers or communications networks such as Internet Service Providers (“ISPs”) and telecommunications companies (so-called “mere conduits”). A person will be a “mere conduit” if: first, he carries on the business of transmitting or receiving material provided to him by others; second, the content of the communication is wholly devised by his customer; and third, he does not exercise control over the content of the communication prior to its transmission or receipt. We suggest that where a mere conduit intervenes, say, to prevent a transmission, for reasons of broader public interest, and under direction from a public authority, he will not be deemed to be exercising “control” over the content of the communication.

2.40 There was general support for this proposed exemption, and for liability to fall on a passive communications provider if they fail to take action to close down a site or prevent the transmission of a communication following a request to do so by the FSA. A similar “exemption” for passive communications providers is contained in the draft E-Commerce Directive. It is therefore proposed that passive communications or network providers be exempted under the Bill if their principal business is transmitting or receiving material provided by others in the three circumstances set out above.

2.41 It is for further consideration whether the FSA should be given a power in the FSM Bill to direct a mere conduit to remove access to unlawful material, since it is not clear that it would be appropriate for a financial regulator to exercise such a power in relation to all those who might wish to benefit from the exemption. In addition, clause 330 of the FSM Bill already allows the FSA to go to Court and seek an order requiring any person who has been “knowingly concerned” in contravention of the Bill to take such steps to remedy the contravention as the Court deems fit.

Material produced by journalists

2.42 The earlier consultation document proposed an exemption from the financial promotion regime for communications made in a periodical publication or broadcast provided that the journalist and the publisher or broadcaster did not receive any direct or indirect benefit. This proposed approach arose out of concern that the reference in the original draft of clause 19 to “information which is intended to lead directly or indirectly to engagement in investment activity” would catch a significant range of *bona fides* journalism.

2.43 There was general support (with a few principled exceptions) for an exemption for financial promotional material published by journalists. However consultation respondents were split on whether contact details, say, of investment service providers, or regarding particular investment products, should be provided in a *bona fide* journalistic article. Some consultation respondents were concerned about whether the proposed “no direct or indirect benefit” test was workable.

2.44 Here again however, we consider that the revised drafting of clause 19 is very significant. Subject to the further views of consultees, it is not felt that the kind of journalism for which an exemption might otherwise have been justified would be likely to contain invitations or inducements, even though the material could fall within the definition of investment advice (which will normally require authorisation under the Bill but for which an exemption for certain

types of journalistic activity has been proposed).

- 2.45 There remains the question of whether or not journalistic articles should generally be allowed to contain contact details for a particular issuers or investment service providers. We consider that any test based specifically on the existence of contact details could be overly-prescriptive. Instead, in considering whether a particular article amounts to an invitation or inducement to engage in investment activity, we consider that the article should be considered as a whole, and the existence, or otherwise, of contact details should be regarded as only one element (albeit a potentially important one) of the broader picture rather than the determining factor in its own right. Further views are particularly welcomed on this proposed approach.

Target of communications

Promotions directed at a particular audience

- 2.46 Consultation responses provided support for making financial promotions accessible to a wider audience than those it is “directed at”, provided that warnings are given and systems are in place to prevent those who are not targeted by the promotion from participating in the underlying investment or service. This raises many of the same issues as the “directed at” test in relation to communications originating overseas.
- 2.47 We therefore propose a broadly similar approach to that described in relation to communications directed at the UK from overseas in paragraph 2.12 - namely, that where all of a series of specified indicators are met, this will amount to a safe-harbour, but where only some of them are met, this will be of evidential weight in determining whether or not a promotion has been directed at a specified audience.

Facilitating informal capital raising from “business angels”

- 2.48 The earlier consultation document set out proposals for possible exemption from the financial promotion regime to permit certain unapproved financial promotions to individuals for whom

the degree of consumer protection provided by the current investment advertisement restrictions may be disproportionate. The consultation document discussed exemptions for both “high net worth” and “sophisticated” investors.

- 2.49 Consultees expressed a wide variety of views on this issue, with a good deal of support in principle, but concern about the precise approach. Many respondents said that “high net worth” investors were not necessarily “sophisticated” and therefore there should be no exemption. Others said sophisticated investors were not necessarily high net worth and therefore the exemption should be available more widely, to all investors who could certify themselves as being suitably sophisticated or to all investors certified as sophisticated by an authorised person. There were also calls to adjust the current exemption under the Financial Services Act for advertising by enterprise companies and to ensure common approaches between the FSA definitions of categories of investor (to be specified in FSA rules) and the exemption order definition.
- 2.50 The Government believes strongly in the need to avoid unnecessary impediments to raising finance for industry. Private individuals are an extremely important source of funding for early stage firms and it is mindful of the concern expressed by commentators that the costs of seeking approval of promotional material by an authorised firm can be prohibitive, especially in the important case of smaller firms seeking relatively modest amounts of finance. It is also conscious that other jurisdictions, notably the USA and Australia, have succeeded in devising arrangements to permit the unregulated offering of securities to “business angels”.
- 2.51 Whilst securing the right degree of protection for consumers of financial services is a key aim of the proposed legislation, the Government is also seeking to adopt a light touch approach to regulation where possible. Against that background, we are proposing for further consultation two separate exemptions which would permit unapproved financial promotion in certain circumstances and subject to certain safeguards.

High net worth investors

- 2.52 The first exemption would allow the promotion to high net worth individuals of shares and debentures in companies where the investor cannot lose more money than he or she invested. There is inevitably a difficult judgement call in determining when a person is of sufficiently high net worth to fall within the terms of the exemption. We propose that an individual's net worth for the purposes of the exemption is determined by reference to an income and a net asset test, so that the exemption will apply to individual investors with a minimum gross annual income of between £70, 000 and £100,000 **or** net assets (excluding the value of their main residence and any life insurance policies and pension entitlements) of between £200, 000 and £300,000.
- 2.53 The figures proposed for determining an individual's high net worth are lower than corresponding amounts contained in the broadly equivalent US and Australian legislation. However, the figures proposed have been based on the known characteristics and profile of business angels in the UK.
- 2.54 It is proposed that in order to benefit from the proposed exemption, the promoter should disclose a number of important facts to potential investors. These include an indication that the promotion has not been approved by an authorised person, an explanation of the meaning of high net worth, a warning of the maximum amount which that the investor could lose, and an indication that any investor who has any doubts should consult a suitably qualified adviser. The investor would be required to certify that he or she has understood the significance of these disclosures. The promoter would be able to rely on certification of assets and income by an accountant, although an accountant's certificate would not be mandatory.
- 2.55 Views are sought on the proposed exemption for high net worth individuals, including in particular, on the level at which the monetary thresholds should be set and more particularly, the basis for calculating these amounts set out in the draft Order. We would also welcome

views on the question of whether a “cool-off” period should be included in the legislation (providing for a mandatory period between (A) the making of the promotion and provision of the required statements and (B) the entry into any resulting contract). There is currently no “cooling off” period proposed. Although it would provide an extra element of consumer protection, it may be thought that a cooling-off period could amount to an unnecessary burden in an area where there are already safeguards in place.

Sophisticated investors

- 2.56 It is proposed that a separate exemption should also be available to permit financial promotion of a wider range of investments to so-called “sophisticated” individuals, defined as those certified by an authorised person as being in a position to understand the risks. The role of the FSA in making certification rules will provide an opportunity for alignment with rules categorising investors for other purposes relevant to ensuring that consumer protection is appropriate and proportionate. In particular, it will allow for an approach which recognises different levels of required sophistication for different types of investment.
- 2.57 It is proposed that the availability of the sophisticated investors exemption should be subject to disclosure requirements similar to those discussed in relation to high net worth individuals.

Other Issues

Specific Articles of the current Investment Advertisement Exemptions Orders and Unsolicited Calls Regulations

- 2.58 There were a wide variety of comments on specific Articles of the current investment advertisement exemptions orders. In particular, proposals for expanding the corporate finance and overseas persons exemptions were made by several respondents. Some respondents said that the private companies takeover exemption is sometimes used in practice (although with difficulty). Principal changes from the exemptions under the current regime are highlighted in Part Three.

Interaction of the financial promotion regime and the legislation on public offers of securities

2.59 There was little substantive comment on this issue. However several respondents suggested that the financial promotion exemptions should be aligned with the exemptions from the prospectus regime under the Public Offers of Securities Regulations 1995.

The use of the financial promotion exemptions in combination

2.60 This was not a subject that provoked very many responses, beyond calls for the ability to use exemptions in combination. The approach taken in the draft order has been to include a general provision which has the effect of setting out more clearly that exemptions can be combined.

PART THREE - COMMENTARY ON THE FINANCIAL PROMOTION (EXEMPTIONS) ORDER

Introduction

General

2. This commentary outlines the broad approach we have taken in preparing the draft Exemptions Order, and highlights some of the more significant changes which have been made to the position under the existing legislation. The commentary does not generally seek to address those numerous detailed provisions where it is proposed that there is to be little substantive change.
3. In general, the approach taken in the draft Exemptions Order has been to retain the substance of the exemptions applying under the current legislation where appropriate, but also, where possible, to rationalise and clarify those exemptions. We have also sought to continue them in a more technology-neutral way. In particular, we have sought to concentrate as far as possible on the mischief, rather than the medium, of a promotion, although the two issues are, to an extent, closely linked.
4. The draft Exemptions Order is in three Parts. Part I contains general provisions dealing with interpretation and the level of prominence to be given to statements or indications required by the specific exemptions. Part II relates to communications concerning deposits and general insurance. Part III relates to communications concerning other sorts of investment activities.

Controlled Activities

5. The Order applies to “controlled activities” under clause 19 of the Financial Services and Markets Bill. Controlled activities are essentially specified activities which relate to specified investments. It is for the Treasury to determine by Order the sorts of investments and activities

which are specified for these purposes, and the first Order to be introduced under the Bill setting out the exemptions from clause 19, or which specifies “controlled activities” for the purposes of that clause, will need to be laid before both Houses of Parliament and approved before it is made. Subsequent Orders which have the basic effect of extending the scope of the financial promotion prohibition will also need to be approved by Parliament.

6. The sorts of activities and investments which the Treasury can specify for these purposes are informed by the provisions of Schedule 2 of the FSM Bill. The nature of the activities and products listed in that Schedule set the four corners of the Treasury’s power, in the sense that they provide a benchmark against which to judge the question of whether any activity not listed in the Schedule can properly be made a controlled activity. Schedule 2 broadly lists investments and activities currently covered by existing financial services, insurance and banking legislation, along with certain other potential investments. (The Government is currently considering whether the FSM Bill should apply to mortgage marketing and advice, and a decision in principle is expected by the end of the year).
7. The intention is that “controlled activities” will generally equate to regulated activities under clause 20 of the FSM Bill, but without the additional exclusions proposed in the Regulated Activities Order for certain kinds of investment or activities. This is the basic approach taken in relation to the scope of the advertising regime under the Financial Services Act.
8. As indicated in Part One, the proposed list of “controlled activities” contained in Schedule 1 to the Exemptions Order is based on the draft Regulated Activities Order published in February 1999. It may therefore be subject to change in response to that consultation exercise.

Types of communication

9. Part Two discusses our broad proposals in relation to different sorts of communication.

Combination of exemptions

10. Article 13 of the draft Order makes it clear that all of the exemptions contained in Part III (relating to promotions which do not concern deposits and general insurance) can be combined. That represents a slight departure from the provisions of the 1995 and 1996 Orders under the Financial Services Act, where in some cases, exemptions could not be combined (for example, in the context of employee share schemes and joint enterprises).

Part I - Interpretation

11. Article 3 specifies that the financial promotion restriction referred to in the draft Order is the restriction contained in clause 19. That includes not only communicating an invitation or inducement to engage in investment activity, but also causing such a communication to be made.
12. Article 4 defines a real-time communication and sets out when a real-time communication will be taken to be solicited. The change from the current position regarding the definition of a solicited call is discussed in Part Two, above.
13. Article 6 specifies how the various contents or disclosure requirements in relation to a communication should be met. Again, this is discussed in Part Two.

Part II - Deposits and general insurance

14. The exemptions in Part II broadly reflect the general position under the existing legislation, although the detailed contents of some of the disclosure requirements have been changed. It is proposed that the basic financial promotion prohibition will not apply to real-time communications concerning deposits and general insurance.

Part III - Other Investment Activities

15. Article 14 specifies the articles under which unsolicited real-time communications may be made. These broadly relate to matters currently covered by the Common Unsolicited Calls Regulations, although we propose to discontinue certain exemptions, for example, in the case of UK persons' existing customers, as described in Part Two, above. In addition, we do not propose to continue certain of the other exemptions under those regulations, such as: CUC Regulations 2 and 5 (non-g geared packaged products and acquisition of investment business respectively - since those provisions are concerned with marketing by unauthorised persons which ought to be dealt with in the future through FSA rules); CUC Regulation 6 (public takeovers - where a call is made under the supervision of an authorised person, we would expect it to be approved by them); CUC Regulation 8(1) (connected individuals - calls to close relatives which are not made by way of business will be exempt by virtue of the clause 19 "business test", and calls between business persons will be exempted in certain other circumstances, such as under articles 38 (group companies) and 49 (preliminary canvassing of interest)).

In some instances, where an exemption applies in relation to a matter under the CUC Regulations, and a broadly similar exemption applies under the 1995 or 1996 Orders, we have tried to align the approach (eg, in relation to calls concerning employee share schemes and in the context of beneficiaries under a trust). Additionally, we propose that certain further exemptions which are currently available under the 1995 and 1996 Orders, but not under the CUC Regulations, are applied to unsolicited real-time communications as well. These exemptions include communications made between group companies (article 38) and to persons in the business of placing promotional material (article 31).

16. Article 15 provides the exemption for promotions originating overseas but which are not directed at the UK. This is discussed in Part Two, above.

17. Article 16 provides the new exemption for solicited real-time communications discussed in Part Two.

18. Article 17 provides the new exemption for generic promotions, again, discussed in Part Two.
19. Article 19 provides a new exemption for introductions to authorised third parties where we propose an exemption to complement the corresponding exclusion from the scope of regulated activities under the Bill. It is thought that this exemption is likely to be particularly useful for professional firms, such as solicitors, accountants and actuaries, who may fall within the exclusion from the scope of direct regulation under the Bill, but who may nevertheless introduce their clients to authorised persons, such as financial advisers, where certain conditions are met.
20. Articles 20-22 broadly reproduce the position currently applying to overseas persons under the Financial Services Act. This is discussed in more detail in Part Two.
21. Article 23 relates to the new “mere conduit” exemption discussed in Part Two.
22. Article 39 relates to communications directed at investment professionals, such as authorised and exempted persons, Governments and Public Authorities. The article adopts a “directed at” test approach, similar to that discussed in Part Two in relation to communications originating overseas. Effectively, a series of conditions are set out in the article for the purposes of determining whether a communication is directed at a particular audience. If all of the conditions are met, we propose there should be a safe harbour. If only some (or indeed, none) of them are met, this will be taken into account by the Court in determining whether or not a promotion was properly directed at the specified audience. The intention is that, provided all of the conditions are met, a person should not be taken to be in breach of the financial promotion prohibition even if, despite, the promoter’s efforts and compliance with the conditions, a promotion is nevertheless communicated to a person at whom it is not directed. A similar approach is taken in certain other articles dealing with communications directed at a particular audience, such as article 42 (high net worth companies) and 44 (common interest

group).

23. Article 41 provides the new exemption for high net worth individuals, as discussed in Part Two.
24. Article 43 provides the new exemption for sophisticated investors, also discussed in Part Two.
25. Article 49 provides the new exemption for preliminary canvassing of interest. It applies to all forms of communication provided that they are not made as part of a co-ordinated promotional strategy, and the exemption might, for example, allow “one-off” unsolicited calls by business associates or acquaintances regarding a proposed investment activity. After that call has been made though, if the communication is to develop into a course of dealing in which promotional communications are to be made, the communications will need to be on an invited basis, or else fall within the terms of another exemption. The detailed terms of the proposed exemption require that the communication is made for the purposes of giving or seeking information about a particular matter, and that it is the first occasion on which contact has been made in relation to that matter.
26. Article 51 relates only to “inducements” comprising annual accounts and any directors’ report. It is hard to see how those communications would amount to an “invitation”.
27. Article 54 relates to sales of bodies corporate where the aim is to acquire or dispose of day-to-day control of the company. Here, the exemption under the Financial Services Act regime has been changed to apply to sales of stakes conferring 50% plus ownership, in keeping with a similar proposal in the draft Regulated Activities Order published in February.

Other

28. We propose not to continue the exemption in the 1996 Regulations concerning publications and programmes which advertise certain types of journal containing investment advice. The exemption currently applies to advertisements which promote journals or newspapers where the journal promoted might contain investment advice, but where the purpose of the journal being promoted, taken as a whole, is not to lead to persons investing in a particular investment. We consider that, following the amendment to clause 19 to apply the basic financial promotion prohibition to “invitations or inducements to engage in investment activity”, an exemption along the lines of one contained in the 1996 Regulations would no longer be necessary.

STATUTORY INSTRUMENTS

[]

FINANCIAL SERVICES

The Financial Services and Markets Act
(Financial Promotion)(Exemptions) Order []

Made

Laid before Parliament.....

Coming into force.....

ARRANGEMENT OF ORDER

PART I

GENERAL

29. Citation and commencement.
30. Interpretation: general.
31. Interpretation: financial promotion restriction.
32. Interpretation: solicited and unsolicited real-time communications.
33. Interpretation: relevant private company.
34. Degree of prominence to be given to required indications.

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DEPOSITS AND GENERAL INSURANCE

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36. General insurance contracts.
37. General insurance contracts: reinsurance and large risks.
38. Solicited and unsolicited real-time communications.
39. Application of other exemptions.

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Application

40. Application of exemptions in this Part.
41. Combination of different exemptions.
42. Unsolicited real-time communications.

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43. Inward promotions not directed at the United Kingdom.
44. Solicited real-time communications.
45. Generic promotions.
46. Promotions required or authorised by enactments.
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49. Overseas persons: unsolicited real-time communications.
50. Overseas persons: solicited real-time communications.
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54. Industrial and provident societies.
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57. Financial markets.
58. Companies promoting industry, commerce or enterprise.

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59. Persons in business of placing promotional material.
60. Joint enterprises.
61. Participants in certain collective investment schemes.
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63. Bearer investments: promotions to existing holders.
64. Members and creditors of certain bodies corporate.
65. Members and creditors of open-ended investment companies.
66. Group companies.
67. Investment professionals.
68. Persons in business of disseminating information.
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70. High net-worth companies, unincorporated associations etc.
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75. Remedy following report by Parliamentary Commissioner for Administration.
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81. Sale of goods.
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84. Take-overs of private companies: warrants etc.

85. Take-overs of private companies: application forms.

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86. Promotions required or permitted by market rules.
87. Promotions in connection with admission to certain EEA markets.
88. Promotions of securities already admitted to certain markets.
89. Promotions in connection with listing applications.
90. Promotions included in listing particulars etc.
91. Promotions included in prospectus for public offer of unlisted securities.
92. Material relating to prospectus for public offer of unlisted securities.

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SCHEDULES

Schedule 1 - Meaning of “controlled activity”

Schedule 2 - Markets and exchanges

Schedule 3 - Takeovers of private companies

The Treasury in the exercise of the powers conferred on them by [section 19] of the Financial Services and Markets Act⁽ⁱ⁾ and of all other powers enabling them in that behalf hereby make the following Order:-

PART I

GENERAL

Citation and commencement

1.--(1) This Order may be cited as the Financial Services and Markets Act (Financial Promotion)(Exemptions) Order.

(2) This Order shall come into force on [].

Interpretation: general

2.--(1) In this Order, except where the context otherwise requires -

“the 1985 Act⁽ⁱ⁾” means the Companies Act 1985;

“the 1986 Order” means the Companies (Northern Ireland) Order 1986^(k);

“the Act” means the Financial Services and Markets Act;

(i) [] c.[.].

(j) 1985 c. 6.

(k) S.I. 1986/1032 (N.I. 6).

“bearer instrument” means any of the following investments title to which is capable of being transferred by delivery -

- (a) any investment falling within paragraph 24 or 25 of Schedule 1;
- (b) any investment falling within paragraph 27 or 28 of that Schedule which confers rights in respect of an investment falling within paragraph 24 or 25;

“close relative”, in relation to any person means -

- (a) his spouse;
- (b) his children or step-children (if under 18);
- (c) his parents or step-parents;
- (d) his brothers or sisters or step-brothers or step-sisters; and
- (e) the spouse of any person within sub-paragraph (b), (c) or (d);

“communicate” includes causing to a communication to be made;

“controlled activity” has the meaning given in Schedule 1;

“equity share capital” has the meaning given in the 1985 Act or in the 1986 Order;

“exempt person”, in relation to a particular matter, means a person who is exempt from the general prohibition in relation to that matter as a result of an exemption

order made under [section 34(1)] of the Act or as a result of [section 35(1) or 256(2)] of the Act;

“financial promotion restriction” has the meaning given in article 3;

“government” means the government of the UK, of Northern Ireland, or of any other country or territory outside the United Kingdom;

“holding company” has the meaning given in the 1985 Act or in the 1986 Order;

“joint enterprise” and, in relation to such an enterprise, “participators” have the meaning given in article 32;

“local authority” means a local authority in the United Kingdom or elsewhere;

“overseas customer” has the meaning given in article 20;

“overseas person” has the meaning given in article 20;

“public authority” means any international organisation the members of which include the United Kingdom or another member State;

“publication” means a newspaper, journal, magazine or other periodical publication (including an equivalent publication conveyed by means of a telecommunication system);

“relevant private company has the meaning given in article 5;

“shares and debentures”, in relation to a relevant private company, has the meaning given in article 55;

“solicited real-time communication” has the meaning given in article 4;

“take-over offer”, in relation to a relevant private company, has the meaning given in article 55;

“telecommunication system” has the same meaning as in the Telecommunications Act 1984⁽¹⁾;

“units”, in relation to a collective investment scheme, has the meaning given in [section 207(4)] of the Act;

“unsolicited real-time communications” has the meaning given in article 4;

“voting shares”, in relation to a body corporate, means shares carrying voting rights attributable to share capital which are exercisable in all circumstances at any general meeting of that body corporate;

“wholly-owned subsidiary” has the meaning given in the 1985 Act or in the 1986 Order.

(2) References to a person engaging in investment activity shall be construed in accordance with subsection (4) of [section 19] of the Act; and for these purposes, “controlled activity” in that subsection has the meaning given in this Order.

(1) 1984 c.12.

Interpretation: financial promotion restriction

3.--(1) In this Order, any reference to the financial promotion restriction is a reference to the restriction in section [19(1) and (2)] of the Act.

(2) In this Order, any reference to the communication of an invitation or inducement is a reference to an invitation or inducement to engage in investment activity which is communicated in the course of business.

Interpretation: solicited and unsolicited real-time communications

4.--(1) In this Order, references to a real-time communication are references to any invitation or inducement which is communicated by an individual in the course of a personal visit or other real-time interaction which takes place between him and one or more individuals.

(2) A real-time communication is solicited where it is made with an express invitation from the individual to whom the communication is made.

(3) A real-time communication is unsolicited where it is made otherwise than as set out in paragraph (2).

(4) A person is not to be taken as having issued an express invitation by reason of any omission to indicate that he does not wish to receive any communication, or any further communication, or by reason of agreeing to standard terms that indicate that such communications will be made.

(5) “Real-time interaction” includes an interaction which takes place by means of a telecommunication system.

Interpretation: relevant private company

5.-- (1) In this Order “relevant private company”, in relation to a take-over offer, means a private company in respect of which, at the time the offer is made, the shares comprised in the equity share capital are not and, for a period of ten years immediately preceding the date of the offer, have not been -

(a) listed or quoted on an investment exchange whether in the United Kingdom or elsewhere; or

(b) shares in respect of which information has, with the agreement or approval of any officer of the company, been published for the purpose of facilitating deals in the shares indicating prices at which persons have dealt or were willing to deal in them other than persons who, at the time the information was published, were existing members of a relevant class; or

(c) subject to a marketing arrangement which accorded to the company the facilities referred to in section 163(2)(b) of the 1985 Act or Article 173(2)(b) of the 1986 Order; or

(d) the subject of an offer (whether in the United Kingdom or elsewhere) in relation to which a copy of the prospectus was delivered to the relevant registrar of companies in accordance with section 64 of the 1985 Act or Article 74 of the 1986 Order or Part II of the Public Offers of Securities Regulations 1995^(m).

(2) For the purposes of paragraph (1)(b), a person shall be regarded as being a member of a relevant class if he was, at the relevant time -

(m) S.I. 1995/1537.

- (a) an existing member or debenture holder of the private company;
- (b) an existing employee of that company;
- (c) a close relative of such a member or employee; or
- (d) a trustee (acting in his capacity as such) of a trust, the principal beneficiary of which is a person within any of sub-paragraphs (a), (b) and (c).

Degree of prominence to be given to required indications

6. Where an invitation or inducement must, if it is to fall within any provision of this Order, be accompanied by an indication of any matter, the indication must be presented to the person to whom the invitation or inducement is communicated -

- (a) in a way that can be easily understood; and
- (b) in such manner as, depending on the means by which the communication is made, is best calculated to bring the matter in question to the attention of the person to whom the communication is made and to allow him to consider it.

PART II

DEPOSITS AND GENERAL INSURANCE

Deposits

7.--(1) If the requirements of paragraph (3) are met the financial promotion restriction does not apply to any invitation or inducement which relates to a controlled

activity falling within paragraph 2 of Schedule 1.

(2) But the exemption in paragraph (1) does not apply if the activity is carried on in relation to an investment that falls within any of paragraphs 24 or 25 of Schedule 1 as well as within paragraph 21 of that Schedule.

(3) The requirements of this paragraph are that invitation or inducement is accompanied by an indication -

(a) of the full name of the person with whom the investment which is the subject of the invitation or inducement is to be made (“deposit taker”);

(b) of the country or territory in which the deposit-taker’s principal place of business is situated (described as such);

(c) if different, of the country or territory in which a deposit-taker that is a body corporate is incorporated (described as such);

(d) whether or not the deposit-taker is regulated;

(e) if the deposit-taker is regulated, of the name of the regulator in the deposit-taker’s principal place of business or, if there is more than one such regulator, the regulator of solvency;

(f) whether or not the deposit-taker belongs to any dispute resolution scheme or deposit compensation scheme;

(g) if it belongs to any such scheme, identifying each one;

(h) the amount of the assets and liabilities of the deposit-taker (described as such) or, in substitution for each amount (as appropriate) -

(i) an indication that the amount of any assets exceeds a particular amount (stating it);

(ii) an indication that the amount of any liabilities does not exceed a particular amount (stating it).

(4) In this Article -

“assets”, in relation to a deposit-taker which is a body corporate, means the paid-up capital and reserves;

“full name”, in relation to a person, means the name under which that person carries on business and, if different, that person’s corporate name;

“liabilities” includes provisions where such provisions have not been deducted from the value of the assets.

General insurance contracts

8.--(1) If the requirements of paragraph (2) are met, the financial promotion restriction does not apply to any invitation or inducement which relates to an activity falling within paragraph 3 or 4 of Schedule 1 which is carried out in relation to an investment falling within paragraph 22 of that Schedule.

(2) The requirements of this paragraph are that the invitation or inducement is accompanied by an indication -

(a) of the full name of the person with whom the investment which is the subject of the invitation or inducement is to be made (“general insurance company”);

(b) of the country or territory in which the general insurance company’s principal place of business is situated (described as such);

(c) if different, of the country or territory in which the general insurance company is incorporated (described as such);

(d) whether or not the general insurance company is regulated;

(e) if the general insurance company is regulated, of the name of the regulator of the company in its principal place of business or, if there is more than one such regulator, the name of the regulator of solvency;

(f) whether or not the general insurance company belongs to any dispute resolution scheme or compensation scheme;

(g) if it belongs to any such scheme, identifying each one;

(h) the amount of the assets and liabilities of the general insurance company (described as such) or, in substitution for either or both those amounts, as the case may be -

(i) an indication that the amount of any assets exceeds a particular amount (stating it);

(ii) an indication that the amount of any liabilities does not exceed a

particular amount (stating it).

(3) In this article -

“assets”, in relation to a general insurance company which is a body corporate, means the paid-up capital and reserves;

“full name”, in relation to a person, means the name under which that person carries on business and, if different, that person’s corporate name;

“liabilities” includes provisions where such provisions have not been deducted from the value of the assets.

General insurance contracts; reinsurance and large risks

9.--(1) The financial promotion restriction does not apply to any invitation or inducement which relates to an activity falling within paragraph 3 or 4 of Schedule 1 which is carried out in relation to an investment falling within paragraph 22 of that Schedule and concerns only -

(a) a contract of reinsurance; or

(b) a contract that covers large risks.

(2) “Large risks” has the same meaning as in section 96B of the Insurance Companies Act 1982⁽ⁿ⁾.

Solicited and unsolicited real-time communications

(n) 1982 c. 50

10. The financial promotion restriction does not apply to any real-time communication (whether solicited or unsolicited) which -

(a) relates to an activity falling within paragraph 2 of Schedule 1; or

(b) relates to an activity falling within paragraph 3 or 4 of Schedule 1 which is carried out in relation to an investment falling within paragraph 22 of that Schedule.

Application of other exemptions

11. Except in a case falling within article 7(2), the exemptions in Part III of this Order do not apply in relation to -

(a) any controlled activity falling within paragraph 2 of Schedule 1; or

(b) any controlled activity falling within paragraph 3 or 4 which is carried out in relation to an investment falling within paragraph 22 of Schedule 1.

PART III

OTHER INVESTMENT ACTIVITIES

Application

Application of exemptions in this Part

12.--(1) The exemptions in this Part of this Order apply only in relation to controlled activities falling within any of paragraphs 5 to 20 of Schedule 1 to the Order.

(2) In this Part, “investment” -

(a) when used without more, means an investment falling within any of paragraphs 24 to 34 of that Schedule; and

(b) when used by reference to one or more paragraphs of that Schedule, means an investment falling within the particular paragraph or paragraphs.

Combination of different exemptions

13. Nothing in this Part of the Order is to be construed as preventing a person from relying on more than one exemption in respect of the same communication.

Unsolicited real-time communications

14.--(1) Except as stated in paragraphs (2) and (3), the exemptions in this Part of this Order do not apply to any unsolicited real-time communication.

(2) The exemptions in the following provisions do apply to unsolicited real-time communications (in accordance with any requirements stated in the relevant article) -

[article 21

article 31

article 38

paragraph (1)(a) of article 39

article 40

paragraph (1)(a) of article 42

article 45

article 46

article 47

article 49
article 52
article 54].

(3) The exemptions in the following provisions apply only to unsolicited real-time communications -

article 65
article 66
article 67.

General

Inward promotions not directed at the United Kingdom

15.--(1) The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated from a place outside the United Kingdom; and

(b) is not directed at persons in the United Kingdom.

(2) Where an invitation or inducement is included in -

(a) a publication which is principally accessed in, and designed for, a market outside the United Kingdom; or

(b) a sound or television broadcast transmitted principally for reception outside the United Kingdom;

the invitation or inducement shall be regarded as not being directed at persons in the United Kingdom.

(3) If all the conditions set out in paragraph (5)(a) to (d) are met in relation to an invitation or inducement, it shall be regarded as not being directed at persons in the United Kingdom.

(4) In any other case where one or more of those conditions is met, that fact shall be taken into account in determining whether the invitation or inducement is directed at persons in the United Kingdom.

(5) The conditions are that -

(a) the invitation or inducement is accompanied by an indication that it is not addressed to persons in the United Kingdom;

(b) the invitation or inducement is accompanied by an indication that it must not be relied on by persons in the United Kingdom;

(c) the invitation or inducement is not referred to in, or directly accessible from, any other communication which is directed at persons in the United Kingdom;

(d) the person communicating the invitation or inducement has in place effective systems and procedures to prevent persons in the United Kingdom engaging with him, a close relative or a member of the same group in any investment activity to which the invitation or inducement relates.

Solicited real-time communications

16.--(1) If the requirements of paragraph (2) are met, the financial promotion restriction does not apply to any solicited real-time communication.

(2) The requirements of this paragraph are that the solicited real-time communication is not part of a co-ordinated promotional strategy.

(3) But where a solicited real-time communication is made as part of a co-ordinated promotional strategy then, if another exemption in this Part of this Order would be applicable (provided that the requirements set out in the relevant article are met), it shall not be necessary to comply with those requirements if, within the period of [12] months ending with the day on which the solicited real-time communication is made, they have already been met in relation to anything done previously as part of the same strategy.

(4) This article does not apply to real-time communications made by overseas persons.

Generic promotions

17. The financial promotion restriction does not apply to any invitation or inducement which -

(a) does not relate to a particular investment; and

(b) does not identify (directly or indirectly) any person who carries on any controlled activity.

Promotions required or authorised by enactments

18. The financial promotion restriction does not apply to any invitation or inducement which is required or authorised to be communicated by or under any enactment

other than the Act.

Introductions

19. The financial promotion restriction does not apply to an invitation or inducement to engage in a controlled activity with or through an authorised person in the circumstances described in [paragraph 28 or 41 of Schedule 3 to the Financial Services and Markets Act (Regulated Activities) Order]^(o).

Promotions by certain persons

Overseas persons: communications with existing customers

20.--(1) In this article -

“overseas person” means a person who does not carry on any regulated activity from a permanent place of business which he maintains in the United Kingdom; and

“overseas customer”, in relation to an overseas person, means a person with (or for) whom the overseas person has, within the period of twelve months ending with the day on which the invitation or inducement was communicated, effected a transaction (or provided a relevant service) in the course of carrying on any regulated activity provided that -

(a) at the time that the transaction was effected (or the service was provided) the customer was neither resident in the United Kingdom nor had a place of business there; or

(b) a transaction (or service) of the same description had, on a previous occasion, been effected with (or provided to) the customer by the overseas

(o) This cross-refers to the draft order that was published in February 1999.

person in the course of carrying on a regulated activity and the circumstances of the previous transaction (or service) were as described in sub-paragraph (a).

(2) The financial promotion restriction does not apply to any invitation or inducement which is communicated by an overseas person to an overseas customer of his.

(3) But the exemption in paragraph (2) does not apply to unsolicited real-time communications.

(4) “Effecting a transaction” includes arranging for a transaction to be effected.

(5) “Relevant service” means -

(a) any controlled activity falling within paragraph 13 of Schedule 1 which is provided outside the United Kingdom;

(b) any service falling within paragraph 14 or 15 of that Schedule; and

(c) any advice falling with paragraph 17 of that Schedule which is given outside the United Kingdom.

Overseas persons: unsolicited real-time communications

21.--(1) If either -

(a) the requirements of paragraph (2) and (4) of this article are met in relation to an overseas customer of an overseas person; or

(b) the requirements of paragraphs (3), (4) and (5) are met in relation to any person other than an overseas customer;

the financial promotion restriction does not apply to an unsolicited real-time communication which is made by an overseas person.

(2) The requirements of this paragraph are that, at the time that the unsolicited real-time communication is made, the terms on which previous transactions and services had been effected or provided by the overseas person were such that the overseas customer would reasonably expect to be contacted by the overseas person in relation to the description of transaction or service in question.

(3) The requirements of this paragraph are that the overseas person believes on reasonable grounds that the person to whom the unsolicited real-time communication is made is sufficiently knowledgeable to understand the risks associated with the controlled activity to which the communication relates.

(4) The requirements of this paragraph are that, in relation to any particular controlled activity, the person to whom the unsolicited real-time communication is made has been informed by the overseas person on an earlier occasion -

(a) that the protections conferred by or under the Financial Services and Markets Act will not apply to any unsolicited real-time communication which is made by the overseas person and which relates to that activity;

(b) that the protections conferred by or under the Financial Services and Markets Act may not apply to any such activity that may be carried on in consequence of the communication; and

(c) of any dispute resolution scheme and compensation scheme to which the overseas person belongs or, if there is no such scheme, of that fact.

(5) The requirements of this paragraph are that the person to whom the unsolicited real-time communication is made has, after being given proper opportunity to consider the information given to him in accordance with paragraph (4), clearly indicated that he understands the warnings referred to in paragraph (4)(a) and (b) and that he accepts fully that he will lose the protections referred to.

Overseas customers: solicited real-time communications

22. The financial promotion restriction does not apply any solicited real-time communication which is made by an overseas person (whether or not the communication is part of a co-ordinated promotional strategy).

Mere conduits

23.--(1) The financial promotion restriction does not apply to any invitation or inducement which is communicated by a person who acts as a mere conduit for it.

(2) A person acts as a mere conduit for an invitation or inducement if -

(a) he carries on a business the principal purpose of which is transmitting or receiving material which is provided to him by others;

(b) the content of the invitation or inducement is wholly devised by a customer of his or by a person acting on behalf of a customer; and

(c) the nature of the service provided in relation to the invitation or inducement is such that he does not select, modify or otherwise exercise control over the content

of the invitation or inducement prior to its transmission or receipt.

Governments, local authorities and public authorities

24. The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated by any government, local authority or public authority; and

(b) relates only to an investment issued by the government or authority in question.

Central banks

25. The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated by the Bank of England, the European Central Bank or the central bank of any country or territory outside the United Kingdom; and

(b) relates only to an investment issued by the bank in question.

Industrial and provident societies

26. The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated by an industrial and provident society; and

(b) relates only to an investment falling within paragraph 25 of Schedule 1 which is issued by the society in question.

Nationals of EEA States other than United Kingdom

27.--(1) The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated by a national of an EEA State other than the United Kingdom in the course of any controlled activity lawfully carried on by him in such a State; and

(b) conforms with any rules made by the Authority under [section 116] of the Act.

(2) Nothing in paragraph (1) shall exempt any invitation or inducement which relates to an investment falling within paragraph 28 of Schedule 1.

Exempt persons

28. The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated by an exempt person; and

(b) relates only to a matter in respect of which that person is exempt.

Financial markets

29. --(1) The financial promotion restriction does not apply to any invitation or inducement -

(a) which is communicated by a relevant market; and

(b) to which paragraph (2) or (3) applies.

(2) This paragraph applies to an invitation or inducement if -

(a) it relates only to facilities provided by the market; and

(b) it does not identify (directly or indirectly) -

(i) any particular investment as one that may be traded or dealt in on the market; or

(ii) any particular person as a person through whom transactions on the market may be effected.

(3) This paragraph applies to an invitation or inducement if -

(a) it relates only to a particular investment falling within paragraphs 30, 31 or 32 of Schedule 1; and

(b) it identifies the investment as one that may be traded or dealt in on the market.

(4) “Relevant market” means a market which -

(a) meets the criteria specified in Part I of Schedule 2; or

(b) is specified in, or is established under the rules of an exchange specified in, Part II, III or IV of that Schedule.

Companies promoting industry, commerce or enterprise

30.--(1) “Enterprise company” means a body corporate which -

(a) has as its principal aim, or one of its principal aims -

(i) the promotion or encouragement of industrial or commercial activity or enterprise in the United Kingdom (or in any particular area of it); or

(ii) the dissemination of information concerning persons who are engaged in such activity or enterprise or who require capital in order to become so engaged; and

(b) apart from receiving payment of fees covering its reasonable costs, has no direct or indirect pecuniary interest in any matters which are the subject of an invitation or inducement which is exempt by virtue of this article or in any investment activity which may be engaged in following the communication of such an invitation or inducement.

(2) If the requirements of paragraph (3) are met, the financial promotion restriction does not apply to any invitation or inducement communicated by an enterprise company which -

(a) is of such description as may reasonably be expected to be communicated in the course of the carrying on of any of the activities mentioned in paragraph (1)(a)(i) or (ii); and

(b) relates to investments falling within paragraph 24 or 25 of Schedule 1 which are issued by a private company.

(3) The requirements of this paragraph are that the invitation or inducement is accompanied by an indication -

(a) that investment in new business carries high risks as well as the possibility of high rewards;

(b) that such investment is highly speculative and potential investors should be aware that no established market exists for the trading of shares in private companies;

(c) that the persons responsible for the content of the invitation or inducement have taken reasonable steps to ensure that the information it contains is neither inaccurate nor misleading;

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

Promotions to particular audience

Persons in business of placing promotional material

31. The financial promotion restriction does not apply to any invitation or inducement which is communicated to a person -

(a) whose business it is to place, or arrange for the placing of, promotional material;
and

(b) to whom the invitation or inducement is communicated for the purposes of that business.

Joint enterprises

32.--(1) The financial promotion restriction does not apply to any invitation or

inducement which is communicated -

(a) by a participator in a joint enterprise; and

(b) to another participator in the same joint enterprise;

in connection with, or for the purposes of, the joint enterprise.

(2) “Joint enterprise” means an enterprise into which two or more persons (“the participators”) enter for commercial purposes related to a business or businesses carried on by them; and, where a participator is a member of a group, each other member of the group shall also be regarded as a participator in the enterprise.

(3) “Participator” includes potential participator.

Participants in certain recognised collective investment schemes

33. The financial promotion restriction does not apply to any invitation or inducement which is communicated -

(a) by a person who is the operator of a scheme recognised under [section 239 or 241] of the Act; and

(b) to persons in the United Kingdom who are participants in any such recognised scheme operated by the person making the communication;

and relates only to such recognised schemes as are operated by that person or to units in such schemes.

Bearer investments; promotions required or permitted by market rules

34.--(1) The financial promotion restriction does not apply to any invitation or inducement which is -

(a) communicated by a body corporate (“A”) that is not an open-ended investment company;

(b) directed at persons entitled to bearer instruments issued by A, a parent undertaking of A or a subsidiary undertaking of A; and

(c) is required or permitted by the rules of a relevant market to be communicated to holders of instruments of a class which consists of or includes the bearer instruments in question.

(2) For the purposes of this Article, a bearer instrument falling within paragraph 27 or 28 of Schedule 1 shall be taken to have been issued by the person (“P”) who issued the investment in respect of which the bearer instrument confers rights if it is issued by -

(a) an undertaking in the same group as P; or

(b) a person acting on behalf of, or pursuant to arrangements made with, P.

(3) “Relevant market”, in relation to instruments of any particular class, means any market on which instruments of that class can be traded or dealt in and which -

(a) meets the criteria specified in Part I of Schedule 2; or

(b) is specified in, or established under the rules of an exchange specified in, Part

II or III of that Schedule.

Bearer investments; promotions to existing holders

35.--(1) The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated by a body corporate (“A”) that is not an open-ended investment company;

(b) is directed at persons entitled to bearer instruments issued by A, a parent undertaking of A or a subsidiary undertaking of A;

(c) relates only to instruments of a class which consists of or includes the bearer instruments in question or instruments in respect of which those bearer instruments confer rights; and

(d) is capable of being accepted or acted on only by persons who are entitled to instruments issued by A, a parent undertaking of A or a subsidiary undertaking of A.

(2) For the purposes of this Article, an instrument falling within paragraph 27 or 28 of Schedule 1 shall be taken to have been issued by the person (“P”) who issued the investment in respect of which the bearer instrument confers rights if it is issued by -

(a) an undertaking in the same group as P; or

(b) a person acting on behalf of, or pursuant to arrangements made with, P.

Members and creditors of certain bodies corporate

36.--(1) The financial promotion restriction does not apply to any invitation or inducement which is communicated -

(a) by a body corporate (“A”) that is not an open-ended investment company; and

(b) to persons whom the person communicating the invitation or inducement believes on reasonable grounds to be persons to whom paragraph (2) applies;

and which relates only to an investment falling within paragraph 24, 25 or 27 of Schedule 1 which is issued or to be issued by A, or by an undertaking (“U”) in the same group as A that is not an open-ended investment company.

(2) This paragraph applies to -

(a) a creditor or member of A;

(b) a person who is entitled to an investment falling within paragraph 24, 25 or 27 of Schedule 1 which is issued by A;

(c) a creditor or member of U;

(d) a person who is entitled to an investment falling within paragraph 24, 25 or 27 of Schedule 1 which is issued by U;

(e) a person who is entitled, whether conditionally or unconditionally, to become a member of A or U but who has not yet done so;

(f) a person who -

(i) is entitled, whether conditionally or unconditionally, to have transferred to him title to an investment falling within paragraph 24, 25 or 27 of Schedule 1 which is issued by A or U; but

(ii) has not yet acquired title to the investment.

(3) For the purposes of this Article, an investment falling within paragraph 27 of Schedule 1 shall be taken to have been issued by the person (“P”) who issued the investment in respect of which the instrument confers rights if it is issued by -

(a) an undertaking in the same group as P; or

(b) a person acting on behalf of, or pursuant to arrangements made with, P.

Members and creditors of open-ended investment companies

37.--(1) The financial promotion restriction does not apply to any invitation or inducement which is communicated -

(a) by an open-ended investment company; and

(a) to persons whom the person communicating the investment or inducement believes on reasonable grounds to be persons to whom paragraph (2) applies;

and which relates only an investment falling within paragraph 25, 27 or 29 of Schedule 1 which is issued or to be issued by the open-ended investment company.

(2) This paragraph applies to -

(a) a creditor or member of the open-ended investment company;

(b) a person who is entitled to an investment falling within paragraph 25, 27 or 29 of Schedule 1 which issued by the open-ended investment company;

(c) a person who is entitled, whether conditionally or unconditionally, to become a member of the open-ended investment company but who has not yet done so;

(d) a person who -

(i) is entitled, whether conditionally or unconditionally, to have transferred to him title to an investment falling within paragraph 25, 27 or 29 of Schedule 1 which is issued by the open-ended investment company; but

(ii) has not yet acquired title to the investment.

(3) For the purposes of this Article, an investment falling within paragraph 27 of Schedule 1 shall be taken to have been issued by the person (“P”) who issued the investment in respect of which the instrument confers rights if it is issued by -

(a) an undertaking in the same group as P; or

(b) a person acting on behalf of, or pursuant to arrangements made with, P.

Group companies

38. The financial promotion restriction does not apply to any invitation or inducement which is communicated -

(a) by one body corporate in a group; and

(b) to another body corporate in the same group.

Investment professionals

39.--(1) The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated only to persons whom the person making the communication believes on reasonable grounds to be persons to whom paragraph (2) applies; or

(b) may reasonably be regarded as directed only at such persons.

(2) This paragraph applies to -

(a) any authorised person;

(b) any exempt person;

(c) any other person -

(i) whose ordinary activities involve him in carrying on any controlled activity for the purposes of a business carried on by him; or

(ii) whom it is reasonable to expect will carry on such activities for the purposes of a business carried on by him;

(d) any government, local authority or public authority;

(e) any person whilst acting in the capacity of director, officer or employee of a person falling within any of sub-paragraphs (a) to (d), being a person whose responsibilities, when acting in that capacity, involve him carrying on controlled activities;

(f) any person to whom the invitation or inducement may otherwise lawfully be communicated (and in any case in which this is dependent on a person acting in a particular capacity, the communication must be made to that person whilst he is acting in that capacity).

(3) For the purposes of paragraph (1)(b), if all the conditions set out in paragraph (5)(a) to (c) are met in relation to the communication of an invitation or inducement, it shall be regarded as directed at a person to whom paragraph (2) applies.

(4) In any other case in which one or more of the conditions set out in paragraph (5)(a) to (c) are met, that fact shall be taken into account in determining whether the invitation or inducement is directed at a person to whom to para (2) applies.

(5) The conditions are that -

(a) the invitation or inducement is accompanied by an indication of the description of persons to whom it is addressed and an indication of the fact that any investment or investment activity to which it relates is available only to investment professionals;

(b) the invitation or inducement is accompanied by an indication that persons of any other description should not rely on it;

(c) the person communicating the invitation or inducement has in place effective systems and procedures to prevent persons other than investment professionals engaging with him, a close relative or a member of the same group in any investment activity to which the invitation or inducement relates.

(6) “Investment professionals” means persons having professional experience in matters relating to investment.

Persons in business of disseminating information

40.--(1) The financial promotion restriction does not apply to any invitation or inducement which is communicated only to persons whom the person making the communication believes on reasonable grounds to be persons to whom paragraph (2) applies.

(2) This paragraph applies to -

(a) any person whilst acting in the course of a business or employment which involves the dissemination of information concerning controlled activities through a publication or by way of sound broadcasting or television;

(b) any person whilst acting in the capacity of director, officer or employee of a person falling within sub-paragraph (a), being a person whose responsibilities, when acting in that capacity, involve him carrying on controlled activities;

(c) any person to whom the invitation or inducement may otherwise lawfully be communicated (but, in any case in which this depends on a person acting in a particular capacity, this is limited to communications made whilst that person is acting in that capacity).

High net-worth individuals

41.--(1) “High net-worth individual” means any individual who -

(a) has an annual income of not less than [£]^(p); or

(b) holds net assets to the value of not less than [£]^(q).

(2) If the requirements of paragraphs (4) and (5) are met, the financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated to a person whom the person making the communication believes on reasonable grounds to be a high net-worth individual; and

(b) relates to any investment falling within paragraph 24 or 25 of Schedule 1.

(3) But paragraph (2) applies only if the terms on which any investment is made are such as to ensure that the high net-worth individual cannot lose more than the amount of the initial sum invested.

(4) The requirements of this paragraph are that the invitation or inducement is accompanied by an indication -

(a) that it is exempt from the general restriction (in [section 19] of the Financial Services and Markets Act) on the communication of invitations or inducements to engage in investment activity on the ground that the communication is made to an

(p) Views are sought as to the appropriate minimum amount between a range of £70,000 to £100,000.

(q) Views are sought as to the appropriate minimum amount between a range of £200,000 to £300,000.

high net-worth individual;

(b) of the requirements that must be met for a person to qualify as a high net-worth individual;

(c) that the content of the invitation or inducement has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required by [section 19] of the Act;

(d) that reliance on the promotion 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 invitation or inducement relates should consult an authorised person specialising in advising on investments of the kind in question.

(5) The requirements of this paragraph are that, before engaging in any investment activity in connection with the investment to which the invitation or inducement relates, the high net worth individual signs the following statement -

“I acknowledge that this investment [identifying it] is made following a promotion that is exempt from the restrictions on financial promotion in section 19 of the Financial Services and Markets Act. The exemption relates to high net-worth individuals and I declare that I qualify as such. I accept that the content of the promotion and other material that I have received has not been approved by an authorised person and I accept that investing on the basis of unapproved promotional material may be very risky. I am fully prepared to accept these risks.”

(6) In determining an individual's "net assets", no account shall be taken of -

(a) the property which is his primary residence;

(b) any investment of his that falls within paragraph 23 of Schedule 1; 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 (or his dependents) is, or may be, entitled.

(7) An individual is to be regarded as a high net-worth individual if, before he engages in any investment activity following the communication to him of the invitation or inducement in question, he produces to the person making the communication -

(a) in relation to the requirement in paragraph (1)(a), a current certificate from his accountant to the effect that, for each of the two financial years immediately preceding the date on which the certificate is signed, his annual income satisfied that requirement;

(b) in relation to the requirement in paragraph (1)(b), a current certificate from his accountant to the effect that he meets that requirement.

(8) For the purposes of paragraph (7), a certificate from an accountant shall be regarded as current if it is signed and dated by the accountant and that date is within the period of twelve months ending with the day on which the certificate is produced.

High net-worth companies, unincorporated associations etc

42.--(1) The financial promotion restriction does not apply to any invitation or

inducement which -

(a) is communicated only to persons whom the person making the communication believes on reasonable grounds to be persons to whom paragraph (2) applies; or

(b) may reasonably be regarded as directed only at such persons.

(2) This paragraph applies to -

(a) any body corporate which has a called-up share capital or net assets of -

(i) in the case of a body corporate which has more than 20 members or which is a subsidiary undertaking of a parent undertaking which has more than 20 members, not less than £500,000;

(ii) in the case of any other body corporate, not less than £5,000,000 ;

(b) any unincorporated association which has net assets of not less than £5,000,000;

(c) the trustee of a high value trust;

(d) any person whilst acting in the capacity of director, officer or employee of a person falling within any of sub-paragraphs (a) to (c), being a person whose responsibilities, when acting in that capacity, involve him carrying on controlled activities;

(e) any person to whom the invitation or inducement may otherwise lawfully be communicated.

(3) For the purposes of paragraph (1)(b) -

(a) if all the conditions set out in paragraph (4)(a) to (c) are met in relation to the communication of an invitation or inducement, that invitation or inducement is to be regarded as directed at a person to whom paragraph (2) applies;

(b) in any other case in which one or more of those conditions are met, that fact is to be taken into account in determining whether the invitation or inducement is directed at a person to whom paragraph (2) applies.

(4) The conditions are that -

(a) the invitation or inducement is accompanied by an indication of the description of persons to whom it is addressed and an indication of the fact that the investment or investment activity to which it relates is available only to such persons;

(b) the invitation or inducement is accompanied by an indication that persons of any other description should not rely on it;

(c) the person communicating the invitation or inducement has in place effective systems and procedures to prevent persons other than persons to whom paragraph (2) applies engaging with him, a close relative or a member of the same group in any investment activity in connection with the investment to which the invitation or inducement relates.

(5) The reference in paragraph (2)(e) to a person to whom a communication may otherwise lawfully be communicated shall, in any case in which the lawfulness of the communication is dependent on a person acting in a particular capacity, be restricted to a

reference to that person whilst acting in that capacity.

(6) “Called-up share capital” has the meaning given in the 1985 Act or in the 1986 Order.

(7) “High value trust” means a trust where the aggregate value of the cash and investments which form part of the trusts’s assets (before deducting the amount of its liabilities) -

(a) is £10 million or more; or

(b) has been £10 million or more at any time during the period of two years immediately preceding the date on which the invitation or inducement in question was first communicated.

(8) “Net assets” has the meaning given in section 264 of the 1985 Act or the equivalent provision of the 1986 Order.

Sophisticated investors

43.--(1) “Certified sophisticated investor”, in relation to any description of investment, means a person certified by an authorised person as sufficiently knowledgeable to understand the risks associated with that description of investment.

(2) If the requirements of paragraphs (3) and (4) are met, the financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated to any person whom the person making the communication believes on reasonable grounds to be a certified sophisticated investor; and

(b) relates only to a description of investment in respect of which that investor is certified.

(3) The requirements of this paragraph are that the invitation or inducement is accompanied by an indication -

(a) that it is exempt from the general restriction (in [section 19] of the Financial Services and Markets Act) on the communication of invitations or inducements to engage in investment activity on the ground that the communication is made to a certified sophisticated investor;

(b) of the requirements that must be met for a person to qualify as a certified sophisticated investor;

(c) that the content of the invitation or inducement has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required by [section 19] of the Act;

(d) that reliance on the invitation or inducement 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 invitation or inducement relates should consult an authorised person specialising in advising on investments of the kind in question.

(4) The requirements of this paragraph are that, before engaging in any investment activity in connection with the investment to which the invitation or inducement relates, the

certified sophisticated investor signs the following statement -

“I acknowledge that this investment [identifying it] is made following a promotion that is exempt from the restrictions on financial promotion in the Financial Services and Markets Act. The exemption relates to certified sophisticated investors and I declare that I qualify as such. I accept that the content of the promotion [and any other material that] I have received has not been approved by an authorised person and I accept that investing on the basis of unapproved promotional material may be very risky. I am fully prepared to accept these risks.”

Common interest group of private company

44.--(1) “Common interest group”, in relation to a company, means an identified group of persons who at the time the invitation or inducement is communicated might reasonably be regarded as having an existing and common interest with each other and the company in -

(a) the affairs of the company; and

(b) what is done with the proceeds arising from any investment to which the invitation or inducement relates.

(2) If the requirements of paragraph (3) are met, the financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated only to persons who are members of a common interest group of a private company; or

(b) may reasonably be regarded as directed only at such persons;

and relates to investments falling within paragraph 24 or 25 of Schedule 1 which are issued by the company.

(3) The requirements of this paragraph are that the invitation or inducement is accompanied by an indication -

(a) of the names of the directors of the company and, if different, the names of the promoters of the company;

(b) that the directors (or promoters) of the company have, without any limitation of liability, accepted responsibility for the invitation or inducement on the ground that they have taken all reasonable care to ensure that every statement of fact or opinion included in it is true and not misleading given the form and context in which it appears;

(c) that -

(i) the directors (or promoters) of the company have, without any limitation of liability, accepted responsibility for the invitation or inducement on the ground that they have taken all reasonable care to ensure that any person belonging to the common interest group (and his professional advisers) can have access, at all reasonable times, to all the information that he or they would reasonably require, and reasonably expect to find, for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the company and of the rights attaching to the investments in question; or

(ii) any person considering subscribing for the investments in question should regard any subscription as made primarily to assist the furtherance of the company's objectives (other than any purely financial objectives) and only secondarily, if at all, as an investment;

(d) in a case that falls within sub-paragraph (c)(i), of the means by which such information can be accessed;

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

(4) For the purposes of paragraph (2)(b) -

(a) if all the conditions set out in paragraph (5)(a) to (c) are met in relation to the communication of an invitation or inducement, that invitation or inducement is to be regarded as directed at a person who is a member of the common interest group;

(b) in any other case in which one or more of those conditions are met, that fact shall be taken into account in determining whether the invitation or inducement is directed at a person who is a member of the common interest group.

(5) The conditions are that -

(a) the invitation or inducement is accompanied by an indication that it is directed at persons who are members of the common interest group and that any investment or investment activity to which it relates is available only to such persons;

(b) the invitation or inducement is accompanied by an indication that it would be imprudent for any other person to respond to it;

(c) the person communicating the invitation or inducement has in place effective systems and procedures to prevent persons other than members of the common interest group engaging with him, a close relative or a member of the same group in any investment activity to which the invitation or inducement relates.

(6) Persons are not to be regarded as having an interest of the kind described paragraph (1) if the only reason why they would be so regarded is that -

(a) they will have such an interest if they become members or creditors of the company; or

(b) they are persons all of whom carry on a particular trade or profession;

(c) they are persons with whom the company has an existing business relationship, whether by reason of their being its clients, customers, contractors or suppliers or otherwise.

Settlors, trustees and personal representatives

45. The financial promotion restriction does not apply to any invitation or inducement which is communicated -

(a) by a person when acting as a settlor of a trust, a trustee or a personal representative; and

(b) to a trustee of the trust, a fellow trustee or a fellow personal representative (as

the case may be);

if the communication is made for the purposes of the trust or estate.

Beneficiaries of trust, will or intestacy

46. The financial promotion restriction does not apply to any invitation or inducement which is communicated -

(a) by a person when acting as a settlor of a trust, trustee or personal representative or by a beneficiary under a trust, will or intestacy; and

(b) to a beneficiary under the trust, will or intestacy or to another beneficiary under the same trust, will or intestacy;

if the communication relates to the management or distribution of the same trust fund or estate.

Promotions for particular purpose

Remedy following report by Parliamentary Commissioner for Administration

47. The financial promotion restriction does not apply to any invitation or inducement which is communicated by any person for the purpose of enabling any injustice, stated by the Parliamentary Commissioner for Administration in a report under section 10 of the Parliamentary Commissioner Act 1967^(r) to have occurred, to be remedied with respect to the person to whom the invitation or inducement is communicated.

Persons placing promotional material in particular publications

(r) 1967 c. 13.

48. The financial promotion restriction does not apply to any invitation or inducement which is included in a publication conveyed to a particular person by reason of his having placed promotional material in that publication.

Preliminary canvassing of interest

49. The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated by one person to another for the purposes of giving or seeking information about a particular matter;

(b) constitutes the first occasion on which contact between those persons has been made in relation to that matter; and

(c) is made otherwise than as part of a co-ordinated promotional strategy.

Acquisition of interest in property run by management companies

50.--(1) “Management company” means a company established for the purpose of -

(a) managing the common parts or fabric of property used for residential or business purposes; or

(b) supplying services to such property.

(2) The financial promotion restriction does not apply to any invitation or inducement if it relates to an investment falling within paragraph 24 of Schedule 1 which -

(a) is issued, or to be issued, by a management company; and

(b) is to be acquired by any person in connection with the acquisition of an interest in the property in question.

Annual accounts and directors' report

51.--(1) The financial promotion restriction does not apply to any invitation or inducement to engage in investment activity which is included in -

(a) the whole or any part of the annual accounts of a body corporate (other than an open-ended investment company); or

(b) any report ("directors' report) which is prepared and approved by the directors of such a body corporate under -

(i) section 234 and 234A of the 1985 Act^(s);

(ii) the corresponding Northern Ireland enactment; or

(iii) the law of an EEA State other than the United Kingdom which corresponds to the provisions mentioned in paragraph (a) or (b).

(2) The financial promotion restriction does not apply to any invitation or inducement which is communicated by a body corporate (other than an open-ended investment company) and which is accompanied by -

(a) the annual accounts of the body corporate; or

(s) Section 234 was substituted, and 234A was inserted by section 8(1) of the Companies Act 1989.

(b) the directors' report.

(3) But the exemption in paragraph (2) does not apply unless all the requirements of paragraph (4) to (7) are met.

(4) The requirements of this paragraph are that the invitation or inducement -

(a) is not, and is not accompanied by, an invitation or inducement to underwrite, subscribe for, or otherwise acquire or dispose of, any investment falling within Part II of Schedule 1; and

(b) does not advise persons to do any of the activities within sub-paragraph (a).

(5) The requirements of this paragraph are that the invitation or inducement is not, and is not accompanied by, an invitation or inducement to -

(a) effect any transaction with the body corporate (or with any named person) in the course of that body's (or person's) carrying on of any activity falling within any of paragraphs 5 to 20 of Schedule 1; or

(b) make use of any services provided by that body corporate (or by any named person) in the course of the carrying on of such activity.

(6) The requirements of this paragraph are that the invitation or inducement is not, and is not accompanied by, an invitation or inducement relating to an investment other than one issued by the body corporate (or another body corporate in the same group) which falls within -

(a) investments falling within paragraph 24 or 25 of Schedule 1; or

(b) investments falling within paragraph 27 or 28 of that Schedule, so far as relating to any investments within paragraph (i).

(7) The requirements of this paragraph are that the invitation or inducement does not refer, and is not accompanied by a reference to -

(a) the price at which investments issued by the body corporate have in the past been bought or sold; or

(b) the yield on such investments.

unless it is also accompanied by an indication that past performance cannot be relied on as a guide to future performance.

(8) For the purposes of paragraph (7)(b), a reference, in relation to any investment, to earnings, dividend or nominal rate of interest payable shall not be taken to be a reference to the yield on the investment.

(9) “Annual accounts” means -

(a) accounts produced by virtue of Part VII of the 1985 Act^(t) (or of that Part as applied by virtue of any other enactment);

(b) accounts produced by virtue of the corresponding Northern Ireland enactment (or of that enactment as applied by virtue of any other enactment);

(t) Part VII of the 1985 Act has been amended by Part I of the Companies Act 1989 (c. 40).

(c) a summary financial statement prepared under section 251 of the 1985 Act^(u);

(d) account delivered to the registrar under Chapter II of Part XXIII of the 1985 Act^(v);

(e) accounts which are produced or published by virtue of the law of an EEA State other than the United Kingdom and which correspond to accounts within any of sub-paragraph (a) to (d).

Participation in employee share schemes

52.--(1) The financial promotion restriction does not apply to any invitation or inducement which is communicated by a body corporate (“A”), a body corporate connected with it or a relevant trustee and is communicated for the purposes of an employee share scheme relating to any of the following investments issued by A -

(a) investments falling within paragraph 24 or 25 of Schedule 1; or

(b) investments falling within paragraph 27 or 28 of that Schedule so far as relating to any investments within sub-paragraph (a);

(c) investments falling within paragraph 34 so far as relating to any investments mentioned in sub-paragraph (a) or (b).

(2) “Employee share scheme”, in relation to any investments issued by A, means arrangements made by A, or by a body corporate connected with A, to enable or facilitate -

(u) Section 251 was substituted by section 15 of the Companies Act 1989.

(v) Chapter II of Part XXIII of the 1985 Act was substituted by section 23 of the Companies Act 1989.

(a) transactions in those investments between or for the benefit of -

(i) the bona fide employees or former employees of A or of another body corporate in the same group; and

(ii) the wives, husbands, widows, widowers, or children or step children (if under 18) of such employees or former employees; or

(b) the holding of those investments by, or for the benefit of, such persons.

(3) For the purposes of this Article, a body corporate is connected with another body corporate if -

(a) they are in the same group; or

(b) one is entitled, either alone or with another body corporate in the same group, to exercise or control the exercise of a majority of the voting rights attributable to the voting shares in the other body corporate or its holding company.

(4) “Relevant trustee”, in relation to an employee share scheme, means a person holding investments to which the scheme relates as trustee in pursuance of the scheme.

Sale of goods

53.--(1) In this article -

“supplier” means any person whose main business is to supply goods and, where the supplier is a body corporate and a member of a group, includes any person in the same group as the supplier;

“customer” means any person to whom a supplier sells or offers or agrees to sell goods and, where the customer is a member of a group, includes any person in the same group as the customer.

(2) The financial promotion restriction does not apply to any invitation or inducement which is communicated by a supplier to a customer of his for the purposes of, or in connection with -

(a) the supplier selling, or offering or agreeing to sell, goods to the customer; or

(b) any other person selling, or offering or agreeing to sell, goods to the customer for or in connection with the same purpose as the sale mentioned in sub-paragraph (a).

(3) But the exemption in paragraph (2) does not apply if -

(a) the customer is an individual; or

(b) the invitation or inducement relates to -

(i) an investment falling within paragraph 23 or 29 of Schedule 1; or

(ii) investments falling within paragraph 34 of that Schedule so far as relating to investments within paragraph (i).

Sale of body corporate

54.--(1) The financial promotion restriction does not apply to any invitation or

inducement which is communicated by -

- (a) a single individual;
- (b) a single body corporate;
- (c) a single partnership; or
- (d) a single group of connected individuals;

and which may reasonably be regarded as having as its object the acquisition or disposal of day to day control of the affairs of a body corporate (other than an open-ended investment company).

(2) An invitation or inducement has the object described in paragraph (1) if it is made for the purposes of an acquisition or disposal of -

- (a) shares in the body corporate which consist of, or include, 50 per cent or more of the voting shares; or
- (b) shares in the body corporate which, together with any shares already held by the person acquiring them, consist of, or include, at least 50 per cent of the voting shares;

and if the acquisition or disposal is, or is to be, between two parties each of whom meets one of the descriptions in paragraph (1)(a) to (d).

(3) “A single group of connected individuals” means -

(a) in relation to a party disposing of shares in a body corporate, a single group of persons each of whom is, or is a close relative of, a director, manager or employee of the body corporate; and

(b) in relation to a party acquiring shares in a body corporate, a single group of persons each of whom is, or is a close relative of, a person who is or is to be a director, manager or employee of the body corporate.

Take-overs of private companies

55.--(1) In this article references to a take-over offer for a relevant private company are references to an offer -

(a) for all the shares in, or all the shares comprised in the equity or non-equity share capital of, a relevant private company (other than any shares already held by or on behalf of the person making the offer); or

(b) for all the debentures of such a company (other than any debentures already held by or on behalf of the person making the offer);

which meets the requirements of Part I of Schedule 3.

(2) If the requirements of paragraphs (3) and (4) are met, the financial promotion restriction does not apply to any invitation or inducement communicated in connection with a take-over offer for a relevant private company.

(3) The requirements of this paragraph are that the invitation or inducement is accompanied by the material listed in Part II of Schedule 3.

(4) The requirements of this paragraph are that the material listed in Part III of Schedule 3 is available at a place in the United Kingdom at all times during normal office hours for inspection free of charge.

(5) Shares or debentures are to be regarded as being held by or on behalf of the person making the offer if the person who holds them, or on whose behalf they are held, has agreed that an offer should not be made in respect of them.

(6) References to shares and debentures, in relation to relevant private company, are references to -

(a) in the case of a body corporate which is a company within the meaning of the 1985 Act, shares and debentures within the meaning of that Act;

(b) in the case of a body corporate which is a company within the meaning of the 1986 Order, shares and debentures within the meaning of that Order;

(c) in the case of any other body corporate, investments falling within paragraphs 24 or 25 of Schedule 1.

Take-overs of private companies: warrants etc

56. The financial promotion restriction does not apply to any invitation or inducement which -

(a) is communicated at the same time as, or after, a take-over offer for a relevant private company is made; and

(b) relates to investments falling within paragraph 27 or 28 of Schedule 1 so far as

relating to the shares or debentures which are the subject of the offer.

Take-overs of private companies: application forms

57. The financial promotion restriction does not apply to any invitation or inducement which is communicated in connection with a take-over offer for a relevant private company and is a form of application for -

(a) shares or debentures; or

(b) investments falling within paragraph 27 or 28 of Schedule 1 so far as relating to the shares or debentures which are the subject of the offer.

Promotion of securities: miscellaneous

Promotions required or permitted by market rules

58.--(1) The financial promotion restriction does not apply to any invitation or inducement which -

(a) relates to an investment falling within any of paragraphs 24 to 28 of Schedule 1 which is permitted to be traded or dealt in on a relevant market; and

(b) is required or permitted to be communicated by -

(i) the rules of the market;

(ii) a body which regulates the market; or

(iii) a body which regulates offers or issues of investments to be traded on such a market.

(2) “Relevant market” means a market which -

(a) meets the criteria specified in Part I of Schedule 2; or

(b) is specified in, or established under the rules of an exchange specified in, Part II or III of that Schedule.

Promotions in connection with admission to certain EEA markets

59.--(1) The financial promotion restriction does not apply to any invitation or inducement which -

(a) a relevant EEA market requires to be communicated before an investment can be admitted to trading on that market;

(b) if it were included in a prospectus issued in accordance with Part II of the Public Offers of Securities Regulations 1995^(w), would be required to be communicated by those regulations; and

(c) is not accompanied by any information other than information which is required or permitted to be published by the rules of the market.

(2) In this article “relevant EEA market” means any market on which investments can be traded or dealt in and which -

(a) meets the criteria specified in Part 1 of Schedule 2; or

^(w) S.I. 1995/1537; various amendments have been made by the Public Offers of Securities (Amendment) Regulations 1999 (S.I. 1999/734) and the Public Offers of Securities (Amendment No2) Regulations 1999 (S.I. 1999/1146).

(b) is specified in, or established under the rules of an exchange specified in, Part II of that Schedule.

Promotions of securities already admitted to certain markets

60.--(1) In this article -

“relevant investment” means any investment falling within -

(a) paragraph 24 or 25 of Schedule 1; or

(b) paragraph 27 or 28 of that Schedule so far as relating to any investments mentioned in paragraph (i);

“relevant market” means any market on which on which investments can be traded or dealt in and which -

(a) meets the criteria specified in Part 1 of Schedule 2; or

(b) is specified in, or established under the rules of an exchange specified in, Part II or III of that Schedule.

(2) The financial promotion restriction does not apply to any invitation or inducement which is -

(a) communicated by a body corporate (“A”), other than open-ended investment company; and

(b) relates only to relevant investments issued by A or by another body corporate in

the same group;

if relevant investments issued by A or by any holding company of which A is a wholly-owned subsidiary are permitted to be traded, or dealt in, on a relevant market.

(3) But the exemption in paragraph (2) does not apply unless all the requirements of paragraph (4) to (7) are met.

(4) The requirements of this paragraph are that the invitation or inducement -

(a) is not, and is not accompanied by, an invitation or inducement to underwrite, subscribe for, or otherwise acquire or dispose of, any investment falling within Part II of Schedule 1; and

(b) does not advise persons to do any of the activities within sub-paragraph (a).

(5) The requirements of this paragraph are that the invitation or inducement is not, and is not accompanied by, an invitation or inducement to -

(a) effect any transaction with A (or with any named person) in the course of the carrying on by A (or the named person) of any activity falling within any of paragraphs 5 to 20 of Schedule 1; or

(b) make use of any services provided by A (or by any named person) in the course of the carrying on of such activity.

(6) The requirements of this paragraph are that the invitation or inducement is not, and is not accompanied by, an invitation or inducement relating to an investment which is

not a relevant security issued by the body corporate (or another body corporate in the same group).

(7) The requirements of this paragraph are that the invitation or inducement does not refer, and is not accompanied by a reference, to -

(a) the price at which investments issued by A have been bought or sold in the past;
or

(b) the yield on such investments,

unless it is also accompanied by an indication that past performance cannot be relied on as a guide to future performance.

(8) For the purposes of paragraph (7)(b), a reference, in relation to any investment, to earnings, dividend or nominal rate of interest payable shall not be taken to be a reference to the yield on the investment.

Promotions in connection with listing applications

61. The financial promotion restriction does not apply to any invitation or inducement to which listing rules made under [section 90(1)] of the Act apply.

Promotions included in listing particulars etc

62. The financial promotion restriction does not apply to any invitation or inducement which is included in -

(a) listing particulars;

(b) supplementary listing particulars;

(c) a prospectus approved in accordance with listing rules made under [section 79 or 82] of the Act;

(d) a supplementary prospectus approved in accordance with listing rules made for the purposes of [section 76] of the Act as applied by [section 81 or 82]; or

(e) any other document required or permitted to be published by listing rules under Part VI of that Act.

(2) In this article “listing particulars” and “listing rules” have the same meaning as in Part VI of the Act.

Promotions included in prospectus for public offer of unlisted securities

63. The financial promotion restriction does not apply to any invitation or inducement which is included in a prospectus or supplementary prospectus that is issued in accordance with Part II of the Public Offers of Securities Regulations 1995^(x).

Material relating to prospectuses for public offer of unlisted securities

64.--(1) The financial promotion restriction does not apply to any invitation or inducement relating to a prospectus or supplementary prospectus where the only reason for considering it to be an invitation or inducement is that it gives -

(a) an indication of the name and address of the person by whom the securities to which the prospectus or supplementary prospectus relates are to be offered;

(x) S.I. 1995/1537; various amendments have been made by the Public Offers of Securities (Amendment) Regulations 1999 (S.I. 1999/734) and the Public Offers of Securities (Amendment No2) Regulations 1999 (S.I. 1999/1146).

- (b) an indication of other particulars for communicating with that person;
- (c) an indication of the nature and the nominal value of the securities to which the prospectus or supplementary prospectus relates, the number offered and the price at which they are offered;
- (d) an indication that a prospectus or supplementary prospectus is or will be available (and, if it is not yet available, when it is expected to be); or
- (e) instructions for obtaining a copy of the prospectus or supplementary prospectus.

(2) In this article -

- (a) “securities” and “offer” have the same meaning as in Part II of the Public Offers of Securities Regulations 1995;
- (b) references to a prospectus or supplementary prospectus are references to a prospectus or supplementary prospectus which is published in accordance with Part II of the Public Offers of Securities Regulations 1995^(y).

Exemptions applicable only to unsolicited real-time communications

Management buy-ins

65. The financial promotion restriction does not apply to any unsolicited real-time communication which is made to a person for the purpose of arranging a management buy-in relating to a business in which that person would act as manager.

(y) S.I. 1995/1537; various amendments have been made by the Public Offers of Securities (Amendment) Regulations 1999 (S.I. 1999/734) and the Public Offers of Securities (Amendment No2) Regulations 1999 (S.I. 1999/1146).

Supply of certain products

66.--(1) The financial promotion restriction does not apply to any unsolicited real-time communication which relates to any of the following investments where they are provided by an authorised or exempt person -

(a) an investment falling within paragraph 29 which is issued by an authorised unit trust scheme that invests only in investments falling within any of paragraphs 24 to 29 of Schedule 1 (other than a scheme that invests entirely in investments falling within paragraph 27 of that Schedule);

(b) an investment falling within paragraph 29 which issued by an authorised open-ended investment company that invests only in investments falling within any of paragraphs 24 to 29 of Schedule 1 (other than a company that invests entirely in investments falling within paragraph 27 of that Schedule);

(c) an investment falling within paragraph 23 of Schedule 1 which can be marketed in the United Kingdom without contravention of [provision equivalent to section 130 of the Financial Services Act 1986] and which is not linked, or potentially linked, to a higher volatility product;

(d) an investment falling within paragraph 24 to 28 of Schedule 1 which is issued by an investment trust;

(e) an investment falling within paragraph 26 of Schedule 1 which is denominated in the currency of the issuer;

(f) an investment falling within any of paragraphs 24 to 28 of Schedule 1 and which is -

(i) admitted to official listing on an exchange in the United Kingdom or another member State; or

(ii) regularly traded on such an exchange or on a recognised investment exchange.

(2) But the exemption in paragraph (1) applies only if -

(a) any agreement entered into in the course of the controlled activity to which the unsolicited real-time communication relates is made on terms that the customer is able, without incurring any cost, to cancel the agreement within seven days of entering into it; or

(b) the arrangements for entering into any such agreement are such as to provide equivalent protection.

(3) In this article -

“higher volatility product means -

(a) an authorised unit trust scheme [or authorised open-ended investment company] which -

(i) invests entirely in investments falling within paragraph 27 of Schedule 1; or

(ii) invests in investments other than ones falling within any of paragraphs 24 to 29 of that Schedule; or

(b) investment trust savings scheme investing in an investment trust whose borrowing exceeds 50 per cent of the market value of shares held by the trust at the mid-value share price;

“investment trust” means a closed-ended company which is admitted to official listing on an exchange in the United Kingdom or another member State and -

(a) is approved by the Inland Revenue under section 842 of the Income and Corporation Taxes Act 1988^(z) (or in the case of a newly-formed company, has declared its intention to conduct its affairs so as to obtain approval); or

(b) is resident in another member State and would qualify for approval if resident and listed in the United Kingdom.

Occupational pensions schemes

67.--(1) The financial promotion restriction does not apply to any unsolicited real-time communication which relates to an agreement to manage the assets of an occupational pension scheme.

(2) “Occupational pension scheme” means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employment so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners with a qualifying service in an employment of any such description or category.

(z) 1988 c. 1.

[Date]

Two of the Lords Commissioners
of Her Majesty's Treasury

MEANING OF CONTROLLED ACTIVITY

PART I

GENERAL DEFINITION

1.--(1) For the purposes of section 19(5) of the Act, a controlled activity is any activity which falls within any of paragraphs 2 to 20.

(2) Paragraphs 21 to 34 specify the investments to which particular provisions of paragraphs 2 to 20 relate.

(3) But paragraphs 21 to 34 have effect subject to the provisions of paragraphs 35 to 42 (which exclude certain matters).

PART II

ACTIVITIES

Accepting deposits

2.--(1) Accepting deposits is a controlled activity if-

(a) money received by way of deposit is lent to others; or

(b) any other activity of the person accepting the deposit is financed, wholly or to any material extent, out of the capital of or interest on money received

by way of deposit.

(2) “Accepting”, in relation to a deposit, means assuming the liability to repay the deposit.

Insurance

3.--(1) Effecting a contract of insurance is a controlled activity.

(2) Activities falling within paragraph 9 shall not be regarded as falling within this paragraph when carried on in relation to a long term insurance contract which is also a contractually based investment.

4. Carrying out a contract of insurance is a controlled activity.

Other controlled activities

5. The following are controlled activities-

(a) establishing, operating or winding up a collective investment scheme;

(b) acting as trustee or depositary of such a scheme;

(c) acting as the sole director of a body incorporated by virtue of regulations under [section 233] of the Act.

6. As principal, buying selling, subscribing for or underwriting securities at prices determined by him generally and continuously rather than in respect of each transaction is a controlled activity.

7. As principal, buying securities with a view to selling them is a controlled activity.

8.--(1) Regularly soliciting members of the public is a controlled activity where it is done for the purpose of inducing them, as principals or agents to buy, sell, subscribe for or underwrite securities or to assign a long term insurance contract which is a contractually based investment or, or to buy sell subscribe for or underwrite investments falling within paragraph 34 so far as relevant to such a contract or such investments.

(2) But sub-paragraph (1) applies only in a case in which the person soliciting does so with a view to entering into a transaction as principal.

9. Buying, selling, subscribing for or underwriting a contractually based investment as principal is a controlled activity.

10. Dealing as agent in-

(a) investments falling within any of paragraphs 24 to 32 or, so far as relevant to any of those paragraphs, within paragraph 34; or

(b) long term insurance contracts which are contractually based investments or, so far as relevant to such contracts, in investments falling within paragraph 34,

is a controlled activity.

11. Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment-

(a) falling within any of paragraphs 24 to 32 or, so far as relevant to any of those

paragraphs, within paragraph 34; or

(b) which is a long term insurance contract and a contractually based investment or, so far as relevant to such a contract, is an investment falling within paragraph 34,

is a controlled activity.

12. Making arrangements in which persons participate with a view (whether as principal or agent) to buying, selling, subscribing for or underwriting an investment falling-

(a) within any of paragraphs 24 to 32 or, so far as relevant to any of those paragraphs, within paragraph 34; or

(b) which is a long term insurance contract and a contractually based investment or, so far as relevant to such a contract, is an investment falling within paragraph 34,

is a controlled activity.

13. Safeguarding and administering, or arranging for the safeguarding and administration of, assets belonging to another is a controlled activity if-

(a) those assets consist of or include any investment-

(i) falling within any of paragraphs 24 to 32 or, so far as relevant to any of those paragraphs, within paragraph 34; or

(ii) which is a long term insurance contract and a contractually based investment or, so far as relevant to such a contract, is an investment falling

within paragraph 34; or

(b) the arrangements under which they are safeguarded and administered have at any time been held out as ones under which such investments would be safeguarded and administered.

14.- (1) Sending, on behalf of another person, dematerialised instructions relating to an investment falling within any of paragraphs 24 to 29 or, so far as relevant to any of those paragraphs, within paragraph 34 is a controlled activity where those instructions are sent by means of-

(a) a relevant system in respect of which an Operator is approved under the Uncertificated Securities Regulations^(aa); or

(b) a computer-based system established by the Bank of England and the London Stock Exchange, through the medium of which specified securities may be transferred or allotted without the need for a written instrument.

(2) In this paragraph-

(a) “Operator” has the same meaning as in regulation 3 of the Uncertificated Securities Regulations 1995; and

(b) “specified securities” has the same meaning as in the Stock Transfer Act 1982^(bb).

15. Causing dematerialised instructions to be sent is a controlled activity where the

(aa) S.I. 1995/3272.

(bb) 1982 c.41.

person causing the dematerialised instructions to be sent-

(a) in relation to a system falling within paragraph 14(1)(a), is a system participant within the meaning of the Uncertificated Securities Regulations 1995; or

(b) in relation to a system falling within paragraph 14(1)(b), is a person who, under an agreement with CRESTCo Limited, is responsible for the operation of and the maintenance of security over a gateway, that is to say, the computer hardware and software by means of which instructions are authenticated and encrypted for processing by the system.

16. Managing assets belonging to another person is a controlled activity in circumstances which involve the exercise of discretion if -

(a) the assets consist of or include any investment-

(i) falling within any of paragraphs 24 to 32 or, so far as relevant to any of those paragraphs, within paragraph 34; or

(ii) which is a long term insurance contract and a contractually based investment or, so far as relevant to such a contract, is an investment falling within paragraph 34; or

(b) the arrangements for their management are such that those assets may consist of or include such investments and either the assets have at any time since 29th April 1988 done so or the arrangements have at any time (whether before or after that date) been held out as arrangements under which the assets would do so.

17. Advising a person is a controlled activity if the advice is given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor, and is advice on the merits of his or his principal buying, selling, subscribing for or underwriting a particular investment-

(a) falling within any of paragraphs 24 to 32 or, so far as relevant to any of those paragraphs, within paragraph 34; or

(b) which is a long term insurance contract and a contractually based investment or, so far as relevant to such a contract, is an investment falling within paragraph 34,

or is advice to exercise any right conferred by such an investment to acquire, dispose of, underwrite or convert such an investment.

18. Advising an underwriting member of the Society of Lloyd's to become, continue or cease to be a member of a particular syndicate is a controlled activity.

19.--(1) Managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's is a controlled activity.

(2) In sub-paragraph (1), "managing agent" has the same meaning as in section 12(1) of the Lloyd's Act 1982^(cc).

20. Agreeing to engage in any activity falling within any of paragraphs 5 to 19 above is a controlled activity.

PART III

(cc) 1982 c.xiv.

INVESTMENTS

Deposits

21. A deposit.

Rights under an insurance contract

22. Rights under a general insurance contract.

23.--(1) Rights under a long term insurance contract.

(2) In the case of a long term insurance contract which is also a contractually based investment, rights falling within this paragraph shall not be regarded as falling within paragraph 32.

Other investments

24.--(1) Shares or stock in the share capital of a company.

(2) In sub-paragraph (1), “company” includes-

(a) any body corporate (wherever incorporated) other than an open-ended investment company, and

(b) any unincorporated body constituted under the law of a country or territory outside the United Kingdom.

25. Such of the following as do not fall within paragraph 26 -

(a) debentures;

(b) debenture stock;

(c) loan stock;

(d) bonds;

(e) certificates of deposit;

(f) any other instruments creating or acknowledging indebtedness.

26. Loan stock, bonds, and other instruments-

(a) creating or acknowledging indebtedness; and

(b) issued by or on behalf of a government, local authority or public authority.

27.--(1) Warrants and other instruments entitling the holder to subscribe for any investment falling within paragraph 24, 25 or 26.

(2) It is immaterial whether the investment to which the entitlement relates is in existence or identifiable.

(3) An investment falling within this paragraph shall not be regarded as falling within paragraph 30, 31 or 32.

28. Certificates or other instruments which confer contractual or property rights-

(a) in respect of any investment falling within any of paragraphs 24 to 27 being an

investment held by a person other than the person on whom the rights are conferred by the certificate or instrument; and

(b) the transfer of which may be effected without requiring the consent of that person.

29.--(1) Shares in or securities of an open-ended investment company.

(2) Units in a collective investment scheme.

30. Options to acquire or dispose of-

(a) an investment falling within any of paragraphs 24 to 29, 31 and 32 or, so far as relevant to those paragraphs, within paragraph 34;

(b) rights under a long term insurance contract which is a contractually based investment or, so far as relevant to such a contract, an investment falling within paragraph 34;

(c) currency of the United Kingdom or of any other country or territory;

(d) palladium, platinum, gold or silver; or

(e) an investment falling within this paragraph by virtue of paragraph (a), (b), (c) or (d) above.

31. Rights under a contract for the sale or delivery of a commodity or property of any other description under which delivery is to be made at a future date and at a price

agreed on when the contract is made.

32. Rights under-

(a) a contract for differences; or

(b) any other contract the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in-

(i) the value or price of property of any description; or

(ii) an index or other factor designated for that purpose in the contract.

33.--(1) The underwriting capacity of a Lloyd's syndicate.

(2) A person's membership (or prospective membership) of a Lloyd's syndicate.

34.--(1) Any right to or interest in anything which is specified under any other provision of this Part of this Schedule.

(2) Sub-paragraph (1) does not apply to interests under the trusts of an occupational pension scheme.

(3) Sub-paragraph (1) does not apply to anything which is specified under any other provision of this Part of this Schedule.

PART IV
EXCLUSIONS FROM PART III

Deposits

35.-- (1) This paragraph relates to an investment falling with paragraph 21.

(2) There shall be excluded any sum-

(a) paid by the Bank of England or by an authorised person whose permission under the Act covers the acceptance of deposits;

(b) paid by a person specified in sub-paragraph (6);

(c) paid by a person other than a person mentioned in paragraph (a) or (b) in the course of carrying on a business consisting wholly or mainly of lending money;

(d) paid by one company to another at a time when both are members of the same group or when the same individual is a majority shareholder controller of both of them;

(e) paid by a person who, at the time when it is paid -

(i) is a close relative of the person receiving it;

(ii) is, or is a close relative of, a director or manager of that person; or

(iii) is, or is a close relative of, a person who is a controller (within the meaning of section 356 of the Act) in relation to that person.

(3) In the application of paragraph (c) of sub-paragraph (2)(c) to a sum paid by a partnership, that paragraph shall have effect as if, for the reference to the person paying the sum, there were substituted a reference to each of the partners.

(4) In sub-paragraph (2)(d), “majority shareholder controller” means a person who, in relation to the person receiving the sum, has control of a kind falling within section 356(2)(a) of the Act where the holding of shares is 50% or more.

(5) In sub-paragraph (2)(e), “manager” means a person (other than a chief executive) who, under the immediate authority of a director or chief executive of the person receiving the deposit-

(a) exercises managerial functions; or

(b) is responsible for maintaining accounts or other records of that person.

(6) The persons specified in this sub-paragraph are-

(a) the central bank of a member State other than the United Kingdom;

(b) the European Central Bank;

(c) the National Savings Bank;

(d) a municipal bank;

(e) a building society incorporated (or deemed to be incorporated) under the

Building Societies Act 1986^(dd);

(f) a friendly society and any society registered under the Friendly Societies Act 1974^(ee) other than a friendly society;

(g) an authorised person whose permission under the Act covers the effecting or carrying out of contracts of insurance;

(h) a credit union within the meaning of the Credit Unions Act 1979^(ff) or the Credit Unions (Northern Ireland) Order 1985;

(i) Keesler Federal Credit Union;

(j) a body of persons certified as a school bank by the National Savings Bank or by an authorised person whose permission under the Act covers the acceptance of deposits;

(k) a local authority;

(l) any other body which by virtue of any enactment has power to issue a precept to a local authority in England and Wales or a requisition to a local authority in Scotland;

(m) the Crown Agents for Overseas Governments and Administrations;

(dd) 1986 c.53.

(ee) 1974 c.46.

(ff) 1979 c.34.

- (n) the European Atomic Energy Community;
 - (o) the European Coal and Steel Community;
 - (p) the European Community;
 - (q) the European Investment Bank;
 - (r) the International Bank for Reconstruction and Development;
 - (s) the International Finance Corporation;
 - (t) the International Monetary Fund;
 - (u) the African Development Bank;
 - (v) the Asian Development Bank;
 - (w) the Caribbean Development Bank;
 - (x) the Inter-American Development Bank;
 - (y) the European Bank for Reconstruction and Development;
 - (z) the Council of Europe Resettlement Fund.
- (7) In sub-paragraph (6) “local authority” means-

(a) in England and Wales, a local authority within the meaning of the Local Government Act 1972^(gg), the Common Council of the City of London or the Council of the Isles of Scilly;

(b) in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1973;^(hh) and

(c) in Northern Ireland, a district council within the meaning of the Local Government (Northern Ireland) Act 1972⁽ⁱⁱ⁾.

Rights under insurance contract

36.- (1) This paragraph relates to an investment falling within either paragraph 22 or 23.

(2) There shall be excluded contracts of any of the following kinds when effected or carried out by a body carrying on a banking business -

(a) contracts for fidelity bonds;

(b) contracts for performance bonds;

(c) contracts for administration bonds;

(d) contracts for bail bonds;

(gg) 1972 c.70. The definition of “local authority” in section 270 of the 1972 Act has been amended by the Local Government Act 1985 (c.51) and by the local Government (Wales) Act 1994 (c.19).

(hh) 1973 c.65. The definition in section 235 of the 1973 Act was substituted by the Local Government (Scotland) Act 1994 (c.39).

(ii) 1972 c.9 (N.I.).

(e) contracts for customs bonds;

(f) contracts of guarantee similar to those mentioned in paragraphs (a) to (e).

(3) Contracts of guarantee similar to those mentioned in sub-paragraph (2)(a) to (e) shall also be excluded when effected incidentally to some other business carried on by the person effecting them.

(4) There shall be excluded capital redemption contracts when effected or carried out by a body carrying on a banking business or by a body which does not otherwise carry on a controlled activity falling within paragraph 3 or 4.

Other investments

37.--(1) This paragraph relates to an investment falling within paragraph 24.

(2) There shall be excluded shares -

(a) in a building society incorporated under the law of, or any part of, the United Kingdom;

(b) in any body incorporated under the laws of, or any part of, the United Kingdom relating to industrial and provident societies or credit unions; and

(c) in any body constituted under the law of another member State for purposes equivalent to those of a body falling within paragraph (a) or (b).

(3) But sub-paragraph (2) does not apply to-

(a) any shares of a class defined as deferred shares for the purposes of section 119 of the Building Societies Act 1986^(jj); or

(b) any transferable shares in a body falling within sub-paragraph (2)(b) or any body falling within sub-paragraph (2)(c) constituted for purposes corresponding to those of such a body.

38.--(1) This paragraph relates to any investment which might otherwise be taken to fall within paragraph 25.

(2) If and to the extent that they might otherwise be taken to fall within paragraph 25, there shall be excluded -

(a) any instrument acknowledging or creating indebtedness for, or for money borrowed to defray, the consideration payable under a contract for the supply of goods or services;

(b) a cheque or other bill of exchange, a banker's draft or a letter of credit;

(c) a banknote, a statement showing a balance on a current, deposit or saving account, a lease or other disposition of property, a heritable security or an insurance contract; and

(d) any contract of insurance.

(3) An instrument to which paragraph 39(3) applies shall not be taken to fall within this paragraph by reason of having been excluded from paragraph 39.

(jj) 1986 c.53.

(4) Sub-paragraph (2) shall not apply to bills of exchange accepted by a banker.

39.- (1) This paragraph relates to an investment falling within paragraph 26.

(2) So far as it is applicable, paragraph 38(2) shall also apply to such investments.

(3) There shall be excluded any instrument creating or acknowledging indebtedness in respect of -

(a) money received by the Director of Savings as deposits or otherwise in connection with the business of the National Savings Bank; or

(b) money raised under the National Loans Act 1968^(kk) under the auspices of the Director of Savings or treated as so raised by virtue of section 11(3) of the National Debt Act 1972^(ll).

40.--(1) This paragraph relates to an investment falling within paragraph 28.

(2) There shall be excluded any instrument which confers rights in respect of two or more investments issued by different persons or in respect of two or more different investments falling within paragraph 26 and issued by the same person.

41.--(1) This paragraph relates to an investment falling within paragraph 31.

(2) There shall be excluded rights under any contract which is made for commercial and not investment purposes.

(kk) 1968 c.13.

(ll) 1972 c.65.

(3) A contract shall be regarded as made for investment purposes if it is made or traded on a recognised investment exchange or made otherwise than on a recognised investment exchange but expressed to be as traded on such an exchange or on the same terms as those on which an equivalent contract would be made on such an exchange.

(4) A contract not falling within sub-paragraph (3) shall be regarded as made for commercial purposes if under the terms of the contract delivery is to be made within seven days.

(5) But sub-paragraph (4) shall not apply if it can be shown that there existed an understanding that, notwithstanding the express terms of the contract, delivery would not be made within seven days.

(6) The following are indications that a contract not falling within sub-paragraph (4) is made for a commercial purpose and the absence of any of them is an indication that it is made for investment purposes-

(a) either or each of the parties is a producer of the commodity or other property and uses it in his business;

(b) the seller delivers or intends to deliver the property or the purchaser takes or intends to take delivery of it.

(7) It is an indication that a contract is made for commercial purposes that the price, the lot, the delivery date or other terms are determined by the parties for the purposes of the particular contract and not by reference to regularly published prices, to standard lots or delivery dates or to standard terms.

(8) The following are also indications that a contract is made for investment purposes-

(a) it is expressed to be as traded on a market or exchange;

(b) performance of the contract is ensured by an investment exchange or a clearing house;

(c) there are arrangements for the payment or provision of margin.

(9) A price shall be taken to be agreed upon when a contract is made-

(a) notwithstanding that it is to be left to be determined by reference to the price at which a contract is to be entered into on a market or exchange or could be entered into at a time and place specified in the contract; or

(b) in a case where the contract is expressed to be by reference to a standard lot and quality, notwithstanding that provision is made for a variation in the price to take account of any variation in quantity or quality on delivery.

42.--(1) This paragraph relates to an investment falling within paragraph 32.

(2) There shall be excluded rights under a contract if the parties intend that the profit is to be obtained or the loss avoided by taking delivery of any property to which the contract relates.

(3) There shall be excluded rights under a contract under which money is received by way of deposit on terms that any interest to be paid on the sum deposited will be

calculated by reference to fluctuations in an index.

(4) There shall be excluded rights under any contract under which-

(a) money is received by the Director of Savings as deposits or otherwise in connection with the business of the National Savings Bank; or

(b) money is raised under the National Loans Act 1968 under the auspices of the Director of Savings or treated as so raised by virtue of section 11(3) of the National Debt Act 1972.

(5) “Occupational pension scheme” means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employment so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners with a qualifying service in an employment of any such description or category.

PART V INTERPRETATION

43.--(1) In this Schedule, unless the context otherwise requires-

“buying” includes acquiring for valuable consideration;

“contract of insurance” includes the following -

(a) a fidelity bond, a performance bond, an administration bond, a bail bond,

a customs bond, or any similar contract of guarantee;

(b) tontines;

(c) capital redemption contracts;

(d) when effected or carried out by a person whose permission under the Act covers the effecting or carrying out of any contract which is a contract of insurance apart from this sub-paragraph or sub-paragraph (c), a contract to manage the assets of pension funds (other than funds solely for the benefit of officers or employees of the person effecting the contract or carrying it out and their dependants or, in the case of a company, partly for the benefit of officers or employees and their dependants of its subsidiary or holding company or a subsidiary of its holding company);

(d) contracts to pay annuities on human life;

(e) any contract in accordance with which benefits are provided-

(i) for the relief or maintenance of any persons during sickness or when in distressed circumstances; or

(ii) to meet the funeral expenses of any person;

(f) contracts of a kind referred to in article 1(2)(e) of the first life directive;
and

(g) contracts of a kind referred to in article 1(3) of the first life directive;

“contractually based investment” means-

(a) rights under a long term insurance contract which is neither a reinsurance contract nor a contract-

(i) under which the benefits are payable only on death or in respect of incapacity due to injury, sickness or infirmity;

(ii) which provides that benefits are payable on death (other than a death due to accident) only if the circumstances are that the death occurs within ten years of the date on which the life of the person in question was first insured under the contract or that it occurs before that person attains a specified age not exceeding seventy years;

(iii) which has no surrender value or the consideration for which consists of a single premium and the surrender value does not exceed that premium; and

(iv) which makes no provision for its conversion or extension in a manner which would result in its ceasing to comply with subparagraphs (i), (ii) and (iii) above;

(b) any investment falling within any of paragraph 30 to 32; and

(c) any investment falling within paragraph 34 so far as relevant to an investment falling within (a) or (b) above;

“dematerialised instruction”-

(a) in relation to a system falling within paragraph 14(1)(a) has the same meaning as in regulation 3 of the Uncertificated Securities Regulations 1995^(mm); and

(b) in relation to a system falling within paragraph 14(1)(b) means an instruction sent through the medium of computer hardware and software by means of which instructions are authenticated and encrypted for processing by the system;

“deposit” means a sum of money (whether denominated in a currency or in any unit of account defined by reference to the former European currency unit as that was defined in article 1 of Council Regulation No. 3320/94/EC) paid on terms-

(a) under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it; and

(b) which are not referable to the provision of property or services or the giving of security;

“depository” in relation to a collective investment scheme established otherwise than under a trust means any person entrusted with the custody of the property of the scheme;

“establishing”, in relation to a collective investment scheme, includes -

(a) in the case of a scheme which has a separate trustee or depository, acting

^(mm) SI 1995/3272.

as the trustee or depositary of the scheme;

(b) engaging the operator of the scheme; and

(c) determining the constitution of the scheme;

“instrument” includes any record whether or not in the form of a document;

“members of the public”, in relation to a person soliciting them (“the relevant person”), means any other persons except-

(a) authorised persons or exempt persons;

(b) members of the same group as the relevant person;

(c) persons who are or propose to become participators with the relevant person in a joint enterprise;

(d) any person who is solicited by the relevant person with a view to the acquisition by the relevant person of 20% or more of the voting shares in a body corporate;

(e) if the relevant person (either alone or with members of the same group as himself) holds 20% or more of the voting shares in a body corporate, any person who is solicited by the relevant person with a view to-

(i) the acquisition by the relevant person of further shares in the body;
or

(ii) the disposal by him of shares in that body to the person solicited or to a member of the same group as the person solicited;

(f) any person who is solicited by the relevant person with a view to the disposal by the relevant person of shares in a body corporate to the person solicited or to a member of the same group as that person in any case in which the person solicited (either alone or with members of the same group as himself) holds 20% or more of the voting shares in the relevant body corporate;

(g) any person whose head office is outside the United Kingdom, who is solicited by an approach made or directed to him at a place outside the United Kingdom and whose ordinary business involves him in carrying on controlled activities falling within any of paragraphs 5 to 17 and 20;

“property” includes currency of the United Kingdom or any other country or territory;

“security” means any investment falling within any of paragraphs 24 to 29 or, so far as relevant to any of those paragraphs, within paragraph 34;

“selling”, in relation to a contractually based investment which is a long term insurance contract and in relation to an investment falling within any of paragraphs 24 to 34, includes disposing of the investment for valuable consideration, and, for these purposes “disposing” includes-

(a) in the case of an investment consisting of rights under a contract-

(i) surrendering, assigning or converting those rights; or

(ii) assuming the corresponding liabilities under the contract;

(b) in the case of an investment consisting of rights under other arrangements, assuming the corresponding liabilities under the arrangements;
and

(c) in the case of any other investment, issuing or creating the investment or granting the rights or interests of which it consists.

(2) For the purposes of the definition of “deposit” in sub-paragraph (1), money is paid on terms which are referable to the provision of property or services or to the giving of security if, and only if -

(a) it is paid by way of advance or part payment under a contract for the sale, hire or other provision of property or services, and is repayable only in the event that the property or services is not or are not in fact sold, hired or otherwise provided;

(b) it is paid by way of security for the performance of a contract or by way of security in respect of loss which may result from the non-performance of a contract;
or

(c) without prejudice to sub-paragraph (b) above, it is paid by way of security for the delivery up or return of any property, whether in a particular state of repair or otherwise.

(3) For the purposes of this Order, assets shall be regarded as being safeguarded and

administered notwithstanding that-

(a) title to them is held in uncertificated form; or

(b) they have been or are to be transferred to a third party subject to a commitment by the person safeguarding and administering them or arranging for their safeguarding and administration that they will be replaced by equivalent assets at some future date or when so requested by the person to whom they belong.

(4) For the purposes of this Order, a group shall be treated as including any body corporate in which a member of the group has a qualifying capital interest; and, for these purposes -

(a) a qualifying capital interest means an interest in relevant shares of the body corporate which the member holds on a long-term basis for the purpose of securing a contribution to its own activities by the exercise of control or influence arising from that interest;

(b) relevant shares means shares comprised in the equity share capital of the body corporate of a class carrying rights to vote in all circumstances at general meetings of the body;

(c) a holding of 20 per cent or more of the nominal value of the relevant shares of the body shall be presumed to be a qualifying interest unless the contrary is shown.

(5) For the purposes of this Order, a transaction is entered into through a person if

he enters into it as agent or arranges, in a manner which falls within paragraph 11, for another person to enter, as principal or agent, into the transaction.

(6) For the purposes of this Order, none of the following constitutes the administration of assets -

(a) providing information as to the number or value of any assets safeguarded and administered;

(b) converting currency; and

(c) receiving documents relating to an investment solely for the purpose of onward transmission to, from or at the direction of the person to whom the investment belongs.

SCHEDULE 2

Articles 29, 34,
58, 59 and 60

MARKETS AND EXCHANGES

PART I

CRITERIA FOR RELEVANT EEA MARKETS

The criteria are -

(a) the head office of the market must be situated in an EEA State; and

(b) the market must be subject to requirements in the EEA State in which its head

office is situated as to -

- (i) the manner in which it operates;
- (ii) the means by which access may be had to the facilities it provides;
- (iii) the conditions to be satisfied before an investment may be traded or dealt in by means of its facilities;
- (iv) the reporting and publication of transactions effected by means of its facilities.

PART II
CERTAIN INVESTMENT EXCHANGES OPERATING
RELEVANT EEA MARKETS

Aktietorget I Norden (Sweden)
Amsterdam Stock Exchange (Netherlands)
Amsterdam Options Exchange (Netherlands)
Amsterdam Financial Futures Market (Netherlands)
Amsterdam New Market (Netherlands)
Athens Stock Exchange (Greece)
Athens Derivative Exchange (Greece)
Barcelona Stock Exchange (Spain)
Belfox Futures and Options Exchange (Belgium)
Belgian Secondary Market for Treasury Certificates (Belgium)
Berlin Stock Exchange (Germany)
Bilboa Stock Exchange (Spain)

Breman Stock Exchange (Germany)

Brussels Stock Exchange (including Primary, Secondary and New Markets)
(Belgium)

Bavarian Stock Exchange (Germany)

Copenhagen Stock Exchange (Denmark)

Danish Authorised Market Place (Denmark)

Dusseldorf Stock Market (Germany)

EASDAQ (Belgium)

Eurex Deutschland (Germany)

Frankfurt Stock Exchange (including Neuer Markt) (Germany)

Hamburg Stock Exchange (Germany)

Hanover Stock Exchange (Germany)

Hex Ltd (including Helsinki Stock Exchange and Securities and Derivatives
Exchange) (Finland)

IDEM - Derivatives Market (Italy)

IM Marketplace - (Sweden)

Irish Stock Exchange (Ireland)

Italian/Milan Stock Exchange (Italy)

Italian and Foreign Govt. Bonds Market (Italy)

Le MATIF (France)

Le Monep (France)

Le Nouveau Marche (France)

Lisbon Stock Exchange (including Exchanges for the Officially Quoted, Secondary
and Unquoted Markets) (Portugal)

London Stock Exchange (Portugal)

London International Financial Futures and Options Exchange (UK)

Luxembourg Stock Exchange (Luxembourg)

Madrid Stock Exchange (Spain)

MEFF Rent Variable Futures & Options Exchange (Spain)
MEFF Rent fija Equity Futures Exchange (Spain)
Market for Public Debt (Spain)
MIF Derivatives Market (Italy)
Neuvo Mercato (Italy)
OMLX (UK)
OM Stockholm (Sweden)
Paris Stock Exchange (France)
Porto Derivatives Exchange (Portugal)
Unlisted Securities Market (Italy)
Stockholm Stock Exchange (Sweden)
Stuttgart Stock Exchange (Germany)
Swedish Bond & Money Market Exchange (Sweden)
Tradepoint Financial Networks (UK)
Valencia Stock Exchange (Spain)
Vienna Stock Exchange (Austria)

PART III
CERTAIN NON-EEA INVESTMENT EXCHANGES
OPERATING RELEVANT MARKETS

Alberta Stock Exchange
America Stock Exchange Australian Stock Exchange
Basler Effektenbourse
Boston Stock Exchange
Bourse de Geneve
Buenos Aires Stock Exchange

Chicago Board Options Exchange
Cincinnati Stock Exchange
Effektenborsenverein Zurich
Fukuoka Stock Exchange
Hiroshima Stock Exchange
Iceland Stock Exchange
Johannesburg Stock Exchange
Korean Stock Exchange
Kuala Lumpur Stock Exchange
Kyoto Stock Exchange
Midwest Stock Exchange
Montreal Stock Exchange
Nagoya Stock Exchange
NASDAQ
New York Stock Exchange
New Zealand Stock Exchange
Niigata Stock Exchange
Osaka Stock Exchange
Oslo Stock Exchange
Pacific Stock Exchange
Philadelphia Stock Exchange
Sapporo Stock Exchange
Securities Exchange of Thailand
Singapore Stock Exchange
Stock Exchange of Hong Kong Limited
Tokyo Stock Exchange
Toronto Stock Exchange
Vancouver Stock Exchange

Winnipeg Stock Exchange

PART IV
OTHER RELEVANT MARKETS

American Commodity Exchange

Amex Commodity Corporation

Australian Financial Futures Market

Cantor Financial Futures Exchange

Chicago Board of Trade

Chicago Mercantile Exchange

Chicago Rice and Cotton Exchange

Commodity Exchange Inc

Eurex Zurich

International Securities Market Association

International Petroleum Exchange

Kansas City Board of Trade

London Metal Exchange

Mid -America Commodity Exchange

Minneapolis Grain Exchange

New York Board of Trade

New York Futures Exchange

New York Mercantile Exchange

New Zealand Futures Exchange

Pacific Commodity Exchange

Pacific Futures Exchange

Philadelphia Board of Trade

Singapore International Monetary Exchange

Sydney Futures Exchange

Toronto Futures Exchange

Twin Cities Board of Trade

SCHEDULE 3

Article 55

TAKEOVERS OF PRIVATE COMPANIES

PART I

REQUIREMENTS RELATING TO THE OFFER

1. The terms of the offer must be recommended by all the directors of the private company other than any director who is -

(a) the person by whom, or on whose behalf, an offer is made (“offeror”); or

(b) a director of the offeror.

2.--(1) This paragraph applies to an offer for debentures or for non-equity share capital.

(2) Where, at the date of the offer, shares carrying 50 per cent or less of the voting rights attributable to the equity share capital are held by or on behalf of the offeror, the offer must include or be accompanied by an offer made by the offeror for the rest of the shares comprised in the equity share capital.

3.--(1) This paragraph applies to an offer for shares comprised in the equity share capital.

(2) Where, at the date of the offer, shares which carry 50 per cent. or less of the categories of voting rights described in sub-paragraph (3) are held by or on behalf of the offeror, it must be a condition of the offer that sufficient shares will be acquired or agreed to be acquired by the offeror pursuant to or during the offer so as to result in shares carrying more than 50 percent of one or both categories of relevant voting rights being held by him or on his behalf.

(3) The categories of voting rights mentioned in sub-paragraph (2) are -

(a) voting rights exercisable in general meetings of the private company;

(b) voting rights attributable to the equity share capital.

4.--(1) Subject to sub-paragraph (2), the offer must be open for acceptance by every recipient for the period of at least 21 days beginning with the day after the day on which the invitation or inducement in question was first communicated to recipients of the offer.

(2) Sub-paragraph (1) does not apply if the offer is totally withdrawn and all persons released from any obligation incurred under it.

5. The acquisition of the shares or debentures to which the offer relates must not be conditional upon the recipients approving, or consenting, to any payment or other benefit being made or given to any director or former director of the private company in connection with, or as compensation or consideration for, -

- (a) his ceasing to be a director;
- (b) his ceasing to hold any office held in conjunction with any directorship; or
- (c) in the case of a former director, his ceasing to hold any office which he held in conjunction with his former directorship and which he continued to hold after ceasing to be a director.

6. The consideration for the shares or debentures must be -

- (a) cash; or
- (b) in the case of an offeror which is a body corporate other than an open-ended investment company, either cash or shares in, or debentures of, the body corporate or any combination of such cash, shares or debentures.

PART II ACCOMPANYING MATERIAL

7. An indication of the identify of the offeror and, if the offer is being made on behalf of another person, the identity of that person.

8. An indication of the fact that the terms of the offer are recommended by all directors of the private company other than (if that is the case) any director who is the offeror or a director of the offeror.

9. An indication to the effect that any person who is in any doubt about the invitation

or inducement should consult a person authorised under the Act.

10. An indication that, except insofar as the offer may be totally withdrawn and all persons released from any obligation incurred under it, the offer is open for acceptance by every recipient for the period of at least 21 days beginning with the day after the day on which the invitation or inducement in question was first communicated to recipients of the offer.

11. An indication of the date on which the invitation or inducement was first communicated to the recipients of the offer.

12. An indication that the acquisition of the shares or debentures to which the offer relates is not conditional upon the recipients approving, or consenting, to any payment or other benefit being made or given to any director or former director of the private company in connection with, or as compensation or consideration for, -

(a) his ceasing to be a director;

(b) his ceasing to hold any office held in conjunction with any directorship; or

(c) in the case of a former director, his ceasing to hold any office which he held in conjunction with his former directorship and which he continued to hold after ceasing to be a director.

13. An indication of the place where additional material listed in Part III may be inspected.

14. The audited accounts of the private company in respect of the latest accounting

reference period for which the period for laying and delivering accounts under the 1985 Act or the 1986 Order has passed or, if accounts in respect of a later accounting reference period have been delivered under the relevant legislation, as shown in those accounts and not the earlier accounts.

15. Advice to the directors of the private company on the financial implications of the offer which is given by a competent person who is independent of and who has no substantial financial interest in the private company or the offeror, being advice which gives the opinion of that person in relation to the offer.

16. An indication by the directors of the private company, acting as a board, of the following matters -

(a) whether or not there has been any material change in the financial position or prospects of the private company since the end of the latest accounting reference period in respect of which audited accounts have been delivered to the relevant registrar of companies under the relevant legislation;

(b) if there has been any such change, the particulars of it;

(c) any interests, in percentage terms, which any of them have in the shares in or debentures of the private company and which are required to be entered in the register kept by the company under section 325 of the 1985 Act or article 333 of the 1986 Order;

(d) any interests, in percentage terms, which any of them have in the shares in or debentures of any offeror which is a body corporate and which, if the director were a director of the offeror, would -

(i) in the case of a company within the meaning of the 1985 Act or the 1986 Order, be required to be entered in the register kept by the offeror under section 325 of the 1985 Act or article 333 of the 1986 Order; and

(ii) in any other case, be required to be so entered if the offeror were such a company.

17. An indication of any material interest which any director has in any contract entered into by the offeror and in any contract entered into by any member of any group of which the offeror is a member.

18. An indication as to whether or not each director intends to accept the offer in respect of his own beneficial holdings in the private company.

19. In the case an offeror which is a body corporate and the shares in or debentures of which are to be the consideration or any part of the consideration for the offer, an indication by the directors of the offeror that the information concerning the offeror and those shares or debentures contained in the document is correct.

20. If the offeror is making the offer on behalf of another person -

(a) an indication by the offeror as to whether or not he has taken any steps to ascertain whether that person will be in a position to implement the offer;

(b) if he has taken any such steps, an indication by him as to what those steps are; and

(c) the offeror's opinion as to whether that person will be in a position to implement the offer.

21. An indication that each of the following -

(a) each the directors of the private company;

(b) the offeror; and

(c) if the offeror is a body corporate, each of the directors of the offeror;

is responsible for the information required by Part I and this Part of this Schedule insofar as it relates to themselves or their respective bodies corporate and that, to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case) the information is in accordance with the facts and that no material fact has been omitted.

22. The particulars of -

(a) all shares in or debentures of the private company; and

(b) all investments falling within paragraphs 27, 28 or 30 of Schedule 1 so far as relating to shares in or debentures of the private company;

which are held by or on behalf of the offeror or each offeror, if there is more than one, or if none are so held an appropriate negative statement.

23. An indication as to whether or not the offer is conditional upon acceptance in respect of a minimum number of shares or debentures being received and, if the offer is so conditional, what the minimum number is.

24. Where the offer is conditional upon acceptances, an indication of the date which

is the latest date on which it can become unconditional.

25. If the offer is, or has become, unconditional an indication of the fact that it will remain open until further notice and that at least 14 days notice will be given before it is closed.

26. An indication as to whether or not, if circumstances arise in which an offeror is able compulsorily to acquire shares of any dissenting minority under Part XIII A of the 1985 Act or articles 421 or 423 of the 1986 Order, that offeror intends to so acquire those shares.

27. If shares or debentures are to be acquired for cash, an indication of the period within which the payment will be made.

28.--(1) Subject to sub-paragraph (2) , if the consideration or any part of the consideration for the shares or debentures to be acquired is shares or debentures of an offeror -

(a) an indication of the nature and particulars of the offeror's business, its financial and trading prospects and its place of incorporation;

(b) the following information, in respect of any offeror which is a body corporate and in respect of the private company, for the period of five years immediately preceding the date on which the invitation or information in question was first communicated to recipients of the offer -

(i) turnover,

(ii) profit on ordinary activities before and after tax,

(iii) extraordinary items,

(iv) profits and loss, and

(v) the rate per cent of any dividends paid, adjusted as appropriate to take account of relevant changes over the period and the total amount absorbed thereby.

(2) In the case of a body corporate -

(a) which was incorporated during the period of five years immediately preceding the date on which the invitation or information in question was first communicated to recipients of the offer; or

(b) which has, at any time during that period, passed a resolution in accordance with section 252 of the 1985 Act or article 260 of the 1986 Order;

the information described in sub-paragraph (1) with respect to that body corporate need be included only in relation to the period since its incorporation or since it last ceased to be exempt from the obligation to appoint auditors, as the case may be.

29. Particulars of the first dividend in which any such shares or debentures will participate and of the rights attaching to them (including in the case of debentures, rights as to interest) and of any restrictions on their transfer.

30. An indication of the effect of the acceptance on the capital and income position

of the holder of the shares in or debentures of the private company.

31. Particulars of all material contracts (not being contracts which were entered into in the ordinary course of business) which were entered into by each of the private company and the offeror during the period of two years immediately preceding the date on which the invitation or information in question was first communicated to recipients of the offer.

32. Particulars of the terms on which shares in or debentures of the private company acquired in pursuance of the offer will be transferred and any restrictions on their transfer.

33. An indication as to whether or not it is proposed, in connection with the offer, that any payment or other benefit be made or given to any director or former director of the private company in connection with, or as compensation or consideration for -

(a) his ceasing to be a director;

(b) his ceasing to hold any office held in conjunction with any directorship; or

(c) in the case of a former director, his ceasing to hold any office which he held in conjunction with his former directorship and which he continued to hold after ceasing to be a director;

and, if such payments or benefits are proposed, details of each one.

34. An indication as to whether or not there exists any agreement or arrangement between -

(a) the offeror or any person with whom the offeror has an agreement of the kind described in section 204 of the 1985 Act or article 216 of the 1986 Order; and

(b) any director or shareholder of the private company or any person who has been such a director or shareholder;

at any time during the period of twelve months immediately preceding the date on which the invitation or inducement in question was first communicated to recipients of the offer, being an agreement or arrangement which is connected with or dependent on the offer and, if there is any such agreement or arrangement particulars of it.

35. An indication whether or not the offeror has reason to believe that there has been any material change in the financial position or prospects of the private company since the end of the accounting reference period to which the accounts referred to in paragraph 14 relate, and if the offeror has reason to believe that there has been such a change, the particulars of it.

36. An indication as to whether or not there is any agreement or arrangement whereby any shares or debentures acquired by the offeror in pursuance of the offer will or may be transferred to any other person, together with the names of the parties to any such agreement or arrangement and particulars of all shares and debentures in the private company held by such persons.

37 . Particulars of any dealings -

(a) in the shares in or debentures of the private company; and

(b) if the offeror is a body corporate, in the shares in or debentures of the offeror;

which took place during the period of twelve months immediately preceding the date on which the invitation or inducement in question was first communicated to recipients of the offer and which were entered into by every person who was a director of either the private company or the offeror during that period; and, if there have been no such dealings, an indication to that effect.

38. In a case in which the offeror is a body corporate which is required to deliver accounts under the 1985 Act or the 1986 Order, particulars of the assets and liabilities as shown in its audited accounts in respect of the latest accounting reference period for which the period for laying and delivering accounts under the relevant legislation has passed or, if accounts in respect of a later accounting reference period have been delivered under the relevant legislation, as shown in those accounts and not the earlier accounts.

39. Where valuations of assets are given in connection with the offer, the basis on which the valuation was made and the names and addresses of the persons who valued them and particulars of any relevant qualifications.

40. If any profit forecast is given in connection with the offer, an indication of the assumptions on which the forecast is based.

PART III

ADDITIONAL MATERIAL AVAILABLE FOR INSPECTION

41. The memorandum and articles of association of the private company.

42 . If the offeror is a body corporate, the memorandum and articles of association of the offeror or, if there is no such memorandum and articles, any instrument constituting

or defining the constitution of the offeror and, in either case, if the relevant document is not written in English, a certified translation in English.

43. In the case of a private company that does not fall within paragraph 45,

(a) the audited accounts of the company in respect of the last two accounting reference periods for which the laying and delivering of accounts under the 1985 Act or the 1986 Order has passed; and

(b) if accounts have been delivered to the relevant registrar of companies, in respect of a later accounting reference period, a copy of those accounts;

44. In the case of an offeror which is required to deliver accounts to the registrar of companies and which does not fall within paragraph 45 -

(a) the audited accounts of the offeror in respect of the last two accounting reference periods for which the laying and delivering of accounts under the 1985 Act or the 1986 Order has passed; and

(b) if accounts have been delivered to the relevant registrar of companies in respect of a later accounting reference period, a copy of those accounts.

45. In the case of an private company or an offeror -

(a) which was incorporated during the period of three years immediately preceding the date on which the invitation or inducement in question was first communicated to recipients of the offer; or

(b) which has, at any time during that period, passed a resolution in accordance with section 252 of the 1985 Act or article 260 of the 1986 Order;

the information described in whichever is relevant of paragraph 43 or 44 with respect to that body corporate need be included only in relation to the period since its incorporation or since it last ceased to be exempt from the obligation to appoint auditors, as the case may be.

46. All existing contracts of service entered into for a period of more than one year between the private company and any of its directors and, if the offeror is a body corporate, between the offeror and any of its directors.

47. Any report, letter, valuation or other document any part of which is exhibited or referred to in the information required to be made available by Part I and this Part of this Schedule.

48. If the offer document contains any statement purporting to have been made by an expert, that expert's written consent to the inclusion of that statement.

49. All material contracts (if any) of the private company and of the offeror (not, in either case, being contracts which were entered into in the ordinary course of business) which were entered into during the period of two years immediately preceding the date on which the invitation or inducement in question was first communicated to recipients of the offer.

**FINANCIAL SERVICES AND MARKETS BILL - TEXT OF REVISED DRAFT OF
CLAUSE 19**

RESTRICTIONS ON FINANCIAL PROMOTION.

(1) A person ("A") must not, in the course of business, communicate an invitation or inducement to engage in investment activity.

(1A) But subsection (1) does not apply if-

- (a) A is an authorised person; or
- (b) the content of the communication is approved for the purposes of this section by an authorised person.

(2) In the case of a communication originating outside the United Kingdom, subsection (1) applies only if the communication is capable of having an effect in the United Kingdom.

(2A) The Treasury may by order specify circumstances in which a person is to be regarded for the purposes of subsection (1) as-

- (a) acting in the course of business;
- (b) not acting in the course of business.

(3) The Treasury may by order specify circumstances (which may include compliance with rules made under section 116) in which subsection (1) does not apply.

(4) "Engaging in investment activity" means-

- (a) entering or offering to enter into an agreement the making or performance of which by either party constitutes a controlled activity; or
- (b) exercising any rights conferred by an investment to acquire, dispose of, underwrite or convert an investment.

(5) An activity is a controlled activity if-

- (a) it is an activity of a specified kind or one which falls within a specified class of activity; and

(b) it relates to an investment of a specified kind, or to one which falls within a specified class of investment.

(6) Schedule 2 applies for the purposes of subsection (5), with references to section 20 being read as references to that subsection.

(7) Nothing in Schedule 2, as applied by subsection (6), limits the powers conferred by subsection (5).

(7A) "Communicate" includes causing a communication to be made.

(8) "Investment" includes any asset, right or interest.

(9) "Specified" means specified in an order made by the Treasury.

RESPONDENTS TO THE MARCH CONSULTATION DOCUMENT ON FINANCIAL PROMOTION

American Banking & Securities Association of London

Amhurst Brown Colombotti

Association of Private Client Investment Managers and Stockbrokers (APCIMS)

Arnheim Tite & Lewis

Association of British Insurers (ABI)

Association of Unit Trusts & Investment Funds

AXA Investment Managers

AXA Sun Life Services

Bankers Trust International PLC

Barclays

Beer & Partners

British Venture Capital Association (BVCA)

British Bankers' Association (BBA)

British Property Federation

Building Societies Association

Business Angels International

Charles Schwab

Churchill Insurance

Clifford Chance

Commonwealth Bank of Australia

Credit Industry Fraud Avoidance System

Denton Hall

Ernst & Young

Eversheds
Faculty & Institute of Actuaries
Family Assurance Friendly Society Group
Fidelity Investments
Freshfields
Fund Managers' Association (FMA)
Future Industry Association (FIA)
Halifax plc
Hermes Pensions Management Ltd
HSBC Holdings plc
Independent Television Commission
Invest TV
Investment and Life Assurance Group (ILAG)
Investment Company Institute (ICI)
J P Jenkins Ltd
Kingston Smith
Liverpool Victoria The Friendly Society
Lloyd's
Local Authorities Coordinating Body on Food & Trading Standards (LACOTS)
London Stock Exchange
London Investment Banking Association (LIBA)
Mercury Asset Management
Midland Bank
Morgan Stanley Dean Witter
Murray Beith Murray WS
National Federation of Consumer Groups (NFCG)
NatWest Group
Norwich Union

Oxford Technology VCT
Personal Investment Authority
Political, Editorial & Regulatory Affairs
Proshare Ltd
Real Time Club
REUTERS Limited
Ruffer Investment Management Limited
Securities Institute
Skandia Life
Swiss Life
The M&G Group
The Association of Friendly Societies (AFS)
The Law Society
The Law Society's Company Law Committee
The Futures & Options Association
The Institute of Chartered Accountants
The City of London Law Society
The Business Angel Networks Association
The Chartered Insurance Institute
The Institute of Chartered Secretaries and Administrators
Warburg Dillon Read
Watson Wyatt Worldwide
Zurich Financial Services

Individuals

Helena Wiesner
Ian Dickson
Jenny Goldsmith

Toby Micklethwait

REGULATORY IMPACT ASSESSMENT

- 1, This Regulatory Impact Assessment concerns the draft Financial Promotion (Exemptions) Order under clause 19 of the Financial Services and Markets Bill. The content of promotional communications by unauthorised persons which fall within clause 19 of the FSM Bill will have to be approved by an authorised person unless the promotion falls within a relevant exemption in the Financial Promotion (Exemptions) Order. Where an unauthorised person makes a promotional communication falling within clause 19 which does not fall within a relevant exemption and the content of which has not been approved by an authorised person, the unauthorised person will be committing a criminal offence and agreements resulting from the communication may be unenforceable against the customer.
2. This structure is similar to the investment advertisement regime of clause 57 of the Financial Services Act 1986 (“FS Act”).

Purpose and effects of the measure

3. The Financial Services and Markets Bill, which was published in draft for consultation in July 1998, will, when enacted, replace the regulatory arrangements currently contained in the FS Act, the Banking Act 1987, the Insurance Companies Act 1982, the Building Societies Act 1986 and the Friendly Societies Act 1992. It creates a single statutory regulator for the UK financial services industry, with a single set of functions and powers. The Regulatory Impact Assessment for the Bill was published when the Bill was introduced to Parliament earlier this summer.
4. Clause 19 of the Bill (as amended in Commons Committee on 22 July 1999) contains a prohibition on financial promotions by unauthorised persons. Communications by unauthorised

persons are prohibited where:

- S the promotion is made in the course of business (and the Treasury may, by subclause (2A), by order specify circumstances in which a person is to be regarded as acting in the course of business or not acting in the course of business for this purpose); and
- S the communication amounts to an invitation or inducement; and
- S the invitation or inducement to engage in investment activity relates to a controlled activity (and the Treasury intends, by subclause (9), by order to specify controlled activities for the purpose of this clause); and
- S where the communication does not fall within an exemption (and the Treasury intends, by subclause (3), by order to specify circumstances in which the financial promotion prohibition will not apply. These circumstances may include compliance with financial promotion rules made by the FSA under clause 116).

5. The draft order contained in this consultation document is the order which the Treasury proposes in due course, subject to consultation responses, to lay before Parliament under the powers contained in subclauses (2A), (3) and (9) of clause 19 of the Bill.
6. The financial promotion provisions will regulate promotion of financial services including insurance, banking (deposit-taking) and investments. Investments which are commonly promoted by unauthorised persons under the investment advertisement regime of the FS Act include public offers of securities (other than those involving a prospectus or listing particulars), private offers of securities and newspaper box advertisements. Other, less common, situations include where a firm has an investment advertisement approved by another member of its group (for example, to allow a product from an overseas subsidiary to be marketed in the UK), where an overseas product provider which is not part of a UK-based group gets its advertisement approved by a UK authorised person, and where a trade body wishing to promote products gets advertisements approved by one of its member firms.

7. Given that clause 19 and this order largely replace the investment advertisement regime of the FS Act 1986 and its associated secondary legislation, together with provisions in other predecessor legislation on advertisements of, for example, insurance and banking services, this assessment focuses on the main changes (and the associated costs and benefits) from the predecessor regimes to the regime which will be introduced by the FSM Bill.

Main changes

8. There are two notable changes proposed compared with the scope of current legislation. First, the proposed financial promotion regime only applies to communications which may be considered an invitation or an inducement, whereas the investment advertisement regime under the Financial Services Act 1986 applies to any advertisement including those which may only indirectly lead persons to enter into an investment agreement although the concept of “advertisement” does require a promotional element. Second, the financial promotion regime only applies to promotions made in the course of business, whereas the investment advertisement regime (but not the unsolicited calls regime under clause 56 of the FS Act) applies to all advertisements without restriction to advertisements issued in the course of business.
9. The other major change is that the financial promotional regime potentially applies to all methods and media of communications whether they are “advertisements” or not. This approach has been adopted to prevent regulation becoming outdated by increasing use of new media techniques which might or might not fall within existing definitions of advertisements.
10. There should be no or minimal additional costs or benefits associated with the provisions of the draft Financial Promotion (Exemptions) Order which specify controlled activities for the purposes of clause 19 under the power in subclause (9). The activities which are controlled for

the purposes of clause 19 are essentially intended to be broadly the same as those for which advertisement regulations apply under the FS Act and other predecessor legislation relating to eg. banking and insurance.

11. In addition, the provisions in clause 19 which restrict the financial promotion regime to promotions in the course of business serve to reduce current regulation and associated compliance costs on persons who are not acting in the course of business (such as private individuals advertising shares they own to several friends) without adding additional burdens to those persons who are making financial promotions while acting in the course of business.
12. The major changes from the current regime therefore result from the provisions of the Financial Promotion (Exemptions) Order which specify circumstances in which the financial promotion regime does not apply under the power in subclause (3). While many exemptions (such as those frequently used by larger companies for listing particulars or prospectuses) to the investment advertisement regime will be replicated in the proposed financial promotion exemptions, it is proposed that the financial promotion exemptions made in the Financial Promotion (Exemptions) Order will differ in some instances from the Investment Advertisement (Exemptions) Orders made under the Financial Services Act 1986, and from similar provisions relating to advertisements in predecessor legislation.
13. The main additional exemptions proposed in the draft Financial Promotions (Exemptions) Order are:
 - S An exemption for financial promotions not directed at the United Kingdom.
 - S An exemption for passive communications providers (or “mere conduits”).
 - S An exemption for generic promotions.
 - S An exemption for promotions to high net worth or sophisticated individuals.

14. Other proposed changes which serve to reduce regulation of promotional material include the proposal to allow promotions directed at a particular audience to be available to a wider audience so long as systems are in place to prevent investors outside the target group from participating in the financial product or service.
15. The main areas which it is proposed to regulate under clause 19 of the FSM Bill and which are not currently regulated under the Financial Services Act relate to:
 - S certain types of solicited calls which do not benefit from a generalised exemption
 - S the regulation of financial promotions out of the United Kingdom by unauthorised persons. (The current position regarding whether investment advertisements by unauthorised persons out of the United Kingdom are regulated under the Financial Services Act 1986 is open to debate. The FSA does however impose rules in relation to outward investment advertisements issued by authorised persons).

Cost of approving investment promotions

16. In determining the regulatory impact of these changes, the cost to be considered is the cost of obtaining approval by an authorised person of the contents of a communication. The financial promotion regime permits promotional communications by unauthorised persons where the content of the communication has been approved by an authorised person.
17. Under the investment advertisement regime of the Financial Services Act 1986, it is estimated that the costs of approval by an authorised person (separately from other legal or financial advisory work provided by such an authorised person) may be in the region of 1.5 hours of time by an external lawyer per page of investment advertisement to be approved. At a rate of £120 an hour (and firms may charge at higher rates), a twenty page investment advertisement may therefore cost in the region of £3-4,000 for approval. The exact amount will of course depend on the nature of the material being approved, depending on whether its contents were

largely factual or made general statements about, for example, the company issuing the securities which are more difficult to verify.

18. It is not expected that the costs of obtaining approval of the contents of a financial promotion by an authorised person under the financial promotion regime will differ from the costs of obtaining approval of an investment advertisement under the FS Act. It is thought that the number of authorised firms, including firms currently authorised by recognised professional bodies (RPBs), may decline in response to proposals designed to reduce unnecessary or precautionary authorisation. However, only a small proportion of authorised professional firms make a business of approving investment advertisements for others, and those firms that wish to approve funding advertisements will need to retain authorisation in order to do so.
19. However, the circumstances where it will be necessary to obtain the approval of an authorised person will be altered, as mentioned above. In some circumstances, exemptions from the financial promotion regime may be available which are not currently available under the investment advertisement regime. On the other hand, the financial promotion regime will clearly apply to promotions by unauthorised persons out of the UK.
20. The financial promotion regime will also regulate the promotions of general insurance and deposit-taking which were previously regulated under advertisement provisions in legislation other than the Financial Services Act 1986. However, the provisions in various insurance and banking regulations are effectively being continued by the provisions in the draft Financial Promotion (Exemptions) Order, and should not give rise to any significant additional costs.

Benefits

21. The proposed changes outlined in paragraphs 8 to 15 above will be beneficial in various ways. The exemptions for promotions not directed at the United Kingdom and for passive

communications providers should assist the UK regulatory regime in adapting to the growth in importance of new technologies including (but not limited to) the Internet. Regulatory and other legal uncertainties about these new technologies are one current impediment to consumers and business in making full use of these new technologies.

22. The proposed exemption for generic promotions will provide consistency with the scope of regulated activities under the Bill where generic advice, not relating to a particular investment, falls outside the scope of regulated activities under the Bill. Generic investment advertisements were not exempted under the FS Act investment advertisement regime.
23. The proposed exemptions to permit unapproved financial promotions to certain categories of private investor should have considerable benefits on the ability of smaller companies to find the risk capital they need to grow and expand. It has been estimated that the costs of approval of investment advertisements may, in some circumstances, be as much as two thirds of the costs of legal and financial advice associated with offers of securities in smaller companies.

Cost for business

24. As outlined above, the most significant proposals which increase regulation compared with the predecessor legislation relate to the clear inclusion of financial promotions out of the United Kingdom within the ambit of clause 19, and also the inclusion of certain solicited calls and other solicited real-time interactions.
25. This approach in relation to “outward” promotions may result in dual regulation of financial promotions made by unauthorised UK firms across borders, at least in advance of any more general move to “home state” regulation by, for example, the European Union, with UK firms needing to meet two sets of regulatory criteria which may not be well aligned.

26. However the additional costs imposed by this regime may be alleviated by the FSA's power to make rules which, in full awareness of the dual regulation issue and its associated costs, adopt a "light touch" approach to making rules in relation to the approval by authorised persons of outward promotions which are compliant with the host country's regulations, where these achieve an adequate level of sophistication.
27. As for the inclusion of certain types of solicited call within the regulatory net, it is thought that the provision of a suitably wide range of exemptions should ensure that in appropriate cases, solicited calls may still be made without requiring the approval of an authorised person.

Total compliance costs

28. It is difficult to estimate the total effect on compliance costs. However, whether compliance costs are increased or decreased in total would be determined by whether the additional compliance costs associated with regulating solicited calls or financial promotions out of the UK is greater or less than the reduced compliance costs associated with no longer regulating financial promotions which are not made in the course of business, or which will fall within one of the proposed new exemptions outlined above in paragraphs 8 to 15. It is submitted that the proposed new exemptions will outweigh the additional costs on outward promotions and therefore that total compliance costs will be reduced.

Impact on small business

29. The proposals for the introduction of exemptions for offering securities to high net worth and sophisticated individuals have been introduced with the particular aim of facilitating fund raising by small and medium-sized companies, although they will of course permit financial promotions in relation to a wider range of investments to be made without the approval of an authorised person.

Identification of other costs

30. None.

Summary and Recommendation

31. The scope of regulated investment activities is being expanded to include outward financial promotions by authorised persons, and certain solicited calls, and cut back to permit unapproved financial promotions to high net worth and more sophisticated individuals and to adapt the regulatory regime better to changes in technology. Comments are invited on the assumptions made and resulting estimates in this draft Regulatory Impact Assessment.

ANNEX D

TABLE OF DESTINATION OF EXEMPTIONS UNDER SECTIONS 56 TO 58 OF THE FINANCIAL SERVICES ACT 1986

N.B. Illustrative only. Process of rationalising and updating means that parallels are not exact.

Section 58 FS Act	Destination in draft Financial Promotion (Exemptions) Order
s 58(1)(a)(i)	Article 24
s 58(1)(a)(ii)	Article 24
s 58(1)(a)(iii)	Article 25
s 58(1)(a)(iv)	Article 24
s 58 (1)(b)	Article 28
s 58(1)(c)	Article 27
s 58(1)(d)(i)	Article 61
s 58(1)(d)(ii)	Article 62
s 58(6)	Article 27

1995 Order	Destination in draft Financial Promotion (Exemptions) Order
Article 3	Article 30
Article 4	Article 55
Article 5	Article 54
Article 6	Not carried forward
Article 7	Articles 31 and 48

Article 8	Article 39
Article 9	Article 39
Article 10	Article 39
Article 11	Article 58
Article 12	Article 29
Article 13	Article 26
Article 14	Articles 59 and 64
Article 15	Article 18

1995 Order	Destination in draft Financial Promotion (Exemptions) Order
Schedule 1	Schedule 2 (Parts I and II)
Schedule 2	Schedule 2 (Part III)
Schedule 3	Schedule 2 (Part IV)
Schedule 4	Schedule 3, Articles 5 and 55

1996 Order	Destination in draft Financial Promotion (Exemptions) Order
Article 3	Articles 36 and 37
Article 4	Articles 51 and 60
Article 5	Articles 34 and 35
Article 6	Article 52
Article 7	Article 38
Article 8	Article 32
Article 9	Article 53
Article 10	Article 20
Article 11	Articles 23, 39, 40 and 42

Article 12	Article 44
Article 13	Article 45
Article 14	Article 33
Article 15	Not carried forward
Article 16	Article 29
Article 17	Article 50
Article 18	Article 47

1996 Order	Destination in draft Financial Promotion (Exemptions) Order
Schedule 1	Schedule 2 (Parts I and II)
Schedule 2	Schedule 2 (Part III)
Schedule 3	Schedule 2
Schedule 4	Article 44

CUC Regulations 1991	Destination in draft Financial Promotion (Exemptions) Order
Article 1	Articles 21, 39 and 42
Article 2	Not carried forward
Article 3	Article 66
Article 4	Article 20
Article 5	Not carried forward
Article 6	Not carried forward
Article 7	Articles 54 and 65
Article 8	Article 45
Article 9	Article 52

Article 10	Article 67
Article 11	Not carried forward
Article 12	Not carried forward
Article 13	Article 39
Article 14	Not carried forward
Article 15	Not carried forward