



## Raising Finance

This page is not intended to give legal advice nor substitute for you taking your own professional and/or legal advice in these areas. The raising of finance is a complex legal and regulatory area and you should be aware of the need to take legal advice during the process.

### Who you can send your plan to!

Sending a business plan to, or discussing it with, potential investors, is a financial promotion and this may require you or other persons involved in the process to be authorised or regulated here in the UK by the Financial Services Authority. Financial promotions sent to private equity houses, and certain other institutions will probably be exempt from the Financial Services and Markets Act (FSMA). Relevant exemptions to individuals or companies communicating business plans to potential investors include the following:

- Authorised persons.
- Exempt persons (where the financial promotion relates to a controlled activity which is a regulated activity for which a person is exempt).
- Governments and local authorities.
- Persons whose ordinary business involves carrying on a controlled activity of the kind to which the financial promotion relates (i.e. private equity and venture capital firms, investment trust companies, large companies which have a corporate treasury function, other persons who carry on activities but are excluded by the Regulated Activities Order).
- Professional firms who are exempt under the Act.
- Individuals in possession of a certificate of high net worth, or who are self-certified sophisticated investors.

Also exempted are persons acting in their capacity as directors, officers or employees of such entities such as directors, officers or employees of authorised private equity and venture capital firms.

### Who you cannot send your plan to!

But if you are considering sending your business plan out to others not exempt under FSMA, and you have not had the financial promotion approved by an authorised person, or you are not an authorised person under FSMA then you could be committing a criminal offence, and any agreements entered into may not be binding on other parties, in addition to offering them financial redress against you.

### What is FSMA?

Financial Services and Markets Act (FSMA) came into force on 1 December 2001 and provides that "a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity".

### Exemptions to FSMA

If you are running a business seeking to raise finance, it is unlikely that you will be authorised. However, the FSMA (Financial Promotion) Order 2001 (Financial Promotion Order) sets out various other main exemptions to the FSMA and these need to be carefully considered in

each case. Recent changes can be found in the sister documents in the section of the c2Ventures website where you downloaded this overview.

## Who you can send your plan to, sometimes

A private company commits an offence if it offers its shares to the public (S.81 Companies Act 1985). An offer is not treated as made to the public if it can properly be regarded (S.742A Companies Act 1985):

***“a. as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer; or***

***b. as being a domestic concern of the persons receiving and making it.”***

This can be interpreted as when raising money for private companies it is not permissible to attach an application form, or contain an offer within the business plan. c2Ventures advises involving a suitably qualified individual, preferably FSA authorised.

Should a potential investor then wish to continue on the investigative path, any further communication from the Limited Company must make a clear written communication to that person specifying who he/she is, and making it clear that the application form or equivalent is not open to anyone else, just the named investor.

S.58 further complicates matters for companies that plan to make a public offering subsequent to the above, if the public offering is made within 6 months after the allotment.

S.58 states that it is evidence that an allotment of shares was made with a view to their being offered for sale to the public if the above holds true, and therefore the company has committed an offence.

Public Offers of Securities Regulations 1995 have always had not only just a quantitative exemption (e.g. offer to no more than 50 persons) but also a qualitative exemption. This qualitative exemption is where *“the securities are offered to a restricted circle of persons whom the offeror reasonably believe to be sufficiently knowledgeable to understand the risks involved in accepting the offer.”* The onus of proof is on the offeror.

Other considerations include:

### i. One recipient, or group acting jointly

And the communications must be *one-off communication*. To benefit from this exemption, the communication must be made only to one recipient (or group who are expected to act jointly). It must identify the product or service and not be part of an organised marketing campaign, and must be made in a non real-time communications or solicited real-time communications<sup>1</sup>

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#### **Real time Communications**

A real-time communication is one that is a communication made in the course of a personal visit, telephone conversation or other interactive dialogue.

#### **Non-real time communications**

A non real-time communication is one that does not fall within the definition of a real time communication and includes letters, emails and publications (including TV and Teletext)

#### **Indicators**

Indicators to look for when determining if a communication is a non real-time communication include if the communication is directed to more than one recipient in identical terms or if the communication is made in a way that the recipient cannot or is not required to reply immediately or can refer to it at a later time.

#### **Solicited and Unsolicited**

The Financial Promotion Order also distinguishes between solicited and unsolicited real-time calls, solicited calls being ones that are initiated by the recipient or take place following an express request (which is more than mere acquiescence) from the recipient.

## ii. High net worth individuals

High net worth individuals can now sign a certificate themselves exempting them from the general financial promotion restrictions of the FSMA in relation to certain categories of investments such as buying, selling or subscribing for securities or receiving advice on investments and in relation to non real-time communications or solicited real-time communications. To qualify, high net worth individuals must have an annual income of *not less than £100,000 or net assets to the value of not less than £250,000. For a list of full requirements, please view the sister documents available on the website section from where you downloaded this document.*

## iii. High net worth companies

Subject to certain conditions, the financial promotion restriction does not apply in the case of circulating a business plan if the communication is made to a body corporate.<sup>2</sup>

The conditions are that the communication must describe the person to whom it is directed and state that it relates to controlled investments or activities, the communication must carry a health warning advising others not to act on it and provide that suitable procedures are in place to prevent others acting upon it. You must have a reasonable belief that the recipients fall into the category of a high net worth company.

## iv. Sophisticated investors

"Sophisticated investors" can self-certify, exempting them from the general restrictions on financial promotion in relation to certain categories of investments, such as subscribing for securities in your business. They have to be able to produce the statement stating that they are sophisticated enough to understand the risks involved in that type of investment. A certificate must have been provided before the communication is made. Any communication to a sophisticated investor must also be accompanied by certain "health warnings" to qualify for this exemption.

## v. Associations of high net worth or sophisticated investors

There is also an exemption in relation to certain categories of investments such as buying, selling or subscribing for securities and advising on investments for non real-time communications or solicited real-time communications, which are made to associations of high net worth or sophisticated investors as long as the potential investment does not incur a liability to the investor to contribute more than he commits by way of investment

## vi. Common interest groups of a company

A non real-time communication or solicited real-time communication in relation to investments in a company, such as shares and debentures, which is made to a group of persons with an existing common interest with each other **and** that company may be exempt. Again to be exempt the communication must be accompanied by certain "health warnings".

## Sale of a body corporate

A communication made in relation to an acquisition or disposal of shares in a body corporate which satisfies certain conditions, such as that it relates to or will result in the sale of 50 per cent or more of the voting rights in a company to another body corporate, partnership, single individual or group of connected individuals, or which relates to the acquisition of day to day control of a body corporate, is exempt from the financial promotion restriction. There is also

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Net assets or called up share capital of £500,000 (if the company has more than 20 members) or £5,000,000 for other companies, a partnership or unincorporated association which has net assets of not less than £5,000,000, the trustees of a high value trust (assets of £10,000,000 or more) or to any director or officer of the high net worth company whose responsibilities include engaging in investment activity.

an exemption for takeovers, although this is subject to further conditions and requires further information to be provided. There are also other exemptions available which may not be relevant in the case of private equity financing.

## **Misleading Statements**

The FSMA generally prohibits the inclusion of misleading statements in documents that are designed to induce or persuade people to enter into investment agreements or to buy or sell shares in companies

Any person who makes a statement, promise or forecast or dishonestly conceals any material facts, or who recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive, is guilty of an offence if he makes the statement, etc. for the purpose of inducing (or is reckless as to whether it will induce) another person to enter or offer to enter into an investment agreement. Sanctions for a contravention of these provisions includes imprisonment up to seven years or a fine or both.

All statements, promises or forecasts contained in any communication, document, including a [business plan](#), private placement memorandum, information memorandum, etc., made available to potential investors must be verified in order to ascertain whether by itself, or taken in the context in which it appears, it could possibly be misleading or false or deceptive.

This verification can be carried out by an authorised person such as an investment bank, corporate finance boutique or authorised professional services firm.

If however you are sending your plan to a UK private equity house which is itself authorised then you do not have to have this verification process undertaken. You should nevertheless ensure that the plan does not contain misleading statements.

## **FiSMA Statutory Requirements – Business Plan Warnings**

The new regulations comply you to place the following warnings prominently and before any other text or graphics if you are considering circulating your business plan to an appropriate person in connection with raising finance. The surrounding box is a requirement, as is the requirement that the text should be at least of the same size and font as the rest of the document.

"The content of this promotion has not been approved by an authorised person within the meaning of the Financial Services and Markets Act 2000. Reliance on this promotion for the purpose of engaging in any investment activity may expose an individual to a significant risk of losing all of the property or other assets invested."

Furthermore this communication is exempt from the general restriction (in section 21 of the Act) on the communication of invitations or inducements to engage in investment activity on the grounds that it is made to a certified high net worth individual / self-certified investor. You should consider carefully any decision to engage in investment activity to which the communication relates. If you are in any doubt about the investment to which the communication relates you should consult an authorised person specialising in advising on investments of the kind in question