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SIDLEY AUSTIN BROWN & WOOD
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UK REGULATION OF ONLINE FINANCIAL PROMOTION

April 2003

INTRODUCTION

1. This paper will deal with the application of:
 - section 21 of the Financial Services and Markets Act 2000 (the "FSMA");
 - the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (the "Financial Promotion Order") and amendments thereto; and
 - the financial promotion rules in the Conduct of Business Sourcebook ("COBS").
2. This paper is intended to give an overview of the main aspects of the above rules and how they apply to online financial promotions.

SECTION 21 OF THE FSMA – THE FINANCIAL PROMOTION RESTRICTION

3. The basic rule is contained in section 21 of the FSMA, the essence of which is as follows:

"(1) A person ("A") must not, in the course of business, communicate an invitation or inducement to engage in investment activity.

(2) 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."

or an exemption applies.
 4. The rule in Section 21(1) is sometimes referred to as the "financial promotion restriction". A breach of the financial promotion restriction is a criminal offence and any resulting contract is unenforceable against the other party. The substance of the definition of "engaging in investment activity" and exemptions from the prohibition contained in section 21, are left to be specified by the Treasury by order, the Financial Promotion Order.
 5. Although the restriction contained in Section 21 of the FSMA is directed at the activities of unauthorised persons, it is still relevant for authorised firms in that it provides the definition of what amounts to a financial promotion. An authorised person proposing to issue or approve a communication falling within section 21 of the FSMA must also comply with the financial promotion rules contained in COBS3. Depending on the nature of the communication and the audience, this may include due diligence requirements, requirements for particular disclosures, risk warnings,

etc.

COURSE OF BUSINESS

6. The prohibition only applies to communications by a person acting "in the course of business". Although the Treasury has the power to specify circumstances in which a person is to be regarded as acting (or not acting) in the course of business, it has indicated that it is not intending to exercise this power for the time being and the phrase is to be given its ordinary meaning.
7. The FSA, in its guidance in the Authorisation Manual ("AUTH") Appendix 1, considers that "in the cause of business" requires a commercial interest on the part of the communicator.
8. The requirement of "in the course of business" eliminates the possibility that Section 21 would otherwise cover personal communications between individuals, for example a conversation at a dinner party.
9. The communication can, however, be in the course of any business, it does not have to be in the course of regulated business. For example, if two commercial companies enter into correspondence about the possible acquisition by one of them of a subsidiary of the other, many items of the correspondence will in all probability constitute "communications" within section 21.

COMMUNICATIONS

10. The FSA confirms, in AUTH Appendix 1, that it is of the view that a person is communicating where he gives material to the recipient or where, in certain circumstances, he is responsible of transmitting the material on behalf of another.
11. Section 21(13) provides that "communicate" includes causing a communication to be made. In the Third Consultation Document on Financial Promotion, the Treasury indicated that it was its intent that "responsibility for communication should lie with the originator".
12. While this indication of intent is helpful, it is not clear from the face of the provisions of the FSMA that this is indeed the intent, and while there are helpful exclusions in the Financial Promotion Order with respect to "mere conduits" of information and journalists, this will be an area to consider carefully in the context of providing any advice.
13. The FSA in AUTH Appendix 1, gives examples of when a person will be viewed as communicating or causing a communication. Apart from the originators of a financial promotion, the FSA considers publishers and broadcasters who carry advertisements (including websites carrying banner advertisements) and intermediaries who redistribute another person's communication (probably with their own communication) will be communicating or causing a communication. A person responsible for securing the placing of an advertisement where they are not responsible for its contents would not be causing or communicating.

14. As part of the Government's consultation on the FSMA, consideration was given as to whether links, even though they are not considered promotional in themselves, might still amount to an unlawful promotion on another's website to be communicated. A specific exemption for certain hypertext links had been proposed where the link contained nothing more than the name of the other person's website. However, the FSA have now dropped the proposal for an exemption and consider that a link will be caught only if the link itself, not the website to which it leads, constitutes an invitation or inducement to engage in investment activity. This accords with the Treasury's intention that responsibility for a promotion should lie with the originator.

INVITATION OR INDUCEMENT

15. While section 21 is headed "financial promotion", this is somewhat misleading as the heading itself is the only reference in the FSMA to "financial promotion" and there is nothing in section 21 that requires the person who makes a communication to have an intention to "promote". Communications are caught if they are an invitation or inducement.
16. FSMA does not contain a definition for "invitation" or "inducement", leaving them to their natural meaning. The Treasury responded stating its intention that only communications containing a degree of incitement would amount to an inducement, unlike information comprising purely factual information.
17. The FSA has provided guidance on the meaning of "invitation" and "inducement" in AUTH Appendix 1. The FSA considers that it is appropriate to apply an objective test. In the FSA's view, the essential elements of an invitation or an inducement are that it must both have the purpose or intention of leading a person to engage in investment activity and be promotional in nature. It must therefore seek to persuade or encourage the recipient to engage in investment activity. Would a reasonable observer, taking account of all the circumstances at the time the communication was made:
- consider that the communicator intended to persuade or encourage the receiver to engage in investment activity, or that that was its purpose; and
 - regard the communication as seeking to persuade or encourage the recipient to engage in investment activity?
18. A communication which does not have any element of persuasion or incitement will not be an invitation or inducement under Section 21.
19. Communications, which are purely profile raising, such as a firm's name on a pencil etc, and which do not identify and promote a particular investment or investment services, may not amount to either an invitation or inducement.
20. The FSA views an invitation as something which directly invites a person to take a step which will result in his engaging in investment activity. The FSA has given

some examples of financial promotions which could amount to an invitation. These are direct offer advertisements, prospectuses with application forms or internet promotions by brokers where the response from the consumer will initiate activity (such as register with us now and begin dealing on line), etc.

21. A communication could amount to an inducement, even though it is not itself an invitation, but a step in a chain which can lead, either directly or indirectly, to a person engaging in investment activity. Not all the links in the chain will be an inducement but only those that are significant steps in persuading or encouraging or seeking to persuade a recipient to engage in investment activity.
22. AUTH 1.4.11 discusses links to websites. Links on a website may be an inducement. Links containing only a name or logo will not be an inducement, however, if they are accompanied by or included within a narrative, it would depend upon the extent to which the narrative seeks to persuade or incite persons to use the link for the purpose of investment activity. Banner advertisements are the internet equivalent of an advertisement in a newspaper and are likely to be inducements. Whether they are inducements to engage in investment activity will depend upon their contents as with any other form of advertising.
23. League tables showing the past performance of investment products of a particular kind or investment firms of a particular class and determined by the application of pre-set criteria will not in the FSA's view, in themselves, be inducements. The fact that such tables represent mere information should be made clear by their being accompanied by a statement to the effect that the fact of a product or firm being well placed in the tables based on past performance is no guide to their likely future performance. The effectiveness of such a statement will, of course, depend upon it being the case that they do, in fact, represent mere information. If, for example, the tables are accompanied by or presented or provided in a way that they are an actual or implied recommendation that a particular products performance suggests it is a potential buy or sell they may become inducements.

ENGAGING IN INVESTMENT ACTIVITY

24. An invitation or inducement, to be within the scope of Section 21, must be to "engage in investment activity". A person may engage in investment activity without carrying on an activity which requires authorisation under the FSMA. Section 21(8) defines "engaging in investment activity" as:
 - (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 a controlled investment to acquire, dispose of, underwrite or convert a controlled investment".
25. Controlled activities and controlled investments are essentially those activities and investments identified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("**RAO**"). Note, however, that the exclusions set out in the

RAO, do not, in most cases, apply when considering whether it is a financial promotion. It is possible for a person to be carrying on business in the UK for which he does not need authorisation because the activity falls within one of the exemptions in the RAO but find that the restriction in Section 21 applies to his communication.

TERRITORIAL APPLICATION

26. The territorial scope of the new regime is far reaching. In addition to the obvious case of applying the restriction to communications originating in the United Kingdom and made to persons in the United Kingdom, there is nothing which prevents applying the restriction to promotions from the United Kingdom to persons outside of the United Kingdom. In fact, the only territorial limitation in section 21 is to dis-apply the restriction to communications originating outside of the United Kingdom if such communications do not have an "effect in the UK". Again, no specific guidance is provided in the FSMA itself with respect to what constitutes having "effect in the UK".

FINANCIAL PROMOTION ORDER

27. The breadth of the new prohibition is scaled back by the Financial Promotion Order which provides guidance on and, importantly limitations to, the territorial provisions in section 21.
28. The Treasury has indicated that the new terms are to reflect a media neutral regime where new technologies are brought within the ambit of the restriction as well as the more traditional forms of communication. Accordingly, the Financial Promotion Order introduces media neutral concepts of "real time communications" (i.e. personal visits, telephone calls and other forms of interactive contact) and "non-real time communications" (which is anything else, and would include emails, websites, as well as more traditional forms of non-interactive advertisements).
29. Real time communications are subdivided into solicited and unsolicited communications. A real time communication will be solicited where it is made in the course of a call, visit or dialogue, initiated by the recipient of the communication or made in response to an express request from the recipient.
30. It is important to bear in mind that a solicited real-time communication will only remain solicited so long as it relates to controlled activities or investments of the kind the receiver expected that they would relate. If you are therefore asked to talk to a customer about an investment product you cannot, without being expressly invited to do so, talk about other specific investment products.
31. Guidance in AUTH Appendix 1 confirms that a scripted call would still be an interactive dialogue and will therefore be regarded as a real time financial promotion as the person making the call could only ever hope to control one side of the dialogue. COB 3 does not allow scripted real time financial promotions to be approved by a regulated firm on behalf of an unregulated person.

32. There are fewer exemptions for unsolicited real time communications on the basis that recipients will need more protection in this situation.
33. Some exemptions require certain indications to be included in the communication. These must be presented in a way that can easily be understood and in a manner best calculated to bring the matter to the attention of the recipient and to allow him to consider it. The general approach of the order is to permit exemptions to be combined, with the exception of (i) deposit and general insurance exemptions which cannot be combined with investment business and long term insurance exemptions (ii) the exemption relating to communications directed at persons outside the UK, which can only be combined with two other specified exemptions (investment professionals and high net worth persons).

EXEMPTIONS TO THE FINANCIAL PROMOTION RESTRICTION

34. There are over 60 exemptions to the financial promotion restriction. Certain exemptions apply to all controlled activities, whilst others are specific to deposit taking, insurance and investment activities.
35. General exemptions include:
 - 35.1 **Overseas recipients** – article 12 provides that, basically, a communication is permitted if it is made to a person who receives the communicate outside the UK or it is directed (addressed to persons generally, as in a website)¹ only at persons outside the UK (if it is an unsolicited real time communication then it has to be made from a place outside the UK and for the purpose of a business which is carried on outside the UK);
 - 35.2 **Communications from Customers or potential Customers** – article 13;
 - 35.3 **Generic promotions** – article 17 exempts communications which do not identify (directly or indirectly) (i) a person who provides the controlled activity to which the communication relates and (ii) any person as a person who carries on a controlled activity in relation that investment.

¹ Article 12(3) sets out the factors which are to be considered in determining whether a communication is "directed only at persons outside of the United Kingdom". These factors include whether (i) there are disclosures on the communication which indicate that its is directed only at persons outside of the United Kingdom (ii) and that the communication must not be acted upon by persons inside the United Kingdom, (iii) the communication is not referred to in any other communications accessible to persons in the United Kingdom, (iv) there are proper systems in place to prevent a persons in the United Kingdom from engaging in the activity which is the subject of the communication and (v) the communication is contained in media intended for or delivered to a market outside of the United Kingdom. If conditions (i) to (iv) are complied with, that establishes conclusively (the so called "safe harbour") that the communication is directed only at the persons outside the United Kingdom. If only one or more is complied with, that must be taken into account. A promotion can be treated as directed only at persons outside the United Kingdom even if it is also directed at United Kingdom based investment professionals and high net worth persons. This means that information on a website could be treated as exempt if it is directed at investment professionals and high net worth persons in the United Kingdom and otherwise only at persons outside the United Kingdom.

- 35.4 **Mere conduits** – article 18 exempts mere conduits. A person acts as a mere conduit if (i) he communicates it in the course of his business the principal purpose of which is to transmit material provided by others; and (ii) the contents of the communication is devised by others; and (iii) he does not select or otherwise control the material. Thus, internet service providers, telephone companies and the like are likely to be exempt;
- 35.5 **Investment professional** – article 19 permits all communications (real time, non real time and unsolicited), to be sent to investment professionals or "only directed" at investment professionals (again safe harbour provisions apply if communication is accompanied by an indication that only so directed, others should not rely on it and procedures are in place to prevent non professional investors engaging in activity).
36. Exemptions for investment business and long term insurance include:
- 36.1 **one off non-real time or real-time communications (article 28)** -- a communication will be regarded as a one off if it is (i) made only to one recipient or to one group who it is expected will engage in any investment activity jointly; and (ii) the identity of the product or service has been determined having regard to the particular circumstances of the recipient; and (iii) it is not part of an organised marketing campaign. If only one or two of these conditions are satisfied, these will be taken into account in determining whether a communication is one-off. Unsolicited real time communications are exempt if in addition the communicator believes on reasonable grounds that the recipient understands the risks and that the recipient would expect to be contacted by him in relation to the investment activity to which the communication relates;
- 36.2 **overseas communicators** – article 30 to 33 allows overseas communicators to communicate with persons inside the United Kingdom subject to some rather complex rules but in summary, an overseas communicator (a person who carries on investment activity outside the UK but does not carry on such activity from a permanent place of business maintained by him in the UK) is allowed to:
- (a) make solicited real time communications from outside the United Kingdom to anyone in the United Kingdom with respect to activities outside of the United Kingdom;
 - (b) make any non-real time communications from outside of the United Kingdom to a "previous overseas customers" (i.e. persons with whom they have done business with in the last twelve months while that person was not a resident of the United Kingdom); and
 - (c) make any unsolicited real time communications from outside of the United Kingdom to a previous overseas customer or a knowledgeable customers, in each case subject to certain conditions (risk warnings) being met;
- 36.3 **communications to certified high net worth individuals (article 48)** -- this exemption has been introduced as part of the attempt to facilitate capital raising from "business angels" and other sources of informal capital for start up and small companies. Non-real time and solicited real-time communications can be made to a

person who has a current certificate of high net worth from an accountant or his employer confirming his annual income is not less than £100,000 or his net assets are not less than £250,000. In addition, he must have signed a statement in the previous twelve months confirming he is a certified high net worth individual, that the communications he may receive are outside the protections offered by Section 21 and that he understands the risks involved. The communication must be made to an identified individual and only if it relates to a particular investment (broadly, unquoted securities and funds which invest in unquoted securities (shares, debentures or units in collective investment schemes) and the potential exposure of the investor must be limited to the amount he pays for the investment. Therefore, it is likely that business plans sent to a certified wealthy individual will be exempt. What is less clear is what the liability of an accountant who wrongly certifies an investor as being of high net worth should be;

- 36.4 **communications to certified sophisticated investors (article 50)**- This exemption also allows promotions to individuals. A communication can be made to a person who has a current certificate signed by an authorised person stating that he is sufficiently knowledgeable to understand the risks associated with the particular investment and who has signed statement to the effect that he is a sophisticated investor and that he understands the risks involved in engaging in investment activity in consequence of an unapproved communication. Again, questions of liability of the authorised person arise in respect of wrongful certifications;
- 36.5 **high net worth corporations** - article 49 permits communications to high net worth corporations and unincorporated associations. Again there is a "directed at" safe harbour test; and
- 36.6 **promotions included in listings Particulars** (only non-real time and solicited real time) - (article 70) issued in accordance with the FSMA section 98 and **Prospectuses** (only non-real time) (article 72) issued in accordance with the POS Regs (unlisted securities);
- 36.7 Exemptions for deposits and general insurance include:
- (a) **non real time communications** - article 22 (deposits) and article 24 (insurance) exempt non real time communications from the prohibition provided the communication is accompanied by certain information regarding to the deposit taker/insurer;
 - (b) **real time communications** - article 23 (deposits) and article 26 (insurance) exempt real time communications which relate to accepting deposits/insurance activity.
37. It should be remembered that offers of securities in the UK to the public for the first time will need to comply in addition with the POS regs. There are exemptions in the POS regs which apply to Professional Investors, listed securities and private placements which will usually be relied upon so as to avoid the application of the POS regs.

CONDUCT OF BUSINESS RULES

38. COBS sets the business standards for authorised firms' relationships with their customers and applies principally to a firm's dealings with private and intermediate customers.
39. Each chapter of COBS is prefaced by guidance indicating the purpose of the rules and in many cases there are references to specific principles for businesses. The chapters cover: the application and general provisions of COBS; the requirement for clear, fair and not misleading communications with clients; financial promotions; accepting customers; advising and selling packaged products to private customers; product disclosure requirements relating to packaged products; dealing and managing; confirmation of transactions; custody and client money; rules for operators of CISs; trustee and depository activities; and rules which apply specifically to the Lloyd's market.
40. An authorised firm proposing to issue or approve a financial promotion falling with Section 21 of the FSMA, must comply with the rules relating to financial promotion in Chapter 3 of COBS.
41. COBS 3 apply to investment business but not to deposit-taking and general insurance business (except for COBS rule 3.1 to 3.5 (general application), 3.8.4 to 3.8.6 (which imposes a general requirement that firms should take reasonable steps to ensure that all non-real time financial promotions are "clear, fair and not misleading") and 3.14 (internet promotions)).
42. The rules do not apply to promotions made only to, or which may reasonably be regarded as directed at, market counterparties and intermediate customers (the communication must include an indication of the description of persons to whom it is directed and an indication of the fact that the investment or service to which it relates is available only to such persons and that persons of any other description should not rely on it. Additionally, the firm must have in place proper systems and procedures that only the persons to whom the communication was directed engage in investment activity (see COBS 3.5.7(4)) or where an exemption under the Financial Promotion Order is available.
43. The financial promotions will still need to be clear, fair and not misleading even when only communicating them to intermediaries or market counterparties or pursuant to an exemption under the Financial Promotions Order. FSA Principle 7: provides that "Communications with clients: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading" this is further described in COBS 2.
44. If an authorised person approves a financial promotion which is exempt from COBS 3 it must still ensure that where it is a non-real time financial promotion it is clear, fair and not misleading and must not approve a real time financial promotion. In addition certain disclosures are required where a firm approves a specific non-real time financial promotion relating to an investment or service of an overseas person.

REAL TIME FINANCIAL PROMOTIONS

45. The rules contain a prohibition on unsolicited real time financial promotions which do not fall within any of the exemptions in the Financial Promotion Order unless they are made to existing customers who would envisage receiving such calls or they relate to generally marketable packaged products.
46. The requirements when making a real time financial promotion are as follows:
- 46.1 It is the firm's obligation to ensure that the individual making the financial promotion on the firm's behalf observes the following requirements (these are set out in COB 3.8.22):
- (a) the financial promotion must be made in a way which is clear, fair and not misleading;
 - (b) he or she does not make any untrue claims;
 - (c) he or she makes clear the purpose of the promotion at the initial point of communication and identifies himself/herself and the firm which he or she represents;
 - (d) if the time and method of communication were not previously agreed by the recipient, he or she must:
 - (i) check that the recipient wishes to proceed;
 - (ii) terminate the communication if the recipient does not wish to proceed;
 - (iii) recognise and respects, promptly, the right of the recipient to (A) end the communication at any time or (B) refuse any request for another appointment.
 - (e) he or she gives the recipient with whom he or she arranges an appointment a contact point;
 - (f) he or she does not communicate with a person;
 - (i) at an unsocial hour, unless the person has previously agreed to such communication;
 - (ii) on an unlisted telephone number, unless the person has previously agreed to such calls on that number.
- 46.2 Under the old SFA cold calling rules, no calls be made before 8am or after 9pm. The new regime is less generous, as neither solicited nor unsolicited calls may be made on Sundays or before 9am or after 9pm on any other day or if the firm knows that the person does not wish to be called for reasons of, e.g. nightshift work or religious faith of the recipient.

47. Generally, real time financial promotions can be made by the Approved Persons of the firm. It is, however, also possible for call centre operators, who would not normally be an Approved Person, to make financial promotions to the firm's customers. Where this is the case, it is vital to have proper procedures in place to ensure that such persons do not provide advice to the recipient of the financial promotion or conduct any other form of designated investment business. Such operators must also be under the supervision of Approved Persons.

NON-REAL TIME FINANCIAL PROMOTIONS

48. Unlike real time financial promotions, a regulated firm is permitted to communicate a non-real time financial promotion, provided it observes the COB Rules (such as the content requirements, as set out in COB 3.8).
- 48.1 If the promotion is only to Market Counterparties or Intermediate Customers then it must be fair, clear and not misleading.
- 48.2 If to a private customer:

All Promotions

- Fair, clear and not misleading.
- Name of firm and either an address or contact point.

Non-Specific Non-Real Time Financial Promotions (no identified investment or activity)

- Comparison of investments or services (same needs/purpose, objective comparison, trade marks) (COB3.8.4).
- Promotional purpose not disguised or misrepresented (COB 3.8.5).
- Relevant assumptions stated (COB 3.8.5).
- Consent from third parties (COB 3.8.5).
- Not misleading firms independence/resources on scale of activities/scarcity of investment or service (COB 3.8.5).
- Clear warnings (COB 3.8.5).
- No approval by FSA (COB 3.8.5).
- No misleading omissions (COB 3.8.5).
- All material statements verified (COB 3.8.5).

Specific Non-Real Time Financial Promotion (identified investment or activity)

- Fair and adequate description of nature of investment or service, commitment required and risks involved (fair and balanced) (COB 3.8.8).
- If it relates to an investment or service of a person other than the firm, the name of that person (COB 3.8.8).
- Disclosure of material interest (COB 3.8.10).
- Past performance (suitability for promotion/audience and warning not to be repeated, relevant and sufficient period, unfair comparisons with performance of another type of investment) (COB 3.8.11).

Direct Offer Promotions (non-real time financial promotion which is an offer by the firm or another person to enter into a controlled activity with anyone who responds to the financial promotion)

- Firm which has approved or communicated the financial promotion is regulated by FSA (COB 3.9.7).
 - Contact firm for advice if in doubt (COB 3.9.7).
 - Full contact information (COB 3.9.7).
 - Name of any receiving agent (COB 3.9.7).
 - Details of basis or amount of charge or expense (COB 3.9.7).
 - Detail of basis or amount of commission to the firm (COB 3.9.7).
49. The confirmation of compliance procedures (see COBS 3.6) only apply to non-real time financial promotions.
50. Internet promotions are expressly acknowledged in the rules. There are no internet specific rules as such, although there is guidance on the application of the general rules to internet communications. Any financial promotion which appears on websites is normally considered to be a non-real time financial promotion.
51. If a promotion of investment services/products is made on a website which is not intended for private individuals or to whom such investments may not be promoted (such as unregulated collective investment schemes), the website should be designed in such a way which reduces the risk of possible purchase by those persons (for example through the use of code words etc.).
52. After approving promotions, a firm must continue to monitor them to ensure that

they continue to meet the requirements of the rules and, if they do not, must withdraw its approval. The rules expressly recognise that a firm may delegate the task of approving promotions.

FSA PROPOSALS

53. The FSA has conducted research to see how effective small print is as a means of conveying key messages to consumers. Financial promotions must be fair and balanced and give a fair indication of the risks as well as the benefits of a particular product. Following that research, the FSA's intention is for key information to be presented in the main body of a promotion, rather than in the small print.
54. The FSA has specifically warned that financial promotions using design techniques that make it easy to miss the small print altogether should be reviewed carefully. Often, in promotions on the Internet, a consumer would have to scroll right to the end of the page, before he or she could see the essential information, or miss it altogether.
55. The FSA is also proposing that past performance warnings should always appear in the body of a promotion and should have the same font size as the main text. The FSA has proposed changes to the COB rules in relation to the use of past performance and bond yield figures in financial promotions as follows:
 - The current rules do not limit the prominence that may be given to past performance information. The FSA wants to reduce the extent to which products are promoted on the basis of past performance by preventing firms from presenting such information as the predominant message in their financial promotions and to make it clear that past performance must not be presented in a way that suggests that it is indicative of future performance.
 - The FSA has said it is unnecessary to prescribe the disclosure of both or either of the redemption and running yields in financial promotions for corporate bond funds (the former is used to indicate the total return that an investor can expect to receive and the latter represents the effective annual yield payable by the fund). However, where yield figures are quoted in an advertisement then both the gross redemption yield and the running yield should be included so that consumers are able to gain a balanced impression of the fund's prospects (*CP132, April 2002; PLC, 2002, XIII(4), 84*).
56. Prompted by recent US events relating to the independence of investment research and the possibility for abuse in the UK, the FSA has published a discussion paper on its regulatory approach to investment research (*FSA discussion paper (DP) 15, July 2002; PLC, 2002, XIII(8), 85*). This paper; examines the role of research analysts, their involvement in the information dissemination process, the potential conflicts of interest for analysts producing investment research and sets out possible approaches to deal with these conflicts.
57. The first option put forward by the FSA is to keep the rules (found in various parts of the Handbook and the Criminal Justice Act 1993) as they are and leave it to the market to reward good practice and objective research. Other possibilities are to

concentrate on enforcing the existing rules more vigorously and to take steps to increase users' awareness and understanding of research reports. The paper also mentions the possibility of making more rules; these could include a more prescriptive approach to managing conflicts of interest, specific rules on the content of research reports, disclosure requirements and registration and training and competence requirements for analysts. The FSA will also address other issues relating to investment research such as the quality, form and content of research reports and expects to publish a further consultation paper on investment research in the second quarter of 2003.

ELECTRONIC COMMERCE DIRECTIVE

58. The EU Electronic Commerce Directive covers services provided by any electronic means from a distance at the individual request of a user (termed "information society services" ("ISS")). It was implemented into UK law with effect from 21 August 2002 by several statutory instruments and by the FSA's E-Commerce Directive Sourcebook (ECO). In ECO the FSA does not use the term ISS. Instead it uses the term Electronic Commerce Activity ("ECA") to refer to financial services delivered by ISS and refers to financial services ISS providers as ECA Providers. Different chapters of ECO apply to Outgoing ECA Providers (firms providing ISS from an establishment in the UK to recipients in other EEA jurisdictions), Incoming ECA Providers (firms providing ISS from an establishment in an EEA jurisdiction other than the UK to recipients in the UK) and Domestic and Non-EEA ECA Providers (firms providing ISS from an establishment in the UK to recipients in the UK and in jurisdictions outside the EEA).
59. The key class to be protected under the Directive is consumers, defined as individuals acting for purposes other than those of their trade, business or profession. Because neither the UK implementing regulations nor ECO can amend this definition, there is a mismatch with FSA customer classification. Consumers is a wider category than "private customers". Individuals (other than individuals who are sole proprietors of businesses or otherwise acting in a business capacity) who have opted to be treated as intermediate customers are still consumers for the purposes of the Directive and the ECO. Corporate entities of whatever size and expertise are not consumers.
60. Generally, Incoming ECA Providers are not subject to FSA's conduct of business rules - including the rules on financial promotions in relation to services within the Directive. ECO Chapter 1 disapplies most of FSA's rules in relation to Incoming ECA Providers recognising that they are subject to equivalent provisions in their home country from which they are providing ISS. This is subject to derogations for insurance business and consumer protection requirements. Income ECA Providers are required to provide certain "essential information in English relevant to the contract" to consumers, either by compliance with relevant equivalent provisions of their country of origin or with UK requirements. Particular risk warning information must be given as part of direct financial promotion of certain high risk products and COB provisions apply in relation to all direct offer financial promotions. Subject to the above, financial promotions by Incoming ECA Providers no longer have to be

approved by an authorised person.

61. Outgoing ECA Providers must comply with COB 3 (Financial Promotion) as if every EEA ECA recipient were a UK recipient. This applies to recipients who are non-consumers, as well as to consumers. A UK firm's website directed at another EEA State must comply with COB3 as well as providing the information discussed in the next paragraph.
62. Outgoing ECA Providers must also make certain minimum information such as name, address and details of their regulatory status "easily, directly and permanently available" to all EEA ECA recipients whether or not they are consumers. The details are set out in ECO 2.3.1R, and ECO 3 Ann R (1) and (2). Commercial communications which are part of ECA must be clearly identifiable as such, and must make clear from whom they emanate. Unsolicited e-mails must be clearly and unambiguously identifiable as such as soon as they are received.
63. Information about the technical steps required to place an order and certain other matters must also be provided to ECA recipients. This requirement does not apply to contracts concluded exclusively by e-mail or equivalent communications. Non-consumers may agree that some or all of those requirements do not apply.
64. Information relating to receipt of orders and certain other matters must also be provided to all recipients of ECA services. In particular electronic orders must be acknowledged without delay and ECA recipients must have "appropriate, effective and accessible technical means" to identify and correct technical errors before placing an order. Again, non-consumers may agree that some or all of those requirements do not apply and contracts concluded exclusively by e-mail or equivalent individual communications are excluded.
65. ECO Chapter 3 covers firms carrying on ECA with ECA recipients in the UK or outside the EEA. They are required to comply with the same information requirements as Outgoing ECA Providers and must also comply COB in full in relation to ECA.
66. Pending the implementation of the EU Distance Marketing of Financial Services Directive (not expected until at least 2004) the effect of the introduction of ECO is that ECA Providers are obliged to comply with two different financial promotion regimes. ECO in relation to ECA and COB in relation to services provided through non-electronic means.

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9 April, 2003

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ALL PARTNERS ARE EITHER SOLICITORS OR REGISTERED FOREIGN LAWYERS

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