

# CUMMINGS PEPPERDINE ON APPROVING FINANCIAL PROMOTIONS: A CHECKLIST

FCA-authorised firms are able to approve the financial promotions of unauthorised persons under section 21 of the Financial Services and Markets Act 2000 (FSMA). This process of approval is designed to enable unauthorised persons to communicate their promotions lawfully.

As each financial promotion must be subject to analysis to confirm that it complies with FCA rules on a case-by-case basis, Cummings Pepperdine has produced a checklist to help identify the key processes and issues.

We have set out below the heading of each topic to be considered and followed it with a list of questions to ask, to help determine whether each financial promotion you look at is suitable for approval.

## **1. COMPETENCE AND EXPERTISE**

- 1.1 Are you satisfied that your staff have the appropriate competence and expertise in the product or service being promoted, before it approves the financial promotion?  
You need to consider:

- 1.1.1 whether you have adequate resources, systems and controls in place to approve and monitor the financial promotion, particularly when approving large volumes of promotions; and

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- 1.1.2 the previous employment history, experience and qualifications of the staff responsible for approving promotions and whether they align with the product and sector underlying the promotion.
- 1.2 Have you taken particular care to ensure that you have the competence and expertise when approving promotions about new and innovative products in their respective fields?
- ## 2. CONFLICTS OF INTEREST
- 2.1 Have you approver identified and prevented or managed any conflicts of interest relevant to your section 21 approval activity, to address the risk of any anti-competitive behaviour when it is asked to approve the financial promotions of your competitors or competitors of your group businesses?
- ## 3. RELIANCE ON OTHERS
- 3.1 Have you formed your own view as to whether the promotion complies with the financial promotion rules in COBS 4, rather than accepting at face value any information provided by the unauthorised person?
- 3.2 Have you considered, on a case-by-case basis, the appropriateness of relying on information and analysis relating to the promotion that has been prepared by an independent professional adviser on behalf of the unauthorised person?
- ## 4. FAIR, CLEAR AND NOT MISLEADING
- In determining whether the financial promotion is clear, fair and not misleading and complies with applicable financial promotion rules, have you taken the following important steps:
- 4.1 Analysed and carried out due diligence relating to the substance of the financial promotion to enable it to establish, for example, that the content is fair and whether any claims (such as rates of return) can be substantiated?
- 4.2 Satisfied yourself about the authenticity of the promotion, including where necessary carrying out background checks on directors, controllers or other key individuals associated with the unauthorised business?
- 4.3 Considered the commercial viability of the proposition and ensured that the promotion adequately discloses any significant factors that could threaten the product's viability to allow clients to make an informed decision about the investment?
- 4.4 Considered whether advertised or headline rates of return are reasonably capable of being achieved, which includes reviewing materials such as the product provider's financial statements or management accounts, business plan, financial projections and capital position?
- 4.5 Considered whether there are any fees, commissions or other charges within the investment's structure or elsewhere that could materially affect the product provider's ability to deliver advertised or headline rates of return?
- 4.6 Checked that any product advertised as being eligible for a particular tax treatment (for example, for inclusion within an Innovative Finance ISA) in fact meets the requirements for this treatment?
- 4.7 If it is relevant, satisfied yourself that it is not misleading to describe the product or service as "guaranteed", "protected" or "secure" (or other similar term)?
- 4.8 Considered whether a promotion that describes the investment as "secured" or "asset-backed" (or equivalent) contains the information necessary to enable clients to understand how such protection operates, and assess any potential weaknesses or deficiencies in it?
- 4.9 Taken steps to establish whether any security is likely to be sufficient to cover

clients' investments (such as, capital repayments or interest payments)?

4.10 Checked that the financial promotion:

- 4.10.1 is clear about the extent to which a product or service is regulated?
- 4.10.2 gives a fair and prominent indication of relevant risks when referencing potential benefits?
- 4.10.3 gives sufficient prominence to risk warnings?
- 4.10.4 presents comparative information in a fair and balanced way and that such comparisons are meaningful?

4.11 Formed your own view of the risks associated with an investment to enable it to confirm that sufficient prominence is given to all relevant risks?

## 5. NAME OF SECTION 21 APPROVER AND DATE OF APPROVAL

- 5.1 Does the financial promotion include your name, as the firm that approved the promotion, as well as the name of the unauthorised person that is communicating the promotion?
- 5.2 Has sufficient prominence been given to the name of the firm that approved the promotion?
- 5.3 Does the promotion clearly state on its face the date on which it was approved?
- 5.4 For promotions communicated by means of digital media that encounter space limitations:
  - 5.4.1 does the text on the face of the promotion refer to your firm reference number (FRN) instead of the full name and date of approval?
  - 5.4.2 does the text include a link to a webpage where your full name and the date of the approval is displayed?

## 6. SOCIAL MEDIA AND DIGITAL COMMUNICATIONS

- 6.1 If the product or service is promoted through social media or other forms of

digital communication, have you taken account of the FCA's finalised guidance in this area?

## 7. RECORD KEEPING

- 7.1 Do you keep and maintain adequate records of the financial promotions that you approve, including copies of scripts used in any telemarketing campaign?
- 7.2 When you approve a promotion, do you record how the promotion complies with COBS 4 financial promotion rules?
- 7.3 Have you made an adequate record of the fact that your staff have the necessary competence and expertise to approve the promotions?
- 7.4 Have you complied with the additional record-keeping requirements that apply when the promotion relates to a restricted mass market investment (RMMI) or non-mass market investment (NMMI)?

## 8. ONGOING MONITORING

- 8.1 You need to ensure that you have taken reasonable steps to monitor the continuing compliance of the financial promotion with the financial promotion rules for the lifetime of the promotion (that is, not just at the point of approval).
- 8.2 You must monitor each promotion you have approved on a periodic basis to assess whether (among other things and as applicable):
  - 8.2.1 there have been any changes to the promotion that mean it is no longer being lawfully communicated?
  - 8.2.2 there have been any changes that could affect whether the promotion continues to be fair, clear and not misleading, including considering the ongoing commercial viability of the proposition described in the promotion, and whether the headline rates of return in the promotion continue to be reasonably achievable?



- 8.2.3 funds raised are being used for the purposes described in the promotion?
- 8.2.4 any new, relevant regulatory requirements (that is, any that have come into force post-approval) are being complied with?
- 8.3 You will need to withdraw your approval and notify any person known to be relying on its approval of this decision, when you become aware that an approved promotion no longer complies with the financial promotion rules.
- 8.4 You will need to collect quarterly attestations of "no material change" from the unauthorised persons for whom you have approved promotions to assist with ongoing monitoring responsibilities
- 8.5 You need to take account of all available information, consider withdrawing its approval where the unauthorised person has failed to provide the attestation.

## **9. HIGH-RISK INVESTMENTS**

- 9.1 Detailed conditions for promotion and withdrawal of approval apply here and the following need to be looked at:
  - 9.1.1 have you taken reasonable steps to ensure it has processes in place so that, on a continuing basis, the detailed conditions that apply to a direct offer financial promotion relating to a RMMI or a financial promotion relating to a NMMI are being satisfied?
  - 9.1.2 are there processes in place to ensure that you withdraw your approval if you are not satisfied that the relevant conditions that apply to RMMIs or NMMIs are being complied with or that the appropriateness assessments are not compliant?
  - 9.1.3 do you have processes in place to ensure that you will withdraw your approval if you are not satisfied


that the relevant conditions that apply to RMMIs or NMMIs are being complied with or that the appropriateness assessments are not compliant?

## **10. APPROPRIATENESS ASSESSMENTS**

- 10.1 Where the rules on direct offer financial promotions relating to RMMIs require an appropriateness assessment to be undertaken, have you ensured (throughout the life of the promotion as well as at the point of first approval) that the relevant processes for appropriateness tests (automated or otherwise) comply with the FCA rules?
- 10.2 Where relevant, have you carried out an objective and unbiased assessment of the adequacy of the systems and controls of the person carrying out the appropriateness assessment to:
  - 10.2.1 assess the customer's knowledge and experience?
  - 10.2.2 assess the customer's understanding of the risks involved with the product or service?
  - 10.2.3 record the customer's information?
- 10.3 Have you taken reasonable steps to ensure that adequate records are made available to it so it can properly consider the adequacy of the unauthorised persons' systems and controls?

## **11. PRELIMINARY SUITABILITY ASSESSMENTS**

- 11.1 When approving financial promotions for NMMI products, have you conducted a preliminary assessment of suitability before an unauthorised person communicates the promotion to a high-net worth or self-certified sophisticated investor?
- 11.2 Have you taken reasonable steps to acquaint yourself with the intended client's profile and objectives?
- 11.3 Do you have information relating to the client, including but not limited to their:

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- 11.3.1 knowledge and history of investing in the type of product in question?
  - 11.3.2 financial circumstances?
  - 11.3.3 investment objectives?
  - 11.3.4 do your processes ensure that approval for the promotion will not be granted if you are not satisfied that the NMMI product is likely to be suitable for the client, having conducted a preliminary assessment of suitability, or via any other available information?

## THE TEAM

Cummings Pepperdine is a leading advisor in crypto. We are one of a select few that advises a large and diverse global client base in the crypto space and the only to provide a complete crypto solution building on the three key areas of law, tax and FCA with legal underpinning at every point.

In law, we have a team of qualified and regulated solicitors and a barrister who retains right of audience.

In tax, we have one of the only crypto tax advisors who is both a qualified solicitor and qualified chartered accountant.

In regulation, our team comprises specialists in crypto compliance monitoring structures and governance oversight who are known to the FCA for the quality of their work.

The team is led by Claire Cummings, a leading solicitor specialising in crypto law and the current and evolving regulation. Claire is on the advisory boards of a crypto exchange and an NFT gaming guild and is also a member of the Global Digital Finance working group on



**Claire Cummings**

stablecoins. Claire has also acted as compliance officer, MLRO and director of an FCA regulated fund manager and qualified under SIB to trade derivatives. As a leading expert in crypto, Claire is a sought after speaker and has published multiple articles on the legal and regulatory issues surrounding cryptocurrencies and the crypto eco-system. Claire is named at the Top 10 influencer in London for hedge funds (2&20, 2022) and is included in the CityWealth Crypto Top 100

The Cummings Pepperdine Online Training Programme, includes sections focussing on approving financial promotions, has been designed by a specialist board of compliance consultants, solicitors, chartered accountants, tax advisors and regulatory consultants. We believe that we are the only firm which offers training created by this range of qualified advisors.

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