



Financial Services Authority

Treatment of material on
overseas Internet World
Wide Web sites accessible
in the UK but not intended
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A Introduction

- 1 Concerns have been expressed by firms in business overseas about their potential exposure to criminal offences in the United Kingdom ('UK') under the Financial Services Act 1986 ('the Act') in relation to material contained on their Internet World Wide Web sites which is not intended for potential investors in the UK but which can be accessed by them. The FSA has to operate within the confines of the existing legislation and this statement addresses issues raised by the current legislation. The FSA is keen not to stifle legitimate commercial development of the Internet to deliver financial services, but is also concerned to ensure that potential investors are not placed in any worse a position when dealing with firms over the Internet than they would be if dealing with them using any other medium.
- 2 This statement relates primarily to the need for UK approval for advertising material or for UK authorisation for the carrying on of investment business. So it is directed at persons who are not authorised to conduct investment business under the Act and do not have a permanent place of business in the UK. Persons authorised by a Self Regulating Organisation ('SRO') or by a certificate to carry on investment business issued by a Recognised Professional Body ('RPB') will be subject to the Rules of the relevant SRO or RPB. This Statement does not apply to persons exempted under the Act.
- 3 This statement is published by the FSA by virtue of its powers under section 206(1) of the Act and constitutes guidance within the meaning of section 114(12) of the Act (see also paragraph 23 below).

- 4 Some clarification has already been provided by the FSA on a case by case basis and indeed through published letters issued in December 1995 and in June 1996 setting out the FSA's general approach.¹ The topic is of increasing interest and importance and a consolidated and expanded statement of the FSA's views will help to remove uncertainty about the approach of the FSA to material on the Internet which may be in breach of the advertising provisions of the Act. It will still be open to people to approach the FSA for clarification, on a case by case basis, as to whether having regard to the guidance provided in the statement their site would be subject to enforcement action.
- 5 The FSA recognises the important role that the Internet World Wide Web can perform in presenting potential investors in the UK with financial services including detailed and up-to-date information about various investment opportunities and giving access to important background research material. Under section 57 of the Act, however, investment advertisements issued or caused to be issued in the UK must normally either be issued or be approved by a person authorised under the Act. An authorised person approving such material has to take regulatory responsibility for the content of the investment advertisement.
- 6 The main issues considered in this statement arise from the accessibility of material over the Internet without any intrinsic territorial limitation. Technological difficulties may arise in any attempt to limit access to Internet World Wide Web sites. The FSA does not seek to discourage by regulation the development of the commercial potential of the Internet, and is committed to operating in a way which recognises the benefits of competition and innovation to consumers, and which ensures that the costs of regulation are proportionate to the benefits. Therefore, the statement deals with access control mechanisms as a factor (though not the only or overriding factor) to be taken into account in deciding whether or not to take enforcement action. Equally, the absence of access controls on a site will not, of itself, trigger enforcement action.

B Investment advertisements

(i) The provisions of the Act

- 7 Under section 57(1) of the Act (subject to certain exemptions) no person other than an authorised person shall 'issue' or 'cause to be issued' an investment advertisement in the UK unless its contents have been approved by an authorised person.

¹ Summaries of the letters can be found on the FSA's web site (<http://www.fsa.gov.uk>) under the Enforcement section and entitled, respectively, 'Internet access and site providers' and 'Advertising over the Internet'.

- 8 UK legislation controls investment advertisements issued in the UK (section 57(1) of the Act). Whether or not any material made available to Internet users in the UK will be an investment advertisement, and, if so, whether or not its issue in the UK would constitute a breach of section 57(1) of the Act, will depend on the precise facts in each case. On the first question, it may be that one of the various exemptions from control within section 58 of the Act will apply, such as the exemption contained in Article 8 of Statutory Instrument (SI) 1995/1536 for advertisements directed at informing or influencing persons of a particular kind. Other examples are the exemptions from control in Articles 11 and 12 which relate to advertisements which are required or permitted to be published by exchange or market rules or advertisements which are issued or caused to be issued by certain markets which relate to futures, options and contracts for differences which may be traded or dealt in on the markets in question.
- 9 An advertisement disseminated through the Internet will fall within the definition of 'an investment advertisement' in section 57(2) of the Act if it contains an invitation or information calculated (ie likely) to lead directly or indirectly to persons entering into or offering to enter into investment agreements (such as, but not limited to, agreements for the purchase or sale of investments or the provision of investment services).
- 10 The restrictions in section 57(1) of the Act apply where an investment advertisement is issued or caused to be issued in the UK. It is the FSA's view that, for the purposes of the Act, an advertisement which can be accessed on a computer screen by a person in the UK, will have been issued in the UK, but there is an important qualification to this for material issued outside the UK. The qualification appears in section 207(3) which sets out particular circumstances in which an investment advertisement issued outside the UK is to be treated as issued in the UK. This is particularly relevant to the operation of the Internet.
- 11 Broadly speaking, section 207(3) provides that an advertisement issued outside the UK will be treated as having been issued in the UK if it is either 'directed at' people in the UK or 'made available' to them other than by way of a periodical publication published and circulating principally outside the UK (or in a sound or television broadcast transmitted principally for reception outside the UK). It is possible that an electronic publication could fall within the definition of a 'periodical publication' (this will depend on the precise facts in each case) but the FSA considers that Internet material is not 'a sound or television broadcast'. So, much of the information on the Internet may be viewed, for the purposes of determining whether section 57(1) applies, as having been issued in the UK as it is 'made available' to persons in the UK.

- 12 Clearly if access was restricted so that a UK person could not view such material then it would not be seen to be 'made available'. More difficult, however, is the case where the UK viewer is not prevented, but only discouraged, from viewing. A disclaimer on an Internet site stating that material² on the site was not aimed at or meant to be viewed by persons in the UK (or was directed or aimed only at particular jurisdictions) may have the effect of putting off enquiries and, if it were combined with a policy, and practice, of refusing to deal with or on behalf of UK residents who may nevertheless access the site, would serve to reduce investor protection concerns. Such steps in and of themselves would not be considered by the FSA to be sufficient to stop an investment advertisement being 'made available' to persons in the UK for the purposes of section 207(3) of the Act (see also the FSA's enforcement policy set out in paragraphs 15-18).
- 13 By virtue of section 57(3) of the Act, contravention of section 57(1) of the Act is a criminal offence punishable on conviction by imprisonment, or a fine, or both and can also form the basis of civil proceedings for an injunction or restitution under section 61 of the Act. Also, under section 57(5) and (6), contracts entered into as a result of a contravention of section 57 may be unenforceable and any money or property paid by the investor may be recoverable together with compensation.
- 14 There is a defence contained in section 57(4)³ for inadvertent breaches. This will be available, whether or not the Internet was the medium used, if all the required elements of the defence are present.

(ii) FSA enforcement in respect of investment advertisements

a) General considerations

- 15 The FSA's main concern will be whether or not, in respect of the potential breach of the advertising provisions of the Act, any UK financial services investor protection issues are involved. A decision to take enforcement action against persons claimed to be responsible for the content of an Internet World Wide Web site⁴ or those who are the sponsors or advisers to such persons (or

2 ie material which fell within the definition of an investment advertisement in section 57(2) of the Act.

3 Under section 57(4) a person shall not be guilty of an offence under section 57 of the Act if in the ordinary course of (non-investment) business he issues an investment advertisement to the order of another person, if he proves that he believed on reasonable grounds that the person who ordered the issue of the advertisement was an authorised person, that the contents had been approved by an authorised person or that the advertisement was otherwise permitted by or under section 58 of the Act.

4 By 'those claimed to be responsible for the content of an Internet World Wide Web site' the FSA means those who originate and arrange for material to appear on a site - not the provider of the technological infrastructure where the provider of the technological infrastructure (eg the person providing capacity on a server or access to the World Wide Web) has no commercial interest or control over the content of the investment advertisement.

otherwise knowingly concerned with a breach of the Act) will depend upon the facts of the particular case. The FSA will consider the steps which a person has taken to avoid 'issuing', or 'causing the issue' of, an investment advertisement in the UK as indicated in this statement.

16 The FSA's policy is to ascertain first whether there has been a contravention of the provisions in section 57 of the Act. Not all material on the Internet will fall within the definition of an 'investment advertisement'. Relevant here will also be the question whether there are any other apparent infringements of the Act such as misleading statements made in breach of section 47 of the Act or the carrying on of unauthorised investment business in contravention of section 3 of the Act. Then the FSA will consider what enforcement action, if any, to take. In enforcement decisions on possible advertising contraventions the FSA will judge each case on its merits and take into account the particular circumstances and all relevant factors including, in particular, the following:

- (a) whether the Internet World Wide Web site was located on a server outside the UK;⁵
- (b) the extent to which the underlying investment or investment service to which the advertisement on the site related was available to UK investors who may respond to the advertisement, including the question whether the underlying investment or investment service is available to UK investors through other media;
- (c) the extent to which positive steps had been taken to ensure that UK investors did not obtain the investment service as a result of an advertisement having been issued over the Internet. This would include whether the person issuing or causing the investment advertisement to be issued had systems in place to ensure that the service could be received only by persons who may lawfully receive it (which would include, for example, an effective system⁶ for ascertaining the country of origin of an individual who attempts to open an account to purchase or to request further information regarding investment services on the site);
- (d) the extent to which any advertisement was directed at persons in the UK (see below);

5 In the FSA's view the existence of a web site on a UK server would not be conclusive evidence that material on that site was aimed at the UK.

6 An example of an ineffective system would be one which permits a visitor to the site to purchase products or services simply by 'clicking' a box to state that he was not from the UK.

- (e) the extent to which positive steps had been taken to limit access to the site⁷ (see also paragraph 6 above);

b) The extent to which investment advertisements are directed at persons in the UK

17 As regards 'directed at persons in the UK' (see (d) above) the FSA would take account of the following factors in considering any particular case:

Factors relating to the content of the site

- i. whether the site contained disclaimers and warnings, present on the home page and/or pages where investment services could be ordered/purchased (eg an application form), as well as hypertext links⁸ to the disclaimer/warning from other pages, which either stated:-
 - that the investment services were, as a matter of fact, available only in certain countries (and if so stating which ones), or
 - (where the investment services were not restricted by their nature to specific countries) that the investment services were not available in those jurisdictions where the firm was not authorised or permitted by local laws to promote or sell the product, or stating the countries where the services were, or were not, available legally;
- ii. whether the warnings/disclaimers could be viewed by visitors to the site in the same browser format as the rest of the site;⁹
- iii. whether the content of the site was written in a manner which made it clear that it was not aimed at UK investors (eg financial projections given in a currency other than pounds sterling; the UK not listed in a country of origin 'drop down box' option; a 'postcode', as well as a 'zipcode' option; and the material was not of specific relevance to potential UK investors - this is not an exhaustive list).

Factors relating to the promotion of the site

- iv. whether those responsible for the content of the site and/or sponsors or advisers to those providing the investment services appear to have notified the existence of the site to a UK search engine or to the 'UK section' of a search engine or to any other UK orientated compendium of World Wide Web sites or listing of investment opportunities;

7 The 'positive steps' might include requiring pre-registration (and the issuing of passwords) to ensure that only those to whom the material was aimed had access. However, if it was in fact possible to circumvent the pre-registration process or if the pre-registration did not form a substantive check to access (for instance if you only had to 'click here' to confirm you were not from the UK), then clearly it would be difficult to argue that the material had not been 'made available' for the purposes of section 207(3) of the Act.

8 Text or a picture which provides an electronic link to another area of text/picture which may be on the same site or on another Internet site.

9 Thus ensuring that the warnings and disclaimers are visible to visitors to the site.

- v. whether those responsible for the content of the site and/or the sponsors or advisers to those providing the investment services appear to have established any e-mail, or newsgroup, or bulletin board, or chat room facility associated with the site (eg which made mention of it or was (hypertext) linked to it), and that associated facility appeared to have been used actively to promote the investment in the UK (eg by sending out unsolicited e-mails or posting material to a newsgroup or chat room or through any other unsolicited approach);
- vi. whether those responsible for the content of the World Wide Web site and/or the sponsors or advisers to those providing the investment services appear to have advertised the site in the UK whether in a printed publication (eg newspaper or journal - unless the printed publication was principally for circulation outside the UK) or by broadcasting (eg TV or satellite or sound), though advertisements contained within a TV or satellite or sound broadcast which was principally for reception outside the UK would be less relevant here.

18 The above is not an exhaustive list - there may be other factors involved in a particular case which would need to be taken into account.

C Investment business

19 This statement is concerned primarily with the position in respect of the advertising provisions of the Act, as were the earlier published letters, but those placing material on the Internet, to whom this statement applies, also need to be aware of the risk that they may be conducting investment business in the UK by providing investment advice to, or investment services for, UK investors. Under section 3 of the Act a person carrying, or purporting to carry on, investment business in the UK (eg giving investment advice, arranging deals, dealing in investments etc) is required to be authorised under the Act (unless exempted).

20 Whether any person is carrying on investment business in the UK over the Internet World Wide Web would be a matter of fact which would depend on a number of factors, as it does in relation to potential investment business activity carried out over any other medium. The availability of exclusions, such as those in paragraphs 26 and 27 of Schedule 1 to the Act (exclusions for persons without a permanent place of business in the UK), will depend on the circumstances of each case but will, in the FSA's view, apply where the Internet World Wide Web is the medium being used in the same way as they apply in other cases. The exclusion in paragraph 27 is not available if there has been a contravention of an advertising restriction in section 57 of the Act. Accordingly the FSA's main concern will centre on whether, as a result of

responding to advertisements issued to them over the Internet in breach of section 57 of the Act, persons in the UK have been offered or been provided with investment services in a manner which constitutes the carrying on of investment business in the UK by the provider. The factors in paragraphs 16 and 17 above will be material to any judgement by the FSA about whether to take enforcement action and, if so, what form it should take.

- 21 A breach of Section 3 of the Act is a criminal offence punishable on conviction by imprisonment, or a fine, or both. Also, under section 5 of the Act, agreements made by or through unauthorised persons may be unenforceable against the other party and under section 6 of the Act the FSA has powers to seek orders from the High Court to restrain the carrying on of unauthorised activity and to seek orders for the restitution of funds to investors.

D Concluding points

- 22 Interpretation of the Act is ultimately a matter for the Courts. This statement is an expression of the enforcement policy of the FSA, and as such, does not bind any Court or any other body with enforcement or prosecution powers under the Act.
- 23 Attempting to address the issues raised by the use of new technology and how they relate to the existing statute is an on-going process as the financial services industry and regulators in the UK and overseas respond to developments. The FSA anticipates the need to keep this statement under review in the light of European Union initiatives in this area and any other international regulatory developments.
- 24 If, having read this statement, anyone is still unsure about their position they should seek their own legal advice. They can also contact the FSA for further clarification:

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