

Provision of cross-border financial services in the United Kingdom by firms from Switzerland

Introduction

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Introduction

1. This memorandum has been produced by HM Treasury following discussions in Berne on 10 June 2011 involving representatives from HM Treasury (HMT), the UK Financial Services Authority (FSA), the Swiss Federal Department of Finance (EFD) and the Swiss Bankers Association (SBV). It responds to issues raised by Swiss banks in respect of providing cross-border financial services to retail consumers in the United Kingdom (UK). As such it is not a comprehensive analysis of all issues which overseas firms need to take into account if they wish to contact and/or provide financial services to UK consumers. It describes the appropriate framework and guides Swiss banks and financial institutions wishing to provide cross-border financial services to the UK.

2. This memorandum contains two types of material:

a) A description of key features of the general legal position concerning the provision of cross-border financial services into the UK by firms located in Switzerland;

b) Illustrative examples of how UK legislation and rules may apply in practice for financial institutions subject to prudential regulation in Switzerland (referred to as “Swiss financial institutions”). These examples should be read in conjunction with the legislation and so should not be relied upon in isolation.

3. Many aspects of the regulation of financial services in the UK derive from EU legislation.

4. In some cases it may be possible for overseas firms to carry on certain activities in relation to consumers either with or through an authorised firm (see Sections A to C below), or by establishing an FSA authorised firm itself. The authorisation process generally takes no more than six months.

A Swiss financial institution may carry on business in the UK without needing to be authorised by the FSA if it offers certain prescribed services with or through a UK authorised firm.

5. The three sections following are set out as a guide to allow Swiss firms to identify potential business opportunities. The annex sets out the general prohibitions and restrictions that apply to all firms if they wish to contact consumers.

6. This memorandum describes the main features of the legal position concerning the provision of cross border financial services as at July 2011. No substantive changes in domestic law are currently envisaged. If there are future changes in law which materially impact on key features in this memorandum, British officials will discuss possible consequential changes to the memorandum which may be necessary.

5 August 2011

SECTION A: Account opening and deposit-taking

7. A deposit involves a payment of money together with the assumption of a liability to repay it. Accordingly a deposit is only made where the obligation to repay the deposit arises. So, for example,

- a) where a sum is sent from the UK direct to the overseas deposit-taker (for instance by cheque or bank transfer), and
- b) the latter does not become liable to repay the sum until he has received it overseas

the deposit-taking activity does not take place in the UK.

A Swiss financial institution is able to accept deposits from UK depositors where the sum is sent direct to the Swiss financial institution, for instance by cheque or bank transfer, and the deposit is not booked until it reaches Switzerland.

A Swiss financial institution may provide prospective clients with account opening documents and assist the prospective client in completing account opening documents provided in doing so it does not breach the financial promotions restriction, see Section C.

8. The acceptance of money outside the UK into a foreign account does not of itself allow regulated activities to be carried on in the UK in relation to that account without separately considering whether each activity is being conducted in compliance with the Financial Services and Markets Act 2000 ('FSMA').

A Swiss financial institution must consider whether, by providing services in connection to the deposit to persons in the UK, it is carrying on other activities regulated by the FSA.

So, even where the deposit taking activity occurs in Switzerland, other activities that the Swiss financial institution may wish to carry out in connection to that account need to be considered individually to check whether they comply with FSMA.

9. Arranging or advising on deposits is not an activity regulated under FSMA. However, the financial promotion restriction in section 21 of FSMA does apply to the communication of promotions that relate to a deposit. (See section C)

10. In relation to deposits, the Financial Services and Market Act 2000 (Financial Promotion) Order 2000 ('FPO'), which is the relevant legislation for persons that are not authorised, provides that any form of interactive ('real time') financial promotion concerning deposits is exempted from the restriction on financial promotion. In addition all non-interactive ('non-real time') promotions are exempted provided they contain certain specified information including:

- a) the name;
- b) the country of incorporation (if relevant);
- c) the principal place of business of the deposit-taker;
- d) whether it is regulated; and

e) details of any redress schemes and necessary capital information to demonstrate the solvency of the firm.

A Swiss financial institution may, consistent with its Swiss authorisation, promote its Swiss deposit-taking service to persons in the UK through:

a) Any kind of “interactive” promotion, including:

- meetings with prospective clients to introduce the Swiss financial institution’s deposit-taking activities;
- telephone calls to prospective clients to introduce the Swiss financial institutions deposit-taking activities, or to arrange meetings to discuss these activities;

b) Any other kind of promotion, including:

- contacting prospective clients via postal mail;
- contacting prospective clients via email;
- contacting prospective clients via fax;

provided that the specified information is included in the communication covering for example:

- the name;
- the country of incorporation (if relevant);
- the principal place of business of the deposit-taker;
- whether it is regulated; and
- details of any redress schemes and necessary capital information to demonstrate the solvency of the firm.

SECTION B: The overseas persons' exclusion: activities which can be carried out by Swiss financial institutions without the need to be authorised

11. There is an exclusion from the requirement to be authorised which is available for 'overseas persons' in specified circumstances. An overseas person is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ('the Regulated Activities Order') as a person who carries on certain regulated activities but does not carry on these activities or offer to do so from a permanent place of business maintained by him in the UK.

12. The exclusion for overseas persons, set out at article 72 of the Regulated Activities Order, applies to regulated activities such as:

- a) dealing as agent or principal;
- b) making arrangements for another person to buy, sell, subscribe for or underwrite particular investments;
- c) advising on investments;
- d) operating a multilateral trading facility;
- e) agreeing to carrying certain activities including agreeing to manage investments; and
- f) certain activities in relation to home finances transactions.

13. It should be noted that, while the regulated activity of agreeing to manage investments can be excluded under the overseas persons' exclusion, the activity of managing investments itself cannot be so excluded.

So it follows that a representative of a Swiss financial institution meeting the terms of the overseas persons' exclusion, including while visiting the UK, may

- buy and sell securities as principal or agent;
- advise on investments;
- agree to manage investments outside the UK (i.e. the assets must be managed from Switzerland or elsewhere);

without needing to be authorised in the UK.

14. The exclusion should be available for the relevant regulated activities, other than those that relate to home finance transactions, in the two broad cases set out below. For some of these regulated activities the exclusion applies in each case, in others it applies in only one.

15. The first case is where the nature of the regulated activity requires the direct involvement of another person and that person is authorised or exempt (and acting within the scope of his exemption). For example, this might occur where:

- a) the person in the UK, with whom an overseas person deals, is an authorised person acting on behalf of a client; or

b) where the arrangements the overseas person makes are for transactions to be entered into by an authorised person.

A Swiss financial institution that meets the terms of the overseas persons exclusion may, without needing to be authorised, carry out certain prescribed activities where it is dealing with a UK intermediary which is authorised or exempt, rather than the client directly.

16. The second case is where a particular regulated activity is carried on as a result of what is termed a 'legitimate approach'. An approach by a person in the UK is a legitimate approach to an overseas person provided it has not been solicited by the overseas person in any way, or has been solicited in a way that does not contravene the restrictions on financial promotion in section 21. An approach by or on behalf of the overseas person is a legitimate approach where it does not contravene section 21.

17. The exemptions to the financial promotion restrictions made under section 21 will be relevant to the question of whether those restrictions have been contravened.

Where a person in the UK approaches a Swiss financial institution:

- without being solicited by that institution; or
- having being solicited, and providing that these solicitations are consistent with the requirements in the FPO;

the Swiss financial institution may, without requiring authorisation:

- enter into deals with (or on behalf of) a person in the UK;
- give advice in the UK; or
- enter into agreements in the UK to carry on certain regulated activities.

SECTION C: Approaching prospective clients and servicing existing ones: relevant exemptions in the Financial Promotion Order (FPO)

18. The financial promotions restriction is set out in the annex (paragraphs 47 to 51). This section describes the most relevant exemptions for unauthorised persons. The financial promotion regime applies in relation to 'controlled activities' and 'controlled investments' as specified in the FPO. The exemptions in the FPO that are most likely to be relevant to overseas persons are detailed below.

Subject to compliance with the FPO, financial promotions by Swiss financial institutions which are not authorised in the UK can be communicated through a number of means, such as:

- product brochures, investment research and marketing material;
- general advertising in magazines, newspapers, radio, television and websites;
- mail shots;
- telephone contact;
- written correspondence;
- personal contact; and
- sales aids.

Swiss financial institutions may only engage in financial promotions to people in the UK in certain circumstances. These circumstances differ depending upon what type of product is concerned and who the client is.

Article 10 (application to qualifying contracts of insurance)

19. Article 10 of the FPO prevents any exemption in the FPO which would otherwise apply from applying where the promotion relates to the entering into of a 'qualifying contract of insurance' (i.e. an investment-related insurance contract) unless the insurer is:

- authorised;
- exempt in relation to effecting or carrying out contracts of insurance to which the promotion relates;
- a company which has its head office in (or which has a branch or agency in) another EEA State and is entitled under the law of that State to carry on the insurance business relevant to the promotion; or
- a company authorised to carry on insurance business to which the promotion relates in a country or territory listed in Schedule 2 of the FPO (Switzerland is not listed).

Article 14 (follow up non-real time communications and solicited real time communications)

20. The main features of the article 14 exemption are as follows. Financial promotions, other than unsolicited real time financial promotions, are exempt where they follow up an earlier financial promotion. But there must also be compliance with another exemption such as that for promotions made to high net worth individuals or sophisticated investors (see below), that contains certain indications or information. This is provided the financial promotion meets the specified conditions including that it:

- a) is made by the person who made or directed the earlier financial promotion;
- b) is made to a recipient of the earlier financial promotion;
- c) relates to the same matter as the earlier financial promotion; and
- d) is made within 12 months of the earlier financial promotion.

21. This exemption does not help where the original financial promotion was made or directed under an exemption which did not require it to include any indications or information. However, it is likely that, in many cases where no indications or information are required, the exemption to which the earlier financial promotion applies would also apply to any follow up financial promotion.

22. The follow up is taken as made by the same person as long as it is made on behalf of the original person. For example, the earlier financial promotion may have been made or directed by an individual in his capacity as an officer or employee of a company or a partner or employee of a partnership. If so, the exemption will be satisfied if the follow-up financial promotion is made by another employee, director or partner of the same company or partnership.

Where a Swiss financial institution has made a previous approach in compliance with the requirements of a relevant exemption in the FPO, it may make another related approach to the same person within a year.

Article 17 (generic promotions)

23. This exemption may apply where there is a financial promotion of a class of products, for example investment trusts. Such financial promotions may be made by a person such as a trade association which is not itself carrying on a controlled activity. But there must not be any mention of any particular product or of any person who may give advice on, arrange, sell or manage such investments.

24. The financial promotion itself must not relate to a controlled investment provided by a person who is identified in it, nor must it identify any person as someone who carries on any controlled activity.

25. Other persons may be able to take advantage of the exemption. For example, a person making a generic financial promotion may identify himself regardless of whether or not he may carry on a controlled activity. There is a proviso to this; the financial promotion must not (directly or indirectly) identify the person as someone who carries on a controlled activity.

A Swiss financial institution may carry out a general promotion of a class of products in the UK and include the name of the financial institution. However, it must not (unless permitted under a different FPO exemption) name specific products in this promotion, nor suggest that the financial institution provides one of the class of products.

Article 19 (investment professionals)

26. Financial promotions made only to or directed only at certain types of person who are sophisticated enough to understand the risks involved are exempt. These include FSA authorised firms and exempt professional firms such as solicitors or accountants.

Article 28 and 28A (one-off communications)

27. Financial promotions relating to certain controlled activities, which are one off communications, are exempt. This includes non-real time and solicited real time communications. A communication is one-off where:

- the communication is made to only one recipient or a group of recipients in the expectation that they would engage in any investment activity jointly;
- the identity of the product or service to which the communication relates has been determined having regard to the particular circumstances of the recipient; and
- the communication is not part of an organised marketing campaign.

If one, but not all, of these conditions applies, that fact will be taken into account in determining whether the communication is a one-off communication. Even if none of the conditions is met the communication may nevertheless be regarded as a one-off communication, depending on the circumstances.

Unsolicited real time one off communications relating to certain controlled activities are also exempt if the following conditions apply:

- the communicator believes on reasonable grounds that the recipient understands the risk associated with the relevant investment activity; and
- the communicator believed on has reasonable grounds at the time of making the communication that the recipient would expect to be contacted in relation to the relevant investment activity.

A Swiss financial institution may telephone or send a bespoke written communication on a one off basis to any existing or potential customer relating to certain sorts of investment activity. If the communication is an unsolicited telephone call, the institution must also reasonably believe that the customer understands the risks and would expect to be contacted by them in relation to the investment. Generally “one off” means that the communication must not be part of an organised marketing campaign, and the promotion relates to a product that the financial institution believes is relevant to the customer, based on knowledge of the circumstances of the customer.

Article 30-33 (overseas communicators)

28. A number of exemptions relate to financial promotions sent into the UK by an overseas communicator who does not carry on certain controlled activities in the UK. These exemptions apply in addition to any other exemptions which may apply to any particular financial promotion by an overseas communicator.

29. Article 30 exempts any solicited real time financial promotion made by an overseas communicator from outside the UK in the course of, or for the purposes of, certain controlled activities which he carries on outside the UK. This enables an overseas communicator, for example, to respond to:

- a) an unprompted telephone enquiry made by a person in the UK; or
- b) an enquiry which follows a financial promotion made by the overseas communicator and which was approved by an authorised person.

Where a person in the UK approaches the Swiss financial institution over the telephone at his own instigation, the Swiss financial institution may, if this relates to certain controlled activities, respond to any enquiry.

Where a person in the UK approaches the Swiss financial institution over the telephone in response to a promotion in line with the rules of this chapter, the Swiss financial institution may, in relation to certain controlled activities, respond to any enquiry.

30. Article 31 exempts non-real time financial promotions made by an overseas communicator from outside the UK to previously overseas customers and subject to certain conditions. Again, to satisfy this exemption, the communicator must be based overseas and must be communicating with a person who is, or was recently, a customer of his while that person too was overseas.

A Swiss financial institution may write to any person who is or was, at any time in the previous 12 months, a person for whom that Swiss financial institution had done business at a time when the customer lived outside the UK. Having 'done business' means that the financial institution has effected a transaction or arranged for a transaction to be effected, provided custody or given advice on investments to the customer. This may be done via post, email, or fax.

For customers resident in the UK, other exemptions may be available. For example, article 33 applies for sophisticated investors – see paragraph 31(b) below

31. To make an unsolicited real time financial promotion, an overseas communicator may be able to rely on either article 32 or article 33:

- a) Article 32 provides an exemption for unsolicited real time financial promotions made by an overseas communicator to persons who were previously overseas and were a customer of his at that time. This is subject to certain conditions, including that, in broad terms, the customer would reasonably expect to be contacted about the subject matter of the financial promotion;

A Swiss financial institution may telephone any person with whom the Swiss institution had done business with at a time when they lived outside the UK, if that person could reasonably expect to be

contacted about the promotion and the person has been informed by the financial institution on an earlier occasion certain information including:

- that FSMA protections will not apply in respect of the making of unsolicited real time financial promotions or any investment activity arising from such a promotion; and
- whether any dispute resolution or compensation scheme would apply to any transaction resulting from the communication.

b) Article 33 is similar to a sophisticated investor exemption and, broadly, applies where the overseas communicator:

- i) has reasonable grounds to believe that the recipient is knowledgeable enough to understand the risks associated with the controlled activity to which the financial promotion relates;
- ii) has informed the recipient that he will not gain the protections under FSMA in respect of the activity or of the making of unsolicited real time financial promotions;
- iii) has informed the recipient whether he will lose the benefit of dispute resolution and compensation schemes.

32. The recipient must also have signified clearly that he accepts the position after having been given a proper opportunity to consider the information. There is no definition of a proper opportunity for this purpose. In the FSA's opinion it is likely to require the recipient to have a reasonable time to reflect on the matter and, if appropriate, seek other advice. What is a reasonable time will depend upon the circumstances of the recipient but it is unlikely that a time of less than 24 hours will be enough.

A Swiss financial institution may telephone (or make other real time contact with) any person if it:

- has reasonable grounds to believe that the recipient is knowledgeable enough to understand the risks associated with the controlled activity to which the financial promotion relates;
- has informed the recipient that he will not gain the protections under FSMA in respect of the activity or of the making of unsolicited real time financial promotions;
- has informed the recipient that he will lose the benefit of dispute resolution and compensation schemes; and
- has signified clearly that he accepts the position after having been given a proper opportunity (more than 24 hours) to consider the information.

Article 48 (certified high net worth individuals)

33. This exemption disapplies the restriction in section 21 from non-real time financial promotions or solicited real time financial promotions which relate to certain investments. It applies when made to a person whom the communicator has reasonable grounds to believe is a certified high net worth individual. The exemption covers various specified investments which include:

- a) shares in or debentures alternative finance investment bonds of an unlisted company; or
- b) warrants, certificates representing certain securities, options, futures or contracts for differences relating to shares in or debentures of an unlisted company; or
- c) units in collective investment schemes investing predominantly in shares in or debentures of an unlisted company.

The exemption only applies where a warning complying with article 48 is given to the person, and the communication is accompanied by information about the exemption, about the requirements to be certified as a high net worth individual and advising anyone in doubt to seek specialist advice from an authorised person.

34. There is an additional requirement that the recipient must have no contingent liability so that the maximum he may lose is the amount he invests. The term 'unlisted company' is defined in article 3 of the FPO. This exemption is expected to be of help to unlisted companies seeking venture capital.

A Swiss financial institution complying with the requirements of article 48 may make a non-real time or solicited real time communication to any certified high net worth individual in respect of certain investments:

- shares in or debentures or alternative debentures of an unlisted company; or
- warrants, certificates representing certain securities, options, futures or contracts for differences relating to shares in or debentures of an unlisted company; or
- units in collective investment schemes investing predominantly in shares in or debentures of an unlisted company,

as long as the individual has no contingent liability arising from the proposed investment.

Article 49 (high net worth companies, trusts, etc.)

35. This exemption works on a different basis to that for high net worth individuals. There is no requirement for a certificate or statement to be signed. Instead, the person making the promotion must believe on reasonable grounds that the recipients are high net worth companies, unincorporated associations or trusts or be reasonably regarded as directing the financial promotion only at such persons.

36. A high net worth company, unincorporated association or trust is a person who satisfies the conditions in article 49(2)(a) to (d) which, for the most part, involve the amount of assets held. In addition, the exemption allows a financial promotion that is made to, or directed at, persons coming under article 49(2)(a) to (d) also to be made to, or directed at, any other persons to whom it may lawfully be made (article 49(2)(e)). This would include persons such as overseas recipients (article 12 (Communications to overseas recipients)) and investment professionals (article 19 (Investment professionals)).

A Swiss financial institution may contact any company, association or trust in any manner if it has reasonable grounds to believe that the recipient is a high net worth company, association or trust.

Article 50 and 50A (sophisticated investors)

37. There are two exemptions that relate to sophisticated investors:

- a) the first (article 50 (Sophisticated investors)) applies to persons who are certified by an authorised person, and the exemption is not limited to specific descriptions of investments;
- b) the second (article 50A (Self-certified sophisticated investors)) is similar to the exemption for certified high net worth individuals and applies where the investor has self-certified himself and relates to a narrower range of specified investments.

Both exemptions require certain information to be communicated to the investor, and article 50A in addition contains a warning notice requirement. For both exemptions, the person making the communication must check that the investment falls within the scope of the certificate, and in the case of article 50A the investment must also fall within article 50A(8).

A Swiss financial institution may contact any person in any manner if the recipient is a certified sophisticated investor with an up-to-date certificate, and the communication is accompanied by an indication:

- that it is exempt from the section 21 financial promotion restriction as it is made to a certified sophisticated investor;
- of the requirements that need to be met for a person to be such an investor;
- that any investors with doubts about the investment should seek specialist advice on the investment in question;
- that the communication has not been approved by an authorised person;
- the risks involved of losing all of the property or of incurring additional liability,

provided the communication does not invite or induce the recipient to engage in investment activity with the person who signed the certified sophisticated investor certificate and provided the communication only relates to a description of investments in respect of which the investor is certified.

Article 51 (associations of high net worth/sophisticated investors)

38. This exemption allows a non-real time or solicited real time financial promotion to be made to an association with a particular membership. Membership of this association must be reasonably believed to be wholly or predominantly made up of:

- a) certified high net worth individuals; or
- b) high net worth companies; or
- c) unincorporated associations or trusts; or

d) certified, or self-certified, sophisticated investors.

39. The financial promotion must not relate to an investment under the terms of which a person can incur additional liability of more than his original investment. The person making the communication must on reasonable grounds believe that an association is predominantly made up of certified, high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified, or sophisticated investors.

A Swiss financial institution may make a non-real time or solicited real time communication to associations if it has reasonable grounds to believe that the association is constituted wholly or predominately of:

- certified high net worth individuals; or
- high net worth companies; or
- unincorporated associations or trusts; or
- certified, or self-certified, sophisticated investors; and

it relates to an investment under which no person can incur liabilities exceeding the amount of their investment.

Article 69 (promotion of securities already admitted to certain markets)

40. This exemption applies to companies whose securities are permitted to be traded or dealt on a relevant market. But such companies will need to ensure that they meet the specific requirements in article 69(3). In very general terms, a financial promotion will comply with these requirements if:

- a) the only reason it is a financial promotion is that it contains or is accompanied by an inducement about certain investments issued , or to be issued, by the company or a group member; and
- b) if it contains any reference to past prices of or yields on the company's investments, it is accompanied by a statement that past performance cannot be relied on as a guide to future performance.

A Swiss financial institution that is a body corporate may use this exemption only in relation to its own (or group member) shares, debentures or related warrants and certificates representing such shares or debentures.

Routine contact with existing clients

41. There are FSA rules on all communications by authorised firms to clients, not just promotional ones. This includes, for example, annual statements, responses to queries, complaints or general correspondence. In line with the FSA's risk-based approach to regulation, the rules that apply to non-promotional communications are high level. The main rule is that communications must be fair, clear and not misleading.

Swiss firms may make contact with UK customers provided it is permitted under FSMA and any financial promotion is permitted under the FPO. Therefore the contact made by the Swiss firm may include:

- Contact existing clients by post, email, fax or telephone to provide information concerning the client's account (statement, performance analysis etc);
- Visit existing clients and provide them with investment advice as well as information on new products and investment opportunities;
- Provide general marketing material, newsletters, brand marketing and general information.

Annex: General prohibitions and requirements

The general prohibition

42. Under FSMA bodies corporate, partnerships, individuals and unincorporated associations may be given permission by the FSA to carry on various financial activities which are subject to regulation. But no person may carry on a regulated activity in the UK, or purport to do so, unless he has FSA permission or he is exempt under FSMA ('the general prohibition').

43. The activities which are regulated by the FSA under FSMA are specified in the Regulated Activities Order: for example, accepting deposits, managing investments and dealing in investments as agent. In general terms, a regulated activity is an activity, specified in the Regulated Activities Order, carried on by way of business in relation to one or more of the investments specified in the Regulated Activities Order.

44. Under section 23 FSMA, a person commits a criminal offence if he carries on activities in breach of the general prohibition in section 19 FSMA. Although a person who commits the criminal offence is subject to a maximum of two years imprisonment and an unlimited fine, it is a defence for a person to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.

45. Another consequence of a breach of the general prohibition is that certain agreements could be held by the courts to be unenforceable (see sections 26 to 29 of FSMA). This applies to agreements entered into by persons who are in breach of the general prohibition. It also applies to any agreement entered into by an authorised person if the agreement is made as a result of the activities of a person who is in breach of the general prohibition.

46. It should be noted that a person who is carrying on a regulated activity but would not otherwise be regarded as carrying it on in the UK may be deemed to be doing so in particular situations. For example, if his head office is not in the UK but the activity is carried on from an establishment maintained by him in the UK.

A Swiss financial institution must understand the general prohibition and be aware of the potential consequences of failing to comply with it.

The financial promotions restriction

47. A financial promotion is a communication in the course of business that is an invitation or an inducement to engage in investment activity. The effect of section 21 FSMA is that, in the course of business, an unauthorised person must not communicate an invitation or inducement to engage in investment activity unless either the content of the communication is approved for the purposes of section 21 by an authorised person or it is exempt.

48. Under section 25 FSMA, a person commits a criminal offence if he carries on activities in breach of the restriction in section 21. A person who commits this criminal offence is subject to a maximum of two years imprisonment and an unlimited fine. However, defences are available for example it is a defence for a person to show that he took all reasonable precautions and used all due diligence to avoid committing the offence.

49. Another consequence of a breach of section 21 is that certain agreements could be unenforceable (see section 30 (Enforceability of agreements resulting from unlawful communications)). This applies to agreements entered into by a person as a customer as a consequence of a communication made in breach of section 21.

50. An authorised person will not breach section 21 when communicating a financial promotion. However, when communicating or approving a financial promotion, an authorised person is required to comply with the financial promotion rules made by the FSA under section 145 FSMA.

51. There are extensive exemptions in the FPO; the more obviously relevant are considered further in section C. They apply to unauthorised firms.

A Swiss financial institution must be aware of the potential consequences of failing to comply with the restrictions on financial promotions in section C. These include:

- a possible criminal conviction;
- the possibility of some agreements becoming unenforceable.

Promotion of investment funds

52. Section 238 FSMA prevents authorised firms from promoting funds unless the funds are regulated collective investment schemes (i.e. authorised unit trusts, authorised open ended investment companies, or recognised schemes). There are a limited number of exemptions from this general restriction.

53. A non-UK fund, other than Undertakings for Collective Investments in Transferable Securities (UCITS), can apply to be a recognised scheme under section 272 FSMA, which will be granted if it meets all the requirements of the section. The FSA has six months in which to consider such applications. Such schemes can be promoted to the general public. This framework will be consulted on as part of the implementation of the Alternative Investment Fund Managers Directive ('AIFMD') by 2013.

54. Section 21 precludes the promotion by unauthorised persons of unregulated collective investment schemes unless the financial promotion is approved by an authorised person or is exempt. Section 238 then precludes the promotion of an unregulated collective investment scheme by authorised persons except where:

- a) there is an exemption in an order made by the Treasury under section 238(6), namely the FSMA 2000 (Promotion of CIS) (Exemptions) Order 2001; or
- b) the financial promotion is permitted under rules made by the FSA under section 238(5) to exempt the promotion, otherwise than to the general public, of schemes of certain descriptions; or
- c) the scheme is a single property scheme and its promotion is exempt under regulations made by the Treasury under section 239 (Single property schemes). To date the Treasury has not made regulations under section 239.

A Swiss financial institution which is not authorised in the UK must not promote any collective investment scheme unless a FPO exemption is available.

A Swiss financial institution which is authorised by the FSA may promote participation in regulated collective investment schemes. These include authorised unit trusts, authorised open ended investment companies, or recognised schemes. UCITS schemes may be promoted only if they have been listed as a recognised scheme by the FSA.

Swiss firms may benefit from HM Treasury's intention to exercise the option of a national private placement regime in the AIFMD.

55. In addition, section 240 (Restriction on approval of promotion) precludes an authorised person from approving a financial promotion for the purpose of section 21 if he would not be able to communicate it himself under section 238.

56. The FSA has made rules under section 238(5) which allow authorised firms to communicate or approve a financial promotion for an unregulated collective investment scheme in certain specified circumstances. These circumstances are set out in the FSA's Handbook at COBS 4.12.1R.

Prospectus requirements

57. It is unlawful under section 85 FSMA for certain types of securities to be offered to the public in the UK or to request the admission of such securities to trading on a regulated market operating in the UK. However, it is lawful if an approved prospectus has been made available to the public before the offer or request is made.

58. There are also exemptions available in relation to the offer of securities.