

New Financial Promotions Restrictions

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By Lee Werrell Chartered FCSI FISMM



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The excitingly named "PS14/4 - The FCA's regulatory approach to "crowd-funding" over the internet, and the promotion of non-readily realisable securities by other media" has been released by the FCA and although the policy statement is primarily concerned with "crowd-funding", the restrictions go far beyond this.

Is this a product of unintended consequences or is it that the new requirements will apply irrespective of the medium used.

So what are "Non-readily realisable securities"?

The Policy Statement refers to and defines "non-readily realisable securities" as: illiquid, hard-to-price securities for which there is no, or only a limited, secondary market. The new term catches all securities that are not "readily realisable securities" (e.g. listed shares), "packaged products" (e.g. authorised funds) or "non-mainstream pooled investments" (e.g. UCIS) for which there are sufficient rules.

To better align the illiquid shares and debentures intended to be covered the FCA have amended the text by replacing 'unlisted share and unlisted debt security' with a new defined term for 'non-readily realisable security'. This term will apply to securities that are not 'readily realisable securities', 'packaged products' or 'non-mainstream pooled investments'

COBS 4.7 Direct Offer Financial Promotions

The **rules only apply** to direct offer financial promotions.

A direct offer financial promotion is one that contains:

- (a) an offer by the firm or another person to enter into a controlled agreement with any person who responds to the communication; or
- (b) an invitation to any person who responds to the communication to make an offer to the firm or another person to enter into a controlled agreement; and which specifies the manner of response or includes a



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form by which any response may be made.

A communication which simply gives marketing information about the promoter of an offer, or information about who can be invited to invest, would fall outside the scope of the rules, but an information memorandum or offer document containing an application form or even a website URL that contains such a form, will be caught.

COBS 4.7 has been amended appropriately from the effective date; 1 April 2014. There will be a transitional period whereby firms will have the option of either complying with the new rules from 1 April 2014, or complying with existing rules until 1 October 2014 and then applying the new rules from that date.

Who is specifically affected by these new rules?

Effectively this applies to all authorised persons who communicate **or** approve the content of a direct offer financial promotion relating to any non-readily realisable security (NRRS) as defined above.

Permitted categories of investor

The good news doesn't stop there. Under these new rules, direct offer financial promotions for NRRS may only be made to certain types of investor.

These are:

- (a) Professional clients
- (b) Retail clients who confirm that, in relation to the investment promoted, they will receive regulated investment advice or investment management services from an authorised person
- (c) Retail clients who are venture capital contacts or corporate finance contacts
- (d) Retail clients who are certified or self-certify as sophisticated investors
- (e) Retail clients who are certified as high net worth investors
- (f) Retail clients who certify that they have not invested, and will not invest, more than 10% of their net investible financial assets in non-readily realisable securities.

The last category of investor (called "restricted investors") is new. There is a form of certification for such investors, which lasts for 12 months after the date of the statement.

Firms need to satisfy themselves that there is a valid statement in place at the time of communicating the promotion, but do not need to ensure that individuals who subsequently invest continues to qualify as 'restricted investors' on an ongoing basis.

Compliance Consultant Tip: it would be good practice to obtain a copy of the annual statement on investment reviews.

COBS 10 Appropriateness test

A further condition is imposed, which must be satisfied before the financial promotion can be communicated or approved. The firm itself, or the person who will arrange or deal in relation to the non-readily realisable security, must comply with the COBS rules on appropriateness or equivalent

requirements in relation to any application or order that the person is aware, or should be aware, is in response to the direct offer financial promotion.

The appropriateness requirement is, broadly, to seek information from the investors that would enable an assessment to be made whether the investor has the knowledge and experience necessary to understand the risks connected with the non-readily realisable security. This seems likely to result in all applications being channelled through an authorised person, and a firm approving an affected financial promotion will need to be satisfied that this is the case.

Compliance Consultant Tip: Firms can integrate the client certification and appropriateness test requirements if they wish. However, to be compliant, it would need to be a pre-promotion process.

Impact

The rules will have a significant impact on those who advise clients on unlisted securities (including EIS and SEIS offers) as well as loan notes. It will, of course, also affect firms who approve financial promotions for such offerings. Note that the new rules only apply to authorised persons: so, if an offer document does not need to be approved under s21 FSMA (for example, because of an exemption under the Financial Promotion Order applies), the current rules will still apply.

Summary

The regulator considers different offers will involve different risks, which need to be explained in a **fair, clear** and **not misleading** way. They also consider the firm promoting the investment, rather than any unauthorised and even totally unconnected bloggers, to be responsible for ensuring that fair, accurate, balanced and sufficient information is provided to investors.

Compliance Consultant Tip: If you operate any form of Distance Marketing, which may include Social Media, get a check up with the “Compliance Doctor” who has published books on the subject. Ask for a free copy of the Ebook “Social Media in Financial Services” from info@complianceconsultant.org or download from [HERE](#).



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