

Strengthening the role of authorised firms communicating and approving financial promotions

Impact on equity capital markets transactions

On 19 January 2022, the FCA published consultation paper [CP22/2](#) in which it proposes various changes to, among other things, the role of authorised firms in communicating and approving financial promotions. Whilst the stated focus of the paper is financial promotions in connection with high-risk investments, including cryptoassets, some of the proposed reforms will have wider implications, including for the systems and controls used by authorised persons when approving financial promotions in the context of an equity capital markets transaction.

Background

The consultation paper builds on questions asked in [Discussion Paper DP21/1](#) and forms part of the FCA's [Consumer Investments Strategy](#) published on 15 September 2021. The proposals also complement work by HM Treasury to improve the financial promotions regime more generally.

The proposed changes are designed to improve the quality and content of financial promotions to enable retail investors to make more informed and effective investment decisions about any given product, and how much to invest. This is to be achieved by ensuring the quality, competence and expertise of firms approving financial promotions.

Competence and expertise

The FCA has identified that its existing rules do not contain a specific restriction on firms approving financial promotion for products or services where they lack relevant expertise. To address this concern, the consultation paper proposes to introduce a new rule that will require firms to self-assess whether they have the necessary competence and expertise (“C&E”) in an investment product or service before approving a relevant financial promotion.

As part of this assessment, the draft non-Handbook guidance included with the consultation paper proposes that, as a minimum, firms should consider for each financial promotion:

- whether it has adequate resources, systems and controls in place to approve and monitor the financial promotion, particularly when approving volumes of promotions;
- whether it has the relevant experience and/or qualifications in the investment product/sector that is the subject of the financial promotion; and
- the previous employment history and qualifications of the individuals responsible for approving promotions and whether they align with the product and sector underlying the promotion.

Firms will be expected to keep an up to date record of how they have met the C&E requirement for any given financial promotion as part of their usual record-keeping obligations under COBS 4.11.1R.

It is not clear from the draft guidance whether the “sector” analysis referred to above is, in the context of an equity capital markets transaction, intended to relate to the relevant product (e.g., shares) or the market sector in which the issuer of those shares operates. Whilst we believe, given the proposed wording of the relevant rules and the commentary elsewhere in CP 22/2, that experience of a sector should be read as experience of offering shares, clarity on this point would be welcomed.

Whilst authorised firms should already be considering C&E before communicating or approving financial promotions, the FCA views the new rules as focusing firms’ attention on whether they have the appropriate in-house skills, knowledge and expertise to understand the product or service in order to ensure that the financial promotion meets the FCA’s requirements.

The consultation paper also notes that the FCA has considered the potential interaction of the C&E requirement with the Senior Managers and Certification Regime (“SMCR”) as there is currently no ‘prescribed responsibility’ that relates to financial promotions from a SMCR perspective or additional information that firms need to disclose as a result of the SMCR. Whilst the FCA is not making any proposals now, it will consider whether it should incorporate the C&E requirements into the SMCR as part of its broader review of the SMCR in the future.

Ongoing monitoring

Once a financial promotion is approved on behalf of an unauthorised person, the authorised person must withdraw their approval if they become aware that the promotion is no longer compliant.

The FCA proposes to extend this obligation

to require approvers of financial promotions to play an active role in ensuring approved promotions remain compliant for the lifetime of the promotion, moving away from a “once and done” approach. The new rule will also require any approver of a financial promotion to have a continuing relationship for the life of the promotion with those for whom they approve the promotion and to actively monitor the promotion after approval for any changes that might mean the promotion is no longer compliant.

As set out in DP21/1, in meeting this requirement reasonable steps will need to be taken to consider whether:

- there have been any changes to the promotion which mean it is no longer being lawfully communicated;
- there have been any changes which may affect whether the promotion continues to be clear, fair and not misleading, including consideration of the ongoing commercial viability of the proposition described in the promotion (this will also include an assessment of whether any headline rates of return continue to be reasonably achievable);
- funds raised are being used for the purposes described in the promotion; and
- the promotion complies with any new requirements the FCA may introduce.

To assist with the monitoring obligations, the FCA also proposes that approvers of financial promotions will be required to collect attestations of ‘no material change’ from those for whom they approve the promotion every three months for the lifetime of the promotion.

In practice, for equity capital markets transactions this shouldn’t present too many issues, although in the context of an IPO where the “expected intention to float” announcement is published up to five weeks ahead of the closing of the offer, additional assessments and confirmations may be required at certain milestones in the process. Records will have to be kept of these assessments.

Other points to note

Regulatory gateway

In June 2021, HM Treasury [confirmed](#) that the Government intends to legislate to introduce a new regulatory gateway for firms approving promotions for unauthorised persons (the “s21 gateway”). The indication from HM Treasury is that the FSMA would be amended to remove the general ability to communicate financial promotions which have been approved by authorised persons. Instead unauthorised persons would only be able to communicate their own financial promotions if those promotions had been approved by an authorised person which had obtained consent from the FCA to provide such approval. The proposed legislation will also impose a new ‘Financial Promotion Requirement’ on all existing and newly authorised firms’ permissions that prohibits them from approving financial promotions for unauthorised persons, other than for a person in the same group or an appointed representative (as defined in the Handbook).

Firms wanting to approve financial promotions will have to apply to the FCA to have the prohibition removed, either entirely (allowing them to approve all types of financial promotions) or partially (allowing them to approve certain types of financial promotions). Firms would do this using a “variation of requirement”. The FCA will not be required to grant permission on a promotion by promotion basis but any permission could be limited to a specific type or types of products and services dependent on a firm’s expertise. The FCA will consult on draft guidance for firms applying to have the prohibition removed when legislation has been published.

The new rules regarding competence and expertise referred to above are intended to complement the s21 gateway and ensure all authorised firms approving financial promotions for unauthorised persons are operating to the same high standard as authorised firms when communicating their own promotions.

Legends

CP 22/2 proposes the legend on a financial promotion should include a date stamp as to when it was approved as a financial promotion.

Exemptions

Whilst the proposed changes in the consultation paper will have no impact where an unauthorised person uses an exemption under the Financial Services and Markets Act (Financial Promotion) Order 2005 (the “FPO”) to promote investments, the FCA welcomes the Government’s [consultation](#) on reforming the exemptions for high net worth individuals and sophisticated investors under the FPO.

What happens next?

The consultation closes on 23 March 2022 and the FCA aims to publish a Policy Statement and final Handbook rules in summer 2022. It will then give firms three months from publishing final rules to comply with the new requirements.

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