

Glossary

Term	Definition
“...in the course of business...”	<p>HM Treasury has the power to define what this means, but currently has no plans to do so. Guidance suggests that this is given its “dictionary” meaning and requires a commercial interest on the part of the communicator but does not necessarily have to relate to the main business. For example, if a holding company sold one of its subsidiaries, that sale would be considered “in the course of business” even though the holding company is not in the business of selling subsidiaries.</p> <p>The FSA takes the view that although it would cover individuals, it should exclude genuine non-business communications such as online forum posts or conversations between friends.</p>
“...communicate...”	<p>FSA guidance gives “communicate” a very wide scope – the FSA considers that all is required is a positive step taken to make the communication. This would include knowingly leaving a copy of a document where it is reasonable to assume that some will pick up copies act may act on them. It also includes “causing a communication to be made” – ie being responsible for the transmission of information even if that information has been prepared by a third party – and so extends to publishers and advertisement carriers as well as intermediaries (unless they are unaware: see Mere Conduit exemption in the Reference Guide).</p> <p>The FSA takes the view that it will not catch professional advisers preparing materials or advising clients on the financial promotion regime, however.</p>
“...an invitation...” ¹	<p>The FSA suggests that this is a communication which directly invites a person to do something which will result in him engaging in investment activity; ie there must be a casual link between the invitation and the engagement. It will therefore include invitations to treat, direct offer advertisements and promotions for instant dealing upon registration. It will not include general corporate advertising.</p>
“...or inducement...” ¹	<p>Another widely defined term which may cover any communication which influences behaviour. The FSA has described “inducement” in terms of a link in a chain where the intent is that the chain leads ultimately to engagement in investment activity. Giving instructions as to the mechanics of an adviser’s engagement will not amount to “inducement”, and neither will general profile raising such as sponsorship or the production of tombstones.</p>

¹ HM Treasury during the consultation process took the view that “invitation or inducement” comprised of any communication containing a degree of incitement (as opposed to a presentation of the facts). The FSA suggests that the purpose of the prohibition is to regulate communications which have a promotional effect – ie those which seek to persuade the recipient to engage in investment activity. The test is considered to be an objective one – would a reasonable observer taking into account all the facts consider that there was an intention on the part of the communicator to invite or induce **and** regard the communication as seeking to persuade him to invest?

Note that this is a two part test which requires a positive assertion for each element: if a reasonable person would not consider that the communicator intended to incite him, whether it did or not is irrelevant. Therefore, if there is an express statement on the communication to the effect that it is not an invitation or inducement, it is compelling evidence (though not conclusive) that the communication is **in fact** not an invitation or inducement.

<p>“...to engage in investment activity.”</p>	<p>“Engaging in investment activity” has a statutory definition (section 21(8) FSMA) of: (i) entering or offering to enter into an agreement the making or performance of which by either party constitutes a controlled activity; or (ii) exercising any rights conferred by a controlled investment to acquire, dispose of, underwrite or convert a controlled investment.</p> <p>“Controlled activity” is defined in Schedule 1 of FPO and covers dealing in shares and securities, arranging deals, managing investments, advising on investments and virtually any financial or credit activity. Likewise, “controlled investment” (defined in the same Schedule) is widely constructed and includes shares, securities, loan notes, options, government and public securities, rights in certain pension schemes and many other financial or corporate instruments.</p>
<p>“Real Time” vs “Non-real Time”</p>	<p>“Real time” is defined in the FPO as “any communication made in the course of a personal visit, telephone conversation, or other interactive dialogue”, whilst “non-real time” is anything else (such as a letter, email, or a communication contained in a publication, website or broadcast).</p> <p>In applying the definition, there tends to be an emphasis on “interaction” – this can produce some strange results, particularly in respect of meetings or presentations which can have a variety of interactive elements (real time) and some non-interactive elements (non-real time).</p>
<p>“Solicited” vs “Unsolicited”</p>	<p>Real time communications are further sub-divided into “solicited” and “unsolicited”. A real time communication is “solicited” where the communication (ie phone call, visit or dialogue) was initiated by the recipient or takes place in response to an express request by him. In all other cases, it will be “unsolicited” (for example, a speculative communication to potential investors).</p>
<p>“Made to” vs “Directed at”</p>	<p>The distinction between communications “made to” persons or “directed at” persons is important when considering the exemptions as some are only available if the communication is “made to” particular people. Written communications (for example, email) are only made to the addressed person (someone else reading it will not be communicated to) and, similarly, a telephone call or meeting which someone happens to overhear will not be deemed to be communicated to that casual listener. By comparison, if a communication is directed at recipients generally (for example, in a TV or radio broadcast or via a website), any person who reads it or hears the communication will be deemed to be a recipient.</p>