

CUMMINGS PEPPERDINE ON FCA REGULATED ACTIVITIES AND INVESTMENTS

SPEEDREAD

In this note we answer the following questions:

1. What does the FCA regulate?
2. How can I carry on a regulated activity in relation to a regulated investment?
3. What if I carry on a regulated activity in relation to an investment which is not a regulated investment?
4. What are regulated activities?
5. What are regulated investments?
6. What exclusions and exemptions might be available?
7. How do I work out whether I meet the FCA's two-limbed test and need to be regulated?

1. WHAT DOES THE FCA REGULATE?

The FCA is the main regulatory body in the United Kingdom for investment managers, advisors, dealer and the like.

It regulates those, both people and corporate bodies, who carry on certain activities, known as regulated activities, in relation to certain type of investments, known as regulated investments.

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The boundary defining which activities the FCA regulated and those it does not is commonly referred to as the perimeter. This FCA perimeter is set out in law, with the relevant legislation being The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the "RAO").

It is here that you will find detail on regulated activities and regulated investments.

The RAO is related to the main piece of legislation which governs financial services in the United Kingdom, the Financial Services and Markets Act ("FSMA").

2. HOW CAN I CARRY ON A REGULATED ACTIVITY IN RELATION TO A REGULATED INVESTMENT?

To answer this question we need to look at Section 19 of FSMA. This makes it clear that no body may carry on a regulated activity in the UK authorised or exempt. This is often called the general prohibition.

However, it is important to note that the FCA applies a two-limbed test. Anyone who is FCA authorised will not only be carrying on a regulated activity, they will also be carrying it on in relation to a regulated investment.

It is also important to look at the various exemptions which apply, and which we discuss below.

3. WHAT IF I CARRY ON A REGULATED ACTIVITY IN RELATION TO AN INVESTMENT WHICH IS NOT A REGULATED INVESTMENT?

If this is the case, you will not need to be regulated. Or, if you wish to be, will not be able to unless a regulated investment is part of the business.

As stated above the FCA applies a two-limbed test which looks at both carrying on a regulated

activity and carrying it on in relation to a regulated investment. It is not uncommon for a business to wish to be FCA regulated and extend its operations to ensure it meets this test

4. WHAT ARE REGULATED ACTIVITIES?

Generally, a regulated activity is a specified activity that relates to a specified investment or property of any kind and is carried on by way of business in the UK. These specifications are set out in the RAO and include:

- accepting deposits;
- insurance-related activities;
- arranging deals in investments;
- advising on investments;
- dealing in investments;
- safeguarding and administering investments, managing investments;
- establishing, operating or winding up a collective investment scheme; and
- other miscellaneous activities, including establishing a stakeholder pension scheme, certain activities relating to Lloyd's, entering into funeral plan contracts, activities of reclaim funds, bidding in emissions auctions, administering a benchmark and certain activities relating to claims management companies.

In the RAO this are called specified activities and regulated activities are often referred to a specified activities. The complete list is found in Part II of the RAO.

5. WHAT ARE REGULATED INVESTMENTS?

As with activities, regulated investments are set out in the RAO. They include investments such as:

- deposits;
- E-money;
- contracts of insurance;
- shares;
- instruments creating or acknowledging indebtedness;

- instruments giving entitlements to investments;
- certificates representing certain securities;
- units in a CIS;
- rights under a pension scheme;
- options;
- futures;
- contracts for differences; and
- rights to or interests in investments.

In the RAO this are called specified investments and regulated investments are often referred to a specified investments. The complete list is found in Part III of the RAO.

6. WHAT EXCLUSIONS AND EXEMPTIONS MIGHT BE AVAILABLE?

Most regulated activities are subject to exclusions that are set out in the RAO.

Anyone who falls within an exclusion will not require authorisation even though they may be carrying on a regulated activity, in relation to a regulated investment.

In general, there are two types of exclusion. These are:

- exclusions that apply to particular regulated activities; and
- exclusions that apply to several regulated activities in certain circumstances

Various exemptions are also available relating to regulated activities and, as with the exclusions, who falls within an exemption will not require authorisation.

It is important to distinguish between an exemption and an exclusion as while an exclusion stops an activity from being a regulated activity, an exemption effectively "removes" an activity from being regulated. While considering the possibility of an exclusion (not an exemption) it is important to look at overrides as well. These apply in some

circumstances where the activities involved insurance distribution, mortgage credit and some MiFID II activities. If one of these applies, the potential exclusion will fall away.

7. HOW DO I WORK OUT WHETHER I MEET THE FCA'S TWO-LIMBED TEST AND NEED TO BE REGULATED?

Questions to ask yourself are:

- will I be carrying carry on a specified activity relating to a specified investment?
- will I be carrying on the activity by way of business?
- will I be carrying on the activity in the UK?
- Is an exclusion available?
- Is an exemption available?
- are there any overrides which I need to consider?

Remember that If an exclusion or an exemption applies, you will either will not be carrying on or will be exempt from carrying on a regulated activity.



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